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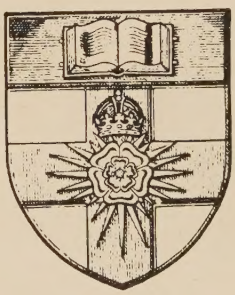

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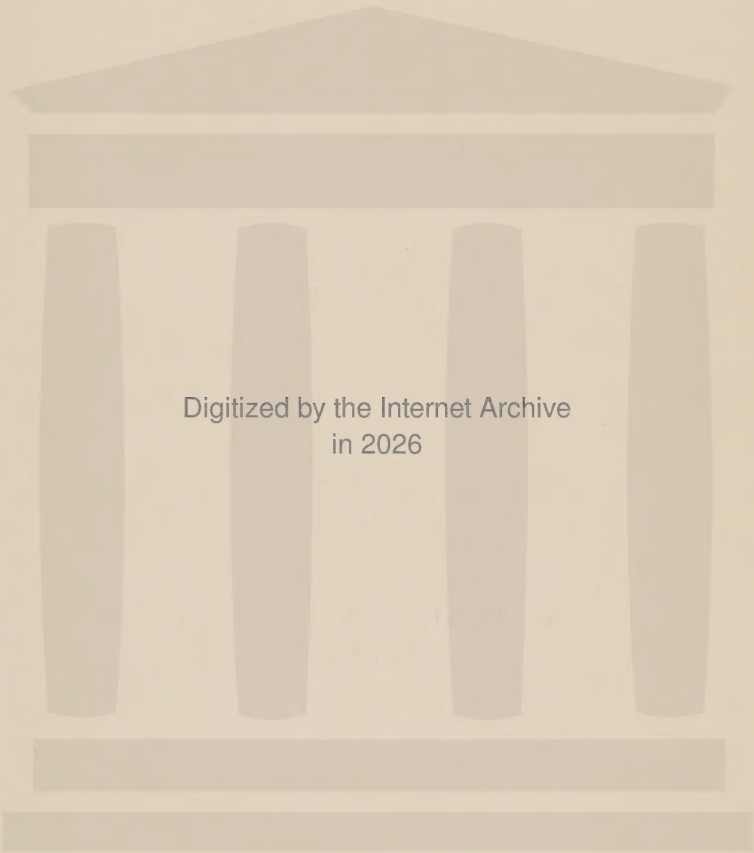
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GENERAL ORDER.

11*th February*, 1873.

I, The Right Honourable Roundell Baron Selborne, Lord High Chancellor of Great Britain, do hereby, in pursuance of all powers and authorities enabling me in that behalf, Order and direct in manner following, that is to say:—

Every Order made by the Lord Chancellor upon the hearing of Petitions against or relating to the sealing of Letters Patent, under the Patent Law Amendment Act, 1852, 15 & 16 Vict. c. 83, shall be drawn up, passed, and entered by the Registrar of the Court of Chancery in attendance, and an office copy of such Order shall be remitted by him without fee to the Clerk of the combined offices of the Great Seal Patent Office, and the office of the Commissioners of Patents for inventions, to be filed with the Petition.

Selborne, C.

GENERAL ORDER IN LUNACY.

1873

30th May, 1873.

I, ROUNDELL BARON SELBORNE, of Selborne, in the County of Southampton, Lord High Chancellor of Great Britain, entrusted by virtue of Her Majesty the Queen's Sign Manual with the care and commitment of the custody of the persons and estates of persons found idiot, lunatic, or of unsound mind, do, with the advice and assistance of the RIGHT HONOURABLE SIR WILLIAM MILBOURNE JAMES, and the RIGHT HONOURABLE SIR GEORGE MELLISH, the Lords Justices of the Court of Appeal in Chancery, also being entrusted as aforesaid, hereby, in pursuance and exercise of the powers and authorities enabling me in that behalf, Order and direct as follows:—

So far as regards costs incurred on and subsequently to the date of this Order, the scale of taxation of costs hereby authorized shall be applied to proceedings in Lunacy.

Solicitors shall in all matters in which the income of a person who is alleged or is found to be a lunatic or person of unsound mind exceeds £150 per annum, be entitled to charge and be allowed the fees set forth in the column headed "Higher Scale," in the second Schedule to the Regulations of the Court of Chancery as to fees and charges to be allowed to solicitors, dated the 30th day of January, 1857, so far as the same shall be applicable to such matters, unless the Lord Chancellor or the Lords Justices of the Court of Appeal in Chancery, or any or either of them, shall make Order to the contrary, as to all or any of the parties to such matters.

Discharged from July 1883 Ord in Lunacy
July 1883 (W.N. (1883) 124 80)

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The Masters in Lunacy, or either of them, shall be at liberty, by memorandum to be signed by them, or either of them, to allow to a solicitor for attending on any warrant or other appointment before them, or either of them, such a sum not exceeding five guineas as, having regard to the special nature of the case, they, or either of them, may in their or his discretion think reasonable.

When the Master in Lunacy shall not have made, and shall not have refused to make any such allowance as last above-mentioned, the Taxing Master shall take into consideration the circumstances of each case, and allow to a solicitor for attending any warrant or other appointment, such a sum, not exceeding three guineas, as he may at his discretion think reasonable.

Solicitors shall also be entitled to charge and be allowed the fees set forth in the third Schedule to the said Regulations of the Court of Chancery.

Selborne, C.
W. M. James, L.J.
George Mellish, L.J.

BANKRUPTCY ACT, 1869: DEBTORS ACT, 1869.

1873

September 1873.

GENERAL RULES made under the Bankruptcy Act, 1869, and the Debtors Act, 1869.

It is Ordered as follows, that is to say:

From and after the publication of this Order in the *London Gazette*, the bill of costs and expenses of and incident to the prosecution of a bankrupt by his trustee, under Order of Court, shall be taxed by the Master of the Crown Office of the Court of Queen's Bench, and shall be delivered to the Solicitor to the Treasury, together with an office copy of the Order of Court directing the prosecution, and a notice of the time fixed for the taxation of such bill of costs, seven days at least before such time, so as to enable the said solicitor, if he shall think fit, to attend such taxation either by himself or his agent.

In every such bill of costs, credit shall be given for so much of the amount of the costs as shall have been allowed by the Court before which the prosecution or trial took place.

With any application to the Commissioners of Her Majesty's Treasury for an order on the Accountant in Bankruptcy to pay the difference between the amount allowed by the Master of the Crown Office and that allowed by the Court before which the prosecution or trial took place, the allocatur of such Master shall be sent.

Selborne, C.

James Bacon,
Chief Judge in Bankruptcy.

NOTE AS TO THE REFERENCE TO RECORD NOW PRINTED WITH THE TITLE OF EACH CAUSE.

The Reference to Record, which is noted on the bill, gives the year of filing, the initial letter of the surname of first Plaintiff, and the consecutive number of the bills of that year and letter, and leads to the file of pleadings in the Record and Writ Clerk's Office.

The year, letter, and number, also lead to the entry of the cause in the Cause Books. The Cause Books commence in the year 1842. As to causes commenced before the 2nd of November, 1852, they contain the dates of pleadings and formal proceedings. As to subsequent causes they contain, in addition to these particulars, the dates of all decrees, orders, reports, and certificates made since the 30th of November, 1855. In these books there is entered against every decree or order a reference to the volume and folio of the Registrar's Books for the year, where the decree or order will be found *in extenso*.

No reference is written against reports or certificates, but the dates, extracted from the Cause Book, lead to the corresponding entries in the Volumes of Reports and Certificates, and the Index thereto.

The Cause Books are kept in the Record and Writ Clerk's Office.

The Registrar's Books and the Index thereto, and the Reports and Certificates and the Index thereto called the Calendar of Reports, are kept in the Report Office, a branch of the Record and Writ Clerk's Office under the same roof.

For the time of commencement of year in the "Registrar's Books," see 1 Seton, pp. 2, 3.

When the Reference to Record is not known, it may be found by searching for the necessary period the Index to Cause Books kept in the Record and Writ Clerk's Office.

In searching for decrees, orders, reports, and certificates made in causes commenced before the 2nd of November, 1852, or made in subsequent causes before the 30th of November, 1855, or made in matters, the old method must still be followed, viz.:

If a decree or order is required, search in the Report Office the Index to the Registrar's Books; if a report or certificate, search in the same office the Calendar of Reports. The Index to the Registrar's Books gives the reference to the Registrar's Books, and the Calendar of Reports the reference to the Volumes of Reports and Certificates.

Affidavits are filed in the Record and Writ Clerk's Office, where the Index thereto may be searched.

Petitions are filed in the Report Office, where the Index thereto may be searched.

Chancery Appeal Cases

(*Including Bankruptcy and Lunacy Cases*)

BEFORE

THE LORD CHANCELLOR

AND THE

COURT OF APPEAL IN CHANCERY.

BARFIELD *v.* LOUGHBOROUGH.

L. C.
1872
Nov. 2, 4, 5.

[1865 B. 344.]

Partnership Accounts—Interest after Dissolution—Annual Rests—Money Received.

In taking the accounts of a partnership, interest after the dissolution will not in general be allowed to the partners on their respective capitals, though interest during the partnership with annual rests is allowed; but this rule may be varied by the terms of the articles, as, for example, by a provision treating the capital left in by a partner as an interest-bearing loan.

Any sums of money received after the dissolution and retained by either partner ought to be debited to him, and applied first in reduction of the interest due to him, and then in reduction of his capital.

Order of *Malins*, V.C., varied.

Pilling v. *Pilling* (1) questioned.

THOMAS LOUGHBOROUGH and *Samuel Barfield* carried on business in partnership as attorneys and solicitors under the provisions of a deed bearing date the 23rd of December, 1854, which provided that *T. Loughborough* should have two-thirds and *S. Barfield* one-third of the profits. The fourth clause of the deed was—

"That the capital requisite for carrying on the said partnership

(1) 3 D. J. & S. 162.

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business shall be advanced and brought into the said business by the said partners in the following proportions: (that is to say) two-thirds by the said *Thomas Loughborough*, and the remaining one-third by the said *Samuel Barfield*. And that in case either of the said partners shall at any time or times, with the consent of the other of them, advance or lend to the said co-partnership, or leave therein with such consent as aforesaid, at any settlement of accounts as hereinafter mentioned, any sum or sums of money, then and in every such case the said partners respectively shall be considered as creditors of the said partnership in respect of such capital and advances so respectively made by them or left as aforesaid, and shall be allowed interest for the same after the rate of five pounds per centum per annum." The 20th clause provided that the partners should during the co-partnership, in the month of December in each year, make up a general account in writing of all the business transactions and other matters and things relating to the partnership, and that upon the settling of every such account the clear gains and profits of the joint practice should be divided between the partners according to their respective shares.

The partnership was dissolved by a decree made in this suit on the 11th of December, 1867, and the accounts were directed to be taken. In taking the accounts the Vice-Chancellor *Malins* had decided (July 3, 1872) on summons, that up to the date of the Chief Clerk's certificate, interest must be allowed to each partner on his capital account, with annual rests, each partner being debited with interest upon his drawings from the date of such drawings respectively to the end of the year.

Mr. *Loughborough* appealed as to the allowance of interest, and also on other grounds, which do not call for a report.

Mr. *Hardy*, Q.C., and Mr. *Higgins*, Q.C., for the Appellant:—

It has long been decided that neither articles of partnership nor any usage between the partners will have any effect after a dissolution, and that the property will then be simply divided without any allowance of interest. This is clear upon the cases: *Watney* v. *Wells* (1); *Dinham* v. *Bradford* (2); *Clark* v. *Leach* (3); *Cooke*

(1) Law Rep. 2 Ch. 250. (2) Law Rep. 5 Ch. 519.

(3) 1 D. J. & S. 409. 10 Jur. N.S. 610

v. *Benbow* (1); *Pilling* v. *Pilling* (2); *Parsons* v. *Hayward* (3); *Bonville* v. *Bonville* (4); *Wood* v. *Scoles* (5).

Mr. *Shapter*, Q.C., and Mr. *Stallard*, for Mr. *Barfield*:—

Mr. *Barfield* left in large sums of money on the faith of being allowed interest, and he ought not to lose it: *Smith* v. *Donaldson* (6) and *Pilling* v. *Pilling* are clear authorities as to the rule. In *Watney* v. *Wells* (7) the money was in Court.

Mr. *Hardy*, in reply.

Nov. 5. LORD SELBORNE, L.C.:—

The questions on which I reserved my judgment are, whether the Vice-Chancellor was right, first, in directing interest to be charged and allowed after the dissolution of the partnership in this case; and, secondly, in directing this to be done with annual rests?

A claim to have partnership accounts, subsequent to the dissolution of a partnership, taken with interest as between the partners, must (in the absence of any facts raising particular equities) be maintained, if at all, upon the footing of an agreement to that effect. In such a case, interest is not due, either upon the footing of delay in the payment of a liquidated debt, payable at a time certain, or upon that of the use by one man for his own profit and advantage of the money belonging to another. Neither partner has a personal demand upon the other for the repayment of his share of the capital employed in the business. It is payable, not at any fixed time, but in a due course of liquidation, out of the assets when realised. These assets are not in the meantime (unless under exceptional circumstances) productive of benefit to one partner rather than to another; they have simply to be got in and realised, and then applied and distributed for the benefit of both partners, according to their respective interests.

(1) 3 D. J. & S. 1.
(2) Ibid. 162.
(3) 4 D. F. & J. 474.
(4) 35 Beav. 129.
(5) Law Rep. 1 Ch. 369.
(6) 2 Dec. in Court of Session, 3rd Series, 86.
(7) Law Rep. 2 Ch. 250.

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In most of such cases there is either an express written agreement, or practice and usage equivalent thereto, that, during the continuance of the partnership, interest shall, before each division of profits, be credited to both parties on the amount of capital standing to the credit of their respective accounts. But it does not appear to me to be a legitimate inference from any such agreement or practice which is merely of this nature, that, after a dissolution, interest should continue to be allowed until the final adjustment and settlement of the partnership accounts.

There are frequently express provisions in partnership articles with respect to the payment of interest on the share of capital of one partner retained by another after dissolution. When no such provision is made, the principles of the settlement which ought to be made between the parties are applicable to a dissolved and not to a continuing partnership, and it would be an unwarrantable extension of the terms of an express agreement, limited to the period of the continuance of the dealings, to apply it to a period when the partnership and the partnership dealings no longer continue, except for the sole and special purpose of winding up the affairs. The foundation of the contract for the allowance of interest in such cases is the employment of the capital of the partnership in profitable business transactions, or in transactions from which profit is expected to accrue; but the contract for such employment of the capital terminates at the moment of dissolution, and no new transaction ought afterwards to be undertaken. If the affairs could be then immediately wound up, the whole assets would be immediately applicable in payment, first, of the debts of the concern, next of the sums due at that moment to the partners respectively; and if there were any ultimate surplus, such surplus would be distributable between the partners as profit on the previous transactions.

If (as generally happens) there are impediments to the immediate realisation of the assets and settlement of the accounts, this state of things does not alter the nature of the rights and interests of the partners in the assets then existing, though to be afterwards realised. Nor does it seem to make any difference in principle if one of the consequences of the delay should be to increase or diminish by subsequent accretions or losses the amount of the

surplus distributable as the ultimate profit of the business carried on before the time of dissolution.

I should hold, therefore, on principle, that no interest is, after dissolution, payable between partners merely on the ground that they have still remaining in the concern unequal shares of capital, on which, during the continuance of the partnership, they were entitled, either by express agreement or by their course of dealing, to have interest credited with or without rests.

The authorities, with the one exception, *Pilling* v. *Pilling* (1), seem to me to be in accordance with this view. *Boddam* v. *Riley* (2), before Lord *Thurlow*, which was affirmed in the House of Lords; *Parsons* v. *Hayward* (3), in 1862, particularly the *dicta* of Lord *Westbury* (4); *Wood* v. *Scoles* (5), before the Lords Justices, in 1866, in which case their Lordships declined to treat sums described in the articles as "capital" and "additional capital" on the footing of debts of the partnership, so as to allow interest upon these sums after the dissolution; while they did treat as debts payable with interest after the dissolution, advances, *ultra* the stipulated amount of "capital" and "additional capital" which had been made by a partner by way of loan to the partnership; and, lastly, *Watney* v. *Wells* (6), decided first by the Master of the Rolls, and afterwards, in 1867, by Lord Chancellor *Chelmsford*.

If *Pilling* v. *Pilling*, decided in 1865, is not to be explained by any special circumstances, it seems right to observe that it was decided, in the first instance, by the Judge whose later decision in *Watney* v. *Wells* was affirmed by Lord *Chelmsford;* and by the same Lords Justices who afterwards, in 1866, decided *Wood* v. *Scoles*. In *Smith* v. *Donaldson* (7) the advances on which interest (with rests) was allowed were made to a dissolved partnership for the purpose of its liquidation; and a binding agreement for the allowance of such interest was held to be established.

I have entered so far into the abstract question, because I wish it to be understood that while I agree with the Vice-Chancellor in allowing interest after the dissolution (though without rests) in this

(1) 3 D. J. & S. 162.
(2) 2 Bro. C. C. 2.
(3) 4 D. F. & J. 474.
(4) Ibid. 485.
(5) Law Rep. 1 Ch. 369, 378.
(6) Ibid. 2 Ch. 250.
(7) 2 Dec. in Court of Session, 3rd Series, 86.

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particular case, I do so not upon general principles, but upon the special terms of this particular contract.

The fourth article of the contract of partnership in this case appears to me to place upon one and the same footing all such sums as the partners might "advance and bring into the business" as their respective proportions of "the capital required for carrying on the partnership business," and such money as either partner might at any time, "with the consent of the other of them, advance or lend to the said co-partnership, or leave therein, with such consent, at any settlement of accounts" as after mentioned. And it was expressly agreed that, "in respect of all such capital and advances so respectively made by them, or left as aforesaid, the partners respectively shall be considered as creditors of the partnership," and "shall be allowed interest for the same after the rate of £5 per cent. per annum." The advances for the necessary capital, and any further advances by way of loan, are both here treated as equally constituting the relation of debtor and creditor between the partnership and the partner making such advances, and as creating a debt payable by the partnership with interest.

This brings the case exactly within the decision in *Wood* v. *Scoles* (1), as to the advances which, in that case, were made by way of loan, *ultrà* the stipulated capital and additional capital. Whatever may have been the reasons for this agreement (and perhaps they may be found in the particular course and nature of the business of attorneys and solicitors) its intention certainly appears to have been, to give the partners a right to interest on the footing (*inter se*) of debtor and creditor, and not merely on that of partner and partner. A creditor must always remain a creditor till the debt is paid.

For the allowance, however, of annual rests after the dissolution of the partnership, I can find no ground in the terms of this contract. Nothing is said expressly about rests, nor about compound interest. The right to compound interest during the continuance of the partnership was derived only from the combined operation of the right to simple interest under clause 4, and the provision for the annual balancing of accounts yearly during the said co-partnership, contained in clause 20; and from the practice

(1) Law Rep. 1 Ch. 369, 378. 12 Jun & S 555

which, in accordance with those provisions, and with the usual course of similar partnership accounts, was actually followed till the dissolution. But it is clear that the provision for yearly accounts is inapplicable to the period after dissolution. Where the relation of partners in a going concern, in which accounts are annually to be made up, has come to an end, the usage of yearly rests, which is a mere consequence of that relation and of these accounts, comes also to its natural end.

The authorities which decide that balances due upon an account between banker and customer, kept during the continuance of that relation according to the usage of bankers, with yearly or half-yearly rests, carry simple interest only from the time when the relation of banker and customer has terminated by death or otherwise, proceed upon a principle which seems to be not less applicable to a case like the present of rests in partnership accounts: *Fergusson* v. *Fyffe* (1); *Crosskill* v. *Bower* (2); *Williamson* v. *Williamson* (3).

I was at one time during the argument under the impression that the parties in the present case had not substantially acted upon the 4th clause of the articles of partnership, but an examination of the accounts produced in evidence has satisfied me that this impression was erroneous.

With respect to the drawings of each partner out of the partnership, I do not find in the partnership articles any provision for charging interest. Down to the date of the dissolution, the accounts ought in this respect to be taken upon the footing established by the usage of the partnership. After that date any sums received and retained to his own use by any partner out of the partnership assets ought to be debited to such partner, as at the dates when they were received, in reduction, first, of the interest accrued after the dissolution on the principal sum (if any) due to such partner at the date of the dissolution, and, secondly, of the interest bearing debt itself. For charging interest against either partner after the dissolution on sums not retained to his own use, and not shewn to have been received or employed otherwise than in the proper course of the realisation of the assets and liquidation of the concern, I see no ground.

(1) 8 Cl. & F. 121. (2) 32 Beav. 86.
(3) Law Rep. 7 Eq. 542.

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I propose, therefore, to make the following order:—

Discharge the order of the 3rd of July, 1872, and, instead thereof, direct that in taking the accounts under the decree, the Plaintiff and the Defendant respectively are, in respect of the period antecedent to the dissolution of partnership, to be credited with interest at the rate of £5 per cent. per annum on all sums from time to time, during that period, advanced by them respectively on account of their respective shares of the capital required for carrying on the partnership business, or advanced, or lent to, or left in the co-partnership, by either of them with the consent of the other of them; and that they are in like manner to be debited with interest at the same rate on all sums from time to time, during the same period, drawn by them respectively out of the said partnership for their own respective use; such accounts in respect of the period aforesaid being taken with annual rests, according to the course and usage of the co-partnership, on the 26th day of December in every year subsequent to the date of the last settled account, and a final rest being made on the 11th day of December, 1867, the day of the dissolution of the partnership: And direct, that from and after the said 11th day of December, 1867, the Plaintiff and Defendant respectively are to be credited with simple interest on the balances due to them respectively from the partnership, on the day of the dissolution (or on so much of such balances as may not from time to time have been afterwards satisfied by moneys received and retained by them, or either of them, to their own respective use out of the partnership assets), at the rate of £5 per cent. per annum without rests.

No costs of the summons on which the order of the 3rd of July, 1872, was made, or of the appeal motion. Deposit to be returned.

Solicitors: Messrs. *Hill & Son*; Mr. *Loughborough*.

L. C.
1872
Nov. 5, 6, 7, 8, 11, 14.

GAUNT *v.* FYNNEY.

[1870 G. 118.]

Nuisance—Evidence—Trespass—Injunction—Jurisdiction—Delay.

The amount of annoyance which will induce the Court to interfere between the owners of adjoining buildings discussed and defined, and the nature and value of evidence in such cases considered.

Where a trifling trespass or an interference with an ancient right has been submitted to for six years, the Court will not exercise its jurisdiction, but will leave the Plaintiffs to their rights at law.

Decree of the Master of the Rolls reversed.

THIS was a suit instituted by the owners of a house for the purpose of obtaining an injunction to restrain the owners of adjoining buildings from causing nuisance by noise, and from trespassing by

encroachment, and from interfering with an ancient light, and for the purpose of obtaining damages. The Master of the Rolls refused to grant an injunction, but made a decree for an inquiry as to damages, and for payment by the Defendant of the costs of the suit.

The Plaintiffs and the Defendant both appealed.

The facts of the case appear in the judgment of the Lord Chancellor sufficiently for the purpose of this report.

Mr. *Anderson*, Q.C., Sir *R. Baggallay*, Q.C., and Mr. *Rowcliffe*, for the Plaintiffs, contended that the Defendant could, at a very small expense, put an end to the nuisance: *Attorney-General* v. *Colney Hatch Lunatic Asylum* (1); *Yates* v. *Jack* (2). As to the question of damages or injunction, they cited *Hindley* v. *Emery* (3); *Senior* v. *Pawson* (4).

The *Solicitor-General* (Sir *G. Jessel*), and Mr. *Fry*, Q.C. (Mr. *Marten* with them), for the Defendant, as to delay, cited *Swaine* v. *Great Northern Railway Company* (5); *Crump* v. *Lambert* (6).

Mr. *Anderson*, in reply.

Nov. 14. LORD SELBORNE, L.C.:—

The Plaintiffs, who are unmarried ladies, living at *Leek*, in *Staffordshire*, ask for an injunction (with damages) to restrain an alleged nuisance by noise and vibration, and to restrain alleged trespasses by encroachment on land and obstruction of light. The Master of the Rolls has made a decree, refusing an injunction, but granting an inquiry as to damages, from which decree both parties appeal.

Leek is a town in which the manufacture of silk is carried on. The Plaintiffs' house faces a street called *Derby Street*, to the south, and has a garden of some size to the north, with two stables to the east, separate from the house and from each other. East-

(1) Law Rep. 4 Ch. 146.
(2) Ibid. 1 Ch. 295.
(3) Ibid. 1 Eq. 52.
(4) Law Rep. 3 Eq. 330.
(5) 4 D. J. & S. 211.
(6) Law Rep. 3 Eq. 409.

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ward and southward of the nearer of these stables (called the old stable), which is about nineteen yards from the house and garden, is a silk mill belonging to and worked by the Defendant. The Plaintiffs state that the Defendant was formerly in the employment of the Plaintiffs' father, who was a mill-owner, carrying on the manufacture of silk in part of the buildings now occupied by the Defendant. The Defendant states that the Plaintiffs' father (from whom they derive their title) deliberately placed his house (the same house in which the Plaintiffs now live) close to the mill.

The mill has, however, been much enlarged by the addition of new buildings since that time. Down to the winter of 1864–5 it was worked by hand-power, and a narrow strip of land between the northern part of it and the eastern wall of the Plaintiffs' old stable remained unbuilt upon. In that winter the Defendant caused this intervening space to be covered over, and erected a small steam-engine, of about four-horse power, in the chamber so formed, connecting this engine by proper gearing with the machinery in the mill, which from that time forward was worked by steam. The Plaintiffs made no complaint of any annoyance till the summer of 1870; and they were in the habit of keeping three or more horses or ponies in the old stable, till the end of October in that year.

I consider it to be admitted upon the Plaintiffs' pleadings, and established by their evidence, that there was no nuisance from noise or vibration, either to the house, or to the garden, or to the stables, prior to the end of May, or the beginning of June, 1870. But the Plaintiffs allege that the Defendant's mill then began to be worked with such a degree of noise as to become, after that time, a serious nuisance, that they remonstrated, and received promises of redress, but that nothing was effectually done to remedy the evil, and that in and after October, 1870, the noise and vibration increased daily, destroying or materially diminishing the comfort, salubrity, and value of their house and garden, and rendering the old stable unsafe and unfit for horses, in consequence of which their horses were removed from it at the end of October, or the beginning of November, 1870.

The bill was filed on the 28th of November, 1870. The ques-

tion of trespass has emerged during the progress of the controversy; but this rests on distinct grounds, and must be separately considered.

The case thus made is met by the Defendant with a general denial of the material facts alleged. He says that no changes have been made in his engine or machinery since January, 1865, except some which were made in 1870, to meet (as far as possible) the Plaintiffs' objections; that the manner of working them has been throughout both in kind and in degree the same; that there has been no increase either of noise or vibration; that the state of things of which the Plaintiffs now complain is a mere continuation of that which existed without complaint during the five preceding years, and which is admitted not to have then constituted a nuisance. In these statements he is supported by the evidence of every witness in the cause who has any knowledge of the interior working of the mill. [His Lordship then referred to the evidence.]

If the Defendant's evidence is believed, the Plaintiffs' case fails. The burden of proof, as to this part of the case, rests wholly on the Plaintiffs. The Scotch law has a phrase which, in cases of this nature, may well admit of a negative, as well as of a positive application. It forbids a man to use his own rights "*in emulationem vicini.*" Neighbours everywhere (and certainly in a manufacturing town) ought not to be extreme or unreasonable either in the exercise of their own rights or in the restriction of the rights of each other. The ruling, approved by the House of Lords, in *St. Helen's Smelting Company* v. *Tipping* (1), that "the law does not regard trifling inconveniences," and that "everything is to be looked at from a reasonable point of view," and the observations of Lord *Cranworth*, seem to be particularly applicable to such a case as the present. [His Lordship then read passages from the report (2)].

There may, of course, be such a thing as a legal nuisance from noise in a manufacturing or other populous town, of which the case of *Soltau* v. *De Held* (3) is an example. But a nuisance of this kind is much more difficult to prove than when the injury com-

(1) 11 H. L. C. 642. (2) 11 H. L. C. 650, 651.
(3) 2 Sim. (N.S.) 133.

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plained of is the demonstrable effect of a visible or tangible cause, as when waters are fouled by sewage, or when the fumes of mineral acids pass from the chimneys of factories or other works over land or houses, producing deleterious physical changes which science can trace and explain. A nuisance by noise (supposing malice to be out of the question) is emphatically a question of degree. If my neighbour builds a house against a party-wall, next to my own, and I hear through the wall more than is agreeable to me of the sounds from his nursery or his music-room, it does not follow (even if I am nervously sensitive or in infirm health) that I can bring an action or obtain an injunction. Such things, to offend against the law, must be done in a manner which, beyond fair controversy, ought to be regarded as excessive and unreasonable.

I am far from saying that there may not be a case in which the owner of a house very near a mill in a manufacturing town may be entitled to protection against noises resulting from the introduction into the mill of new machinery, or of new modes and processes of working. But in every case of this kind it ought to be clearly made out that the mill-owner has exceeded his rights. When there has been no introduction of new machinery, and nothing new in the manner of working—when everything within the mill has gone on without change in the usual and accustomed course of the manufacturer's business—a Plaintiff undertaking to prove that at and after a definite time the noise from the mill, admitted to have been previously lawful and harmless, became excessive and noxious imposes upon himself (to say the least) an arduous task.

And how have the Plaintiffs acquitted themselves of this burden? I see no reason to doubt that they, and their servants and friends, who are witnesses in this case (several of whom have not been cross-examined), do themselves believe that the considerable increase of noise of which they speak has really taken place, and are persuaded that this noise is a serious nuisance. But it is not impossible that this should be the case, and yet that the witnesses for the Defendant (none of whom have been cross-examined) should be believed. Those who compare the noise which they hear to-day with the noise which they heard months or years ago, are witnesses (within certain limits) to impressions

upon the mind rather than to facts. Those who speak of the manner in which the engine and machinery have been worked, and the business of the mill carried on, speak of facts, and not of impressions on the mind. Mr. *Fry* made, in a part of his argument, a happy use of a passage in a recent work upon mental science (1), which (treating of the influence of the mind upon the sense of hearing) says "that the thought uppermost in the mind, the predominant idea or expectation makes a real sensation from without assume a different character." Every one must have had some experience of the truth of this statement; a nervous, or anxious, or prepossessed listener hears sounds which would otherwise have passed unnoticed, and magnifies and exaggerates into some new significance, originating within himself, sounds which at other times would have been passively heard and not regarded. In the present case, I have no doubt that a real "whirring sound," such as the Plaintiffs' witnesses describe, did proceed from the machinery in the mill when at work, at all times, before as well as after the erection of the steam-engine in 1864-5. I have no doubt that this sound (and also the sound of the steam-engine), after its erection, was often, if not always, perceptible in the Plaintiffs' garden, and in some of the rooms of their house, especially when the windows were open; I have no doubt that it was louder and more audible at some times and when the wind was in particular quarters, than at other times and other states of the wind. I have no doubt that it must always have been more or less heard in the old stable, where the heads of the horses, as they stood in their stables, were turned towards the wall (described as a thin wall) on the other side of which the engine was fixed, and where there was a small window, which, but for its being closed by certain boards, would have opened directly into the engine room itself. But all this is admitted to have gone on from January, 1865, to June, 1870, without amounting to a nuisance.

[His Lordship then stated that in June, 1870, a sudden noise had alarmed the servants of the Plaintiffs, and that since that time the Plaintiffs had entertained the idea of some danger from the

(1) *Tuke.* Influence of the Mind on the Body, p. 47.

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boiler used by the Defendant. That from this time forth the engine and its noises were to the Plaintiffs a permanent source of irritation and uneasiness. His Lordship then examined the evidence on both sides as to the house, and then the evidence as to the effect of the noise and vibration on the horses in the stable. Witnesses for the Plaintiffs had stated that on one occasion the horses of a visitor when put in the stable suffered tremors, as to which his Lordship said that this evidence did not make a powerful impression on his mind. The case of *Cooke* v. *Forbes* (1) shewed that it was not every occasional and accidental noise which might frighten a horse in a stable on a particular day that would entitle a Plaintiff to an injunction, if the general case or habitual nuisance alleged in the bill was not satisfactorily proved. His Lordship came to the conclusion that no sufficient case was made out, and that the bill, so far as it sought relief on the ground of nuisance, must be dismissed. As to the trespass, it appeared that part of the Defendant's engine-house overhung the plinth of one of the Plaintiffs' walls. The Defendant, however, disputed the right of the Plaintiffs to the plinth, and His Lordship would not decide this question.]

His Lordship then proceeded to say:—It is enough, in my opinion, to dispose of this part of the bill, that the Defendant had been, for nearly six years before the filing of the bill, in undisputed possession in a manner patent to the Plaintiffs, though they may have not known the particular arrangement or position of his engine or machinery; and that the title to this small piece of land is in controversy between the parties. A bill for ejectment, by way of mandatory injunction, cannot, in my opinion, be supported under such circumstances. This part, therefore, of the bill must also be dismissed.

There is left only one more question, that of the obstruction of the window in the Plaintiffs' old stable by the boards placed against it, and also by the roof of the Defendant's engine-room. As to this I have felt some embarrassment. On the one hand, it seems to me that an unlawful obstruction by the Defendant of an ancient, though not very valuable light has been established. On the other hand, this obstruction took place nearly six years

(1) Law Rep. 5 Eq. 166.

before the bill was filed, under the very eyes of the Plaintiffs or their servants, who can never have gone into the stable without perceiving it; and the light does not appear to have been, for any practical purpose, missed or wanted since its obstruction. A bill for an injunction in such a case would, I think, before the passing of *Lord Cairns' Act*, have been dismissed, and the Plaintiffs would have been left to their remedy at law. Since that Act, if the bill were not dismissed, I should certainly agree with the Master of the Rolls in thinking the case one for an inquiry as to damages, and not for an injunction. But, finding myself obliged to leave the Plaintiffs to their legal remedy (if any) as to the other matters complained of, and being of opinion that the obstruction of light is so connected with the other alleged trespass as to make it possible that some injustice might be done if damages as to the light were given here, and the Plaintiffs at the same time left in possession of all their legal remedies as to the plinth of their wall and the disputed slip of land, I have come to the conclusion that the bill ought to be altogether dismissed, without prejudice to any action which the Plaintiffs may be advised to bring.

The costs of the suit will follow the event; the Plaintiffs' appeal will be dismissed with costs. There will be no costs of the Defendant's appeal; but the deposit will be returned.

Solicitors for the Plaintiffs: Messrs. *Gregory, Rowcliffes, & Rawle.*

Solicitors for the Defendant: Messrs. *Milne, Riddle, & Mellor.*

L. C.
1872
Nov. 11, 12, 14, 15.

GILBERT *v.* GUIGNON.

[1869 G. 7.]

Bills of Lading—Transfer—Priority—Acceptance—Inadvertence.

Corn merchants in *California* agreed to send cargoes of wheat to a miller in *England*, the reimbursement to be by his acceptance against bill of lading. The corn merchants shipped a cargo, and made out the bill of lading in six parts. Three parts, with corresponding bills of exchange drawn on the miller for the price of the cargo, were indorsed by the corn merchants, and transferred to a Californian bank for valuable consideration. These bills of exchange were, with the bills of lading annexed, accepted by the miller. One indorsed part of the bill of lading was inadvertently sent by the corn dealers to the miller, and by him transferred to an English bank for valuable consideration. The bills of exchange were not met by the miller:—

Held, that the corn merchants were entitled to deal as they did with the cargo by transferring the bills of lading; that the English bank could not, under the circumstances, claim as holders of the bill of lading without notice; and that the English bank had no priority.

Quære, whether the miller might not have refused to accept the bills of exchange unless the bills of lading were delivered to him.

Decree of the Master of the Rolls affirmed.

MESSRS. *Forbes & Co.*, who were corn merchants in *California* and at *Glasgow*, proposed to ship wheat from *California* to *James Kemp*, a miller in *Devonshire*, on the following terms, as contained in a letter written by their agent to *Kemp*, and dated the 21st of May, 1868:—"With reference to my letter of the 7th inst. respecting *California* wheat, I observe that I omitted the matter of reimbursement, which would be your acceptance at ninety days' sight against bill of lading."

The ninety days' sight was afterwards altered to sixty days' sight, and it appeared to be understood that *Kemp* intended to "finance the cargoes," or, in other words, deal with them before they arrived. On these terms *Kemp* ordered about twenty cargoes of wheat. The first cargo, at the price of £5625, was shipped by *Forbes & Co.* in the ship *Theodore Ducos*, and six bills of lading were made out by *Forbes & Co.*, and signed by the master of the ship, all dated the 11th of September, 1868. Six corresponding bills of exchange for £5625 each were also drawn by *Forbes & Co.*

on *Kemp;* three of these bills were annexed to as many indorsed bills of lading, and were, on the 12th of September, 1868, delivered by *Forbes & Co.* to the *Bank of British Columbia,* by way of security for a sum of money then advanced.

Forbes & Co., on the 12th of September, 1868, sent a letter to *Kemp,* inclosing therein an invoice of the cargo of the *Theodore Ducos,* and by a mistake of their clerk, or by inadvertence, inclosing also one of the bills of lading indorsed in blank. This bill of lading was, on the 11th of October, 1868, delivered by *Kemp* to the *West of England Banking Company* by way of security either for an advance then made or for money due by *Kemp* to the banking company. The circumstances under which this bill of lading was deposited, and how far the banking company were aware of the agreement between *Forbes & Co.* and *Kemp,* were much disputed. The conclusion to which the Lord Chancellor arrived is stated in his judgment.

The three bills of exchange were presented by the agents of *Forbes & Co.,* or of the *Bank of British Columbia,* to *Kemp,* and were by him accepted with the bills of lading attached thereto. This latter fact was disputed by the banking company, but in the opinion of the Lord Chancellor was established. Similar proceedings took place as to other cargoes. With respect to one of these, it appeared that *Kemp* objected to accept the bills of exchange unless the bills of lading were left with him. *Forbes & Co.* thereupon, on the 26th of October, wrote to *Kemp,* saying that the holders of the bills of exchange must hold the bills of lading, otherwise their lien was illusory. On the 14th of December, 1868, the bills of exchange for £5625 were protested for non-payment by *Kemp,* up to which time *Forbes & Co.* had not, as they alleged, any suspicion that the bill of lading sent to *Kemp* had been used by him. On learning that the bills of exchange were dishonoured, *Forbes & Co.* deposited the sum of £5625 as security to the *Bank of British Columbia;* that bank agreeing to take the necessary proceedings in respect of the cargo on being indemnified by *Forbes & Co.* The *Bank of British Columbia,* by arrangement with *Forbes & Co.,* obtained possession of the cargo of the *Theodore Ducos* on its arrival in *England.*

The *West of England Banking Company* then filed the bill in

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this suit against the *Bank of British Columbia*, and *Forbes & Co.*, and others, alleging that the sale of the bills of exchange to the *Bank of British Columbia* was subsequent to the time when the bill of lading was deposited with the banking company; that the *Bank of British Columbia* had notice that *Forbes & Co.* had parted with the control of the cargo; and that the Plaintiffs were not, until the arrival of the ship, aware that the *Bank of British Columbia* had possession of any bill of lading. And the bill prayed a declaration that the Plaintiffs were entitled to a charge on the cargo of wheat, in respect of the said sum of £5625, in priority to the charge of the *Bank of British Columbia*, with consequent relief.

The Master of the Rolls dismissed the bill with costs. The Plaintiffs appealed.

Mr. *Fry*, Q.C., and Mr. *Ince* (Mr. *Murch*, of the Common Law Bar, with them), for the Plaintiffs:—

Kemp had clearly a right to deal with the cargoes, and the documents must be such as would enable him to do so: *Dracachi* v. *Anglo Egyptian Navigation Company* (1). Even if the words of the contract might be construed differently, they are controlled by the custom of merchants, as shewn in *Berndtson* v. *Strang* (2); *Shepherd* v. *Harrison* (3). *Kemp* had a right to consider the bill of lading as given in exchange for his acceptance. It is clear that *Forbes & Co.* have enabled *Kemp* to pledge this bill of lading, and the *West of England Bank*, if not prior in time, have at all events a good charge, without notice of any other.

Sir *R. Baggallay*, Q.C., and Mr. *Kekewich*, for the *Bank of British Columbia*.

Mr. *Benjamin*, Q.C., and Mr. *Bradford*, for *Forbes & Co*:—

The bill of lading sent to *Kemp* could have no value after the first bills had been parted with: *Gurney* v. *Behrend* (4). At all events, *Kemp* had no right to use it. If a man holding a bill of lading under a promise not to use it, does part with it, can his assignee thereby acquire any rights against the person who en-

(1) Law Rep. 3 C. P. 190.
(2) Ibid. 4 Eq. 481, 483; Ibid. 3 Ch. 588.
(3) Law Rep. 5 H. L. 116.
(4) 3 E. & B. 622.

trusted him with the bill? If *Kemp* has any claim against us, it is on tort for our wrongful conduct in not allowing him to deal with the cargoes. Neither he nor those who claim under him have any rights against us *ex contractu*. But we say that *Kemp* understood that we were to raise money on the cargoes. The cargoes to be sent were to the amount of nearly £120,000, and he knew that we must raise money on the first cargoes. As to the case set up of a purchase by the *West of England Bank* without notice, we contend on the evidence that the bank must have known on what terms the cargoes were sent.

Mr. *Fry*, in reply:—

Forbes & Co. have not given a satisfactory explanation of how they came to send *Kemp* the indorsed bill of lading, if they did not intend him to use it. They say that, at all events, it was not to be used; but when it was used, the transferee acquired a title: *Briggs* v. *Jones* (1). The Defendants, in fact, suggest that this was a scheme between the Plaintiffs and *Kemp* to defraud *Forbes & Co.*; but it is more like a scheme to entrap the Plaintiffs.

LORD SELBORNE, L.C.:—

In this case I only called upon counsel for the Defendants, Messrs. *Forbes & Co.*, to address the Court upon one branch of it; and after hearing the very able argument of Mr. *Benjamin*, and the light thrown upon the facts and the evidence in the course of that argument, I have come to a clear conclusion that the decision of the Master of the Rolls is right.

The case made by the bill really and truly is, that the Plaintiffs have a legal priority by the first indorsement of one of a set of bills of lading, and that their right to that was in accordance with the contract between the vendor and purchaser of the cargo to which the bills of lading related. Now in the view I take of the case it is not necessary to dwell much, if at all, upon the question of mercantile understanding in contracts of this kind, which occupied a considerable part of the argument; but I think it well to say a few words upon the subject, by way of introduction to what

(1) Law Rep. 10 Eq. 92.

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I regard as the only question in the cause requiring serious consideration.

This contract for the purchase of wheat at *San Francisco* on the order of the miller in *Devonshire* was, according to the original letter of the 21st of May, 1868, upon the terms that reimbursement was to be made by the purchaser's acceptance—originally at ninety days' sight, afterwards altered to sixty—against the bill of lading. The Plaintiffs have argued that it was wrong for the unpaid vendors before acceptance of the bills of exchange, by means of which their reimbursement was to be made, to negotiate those bills of exchange, and to document them in the usual manner by annexing the bills of lading, and so sending them forward in the hands of the person discounting the bills of exchange. I apprehend, on the contrary, that that course is perfectly regular, and perfectly right and proper, unless, indeed, in a particular case, where there is an express contract that the bills of exchange are not to be negotiated. In no other way can the vendor protect himself, under these circumstances, against the contingency of the acceptance even of the bills of exchange being refused. The contract that he is to be reimbursed by acceptances against bills of lading cannot possibly disable him from dealing in the ordinary course of mercantile business with the bills of lading for his own protection so as to secure himself against liabilities upon the bills that he draws, at all events before they are accepted. Therefore, in negotiating these bills of exchange with the *Bank of British Columbia*, or those from whom the bank took them, in annexing to them the bills of lading, and so sending them forward to this country, *Forbes & Co.*, as it appears to me, merely followed the proper and ordinary course of mercantile usage.

It might be quite consistent with these dealings that *Kemp*, the purchaser, should have a right, when the bills of exchange were presented to him for acceptance, to say he would not accept the bills under this contract, unless the bills of lading were at the same time delivered up to him. And if they had refused to deliver up the bills of lading, and he had offered acceptances on those terms as according to his contract, it may be that he would have had a right to bring an action for breach of contract as against *Forbes & Co.* That may be the case, and as to that much

would depend upon the particular course of dealing between the parties, which might vary the mode in which the contract ought to be performed.

But the real substance of the contract in such a case is, that the purchaser is to be under the obligation to accept only when the bills of lading come forward to and are seen by him in the proper course of the transaction; and if he, having the bills of exchange presented to him for acceptance, with the bills of lading annexed to them, does not think fit to claim the delivery of the bills of lading to him (supposing him to have the right to do so), if he is content that they should remain in the hands of the holder, it is exactly the same thing as if he had previously and originally authorized that course of proceeding, and had himself adopted that mode, as it is expressed, of "financing the cargoes;" and that, according to my view of the evidence, is what actually happened in the present case. There can be no doubt whatever that the *Bank of British Columbia* sent forward these three bills of exchange with the bills of lading annexed to the three parts of the bills of exchange, and that these documents came in the ordinary course of business into the hands of their agents in *London*.

[The Lord Chancellor then referred to the evidence, upon which he came to the conclusion that the bills of lading must have been annexed to the bills of exchange when the bills of exchange were accepted by *Kemp;* and that the sending of the bill of lading to *Kemp* must have been done by inadvertence. Still, however, if this had enabled *Kemp* to deceive a third party, *Forbes & Co.* would, according to the principles of the Court, be bound by what they had done. The bill, however, did not directly set up the case of the Plaintiffs being holders for valuable consideration without notice of the transaction, and there seemed to be good reason why such a case should not be distinctly set up. His Lordship then referred to the evidence as to the dealings between *Kemp* and the Plaintiffs, and came to the conclusion that the Plaintiffs must have known that there were six parts of the bills of lading, and that each would be documented with a corresponding bill of exchange. That being so, it was plain that the officers of the bank could not have been, and were not deceived by reason of the inadvertent indorsement of the bill of lading which was sent to

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Kemp. His Lordship thought that the Master of the Rolls had come to a perfectly just and right conclusion in dismissing the bill with costs; and dismissed the appeal with costs.]

Solicitors for the Plaintiffs: Messrs. *Clarke, Woodcock, & Ryland.*

Solicitors for the *Bank of British Columbia:* Messrs. *Freshfield.*

Solicitors for Messrs. *Forbes & Co.:* Messrs. *Rooks, Kenrick, & Harston.*

L. C. and L. JJ. 1872 Nov. 8.

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[1872 H. 141.]

Injunction—Policy of Assurance obtained by Misrepresentation—Action at Law—Conflict of Evidence—Concurrent Jurisdiction—Discretion of the Court.

A bill having been filed by an assurance company for the cancellation of a life policy as having been obtained by concealment and misrepresentation, a motion was made to restrain an action at law upon the policy, which had been commenced immediately after the filing of the bill:—

Held (affirming the decision of *Malins*, V.C.), that although the Court of Chancery had complete jurisdiction in such a case, yet the Court of Law was the most suitable tribunal for dealing with disputed facts respecting a policy of assurance; and the motion for an injunction was refused.

When proceedings are commenced at law and in equity respecting the same matter, if the nature of the claim of the Plaintiff at law is such that he could only enforce it at law, the Court of Equity will be very reluctant, on an interlocutory application, to withdraw the case from the jurisdiction of the Court of Law.

THIS was an appeal from a decision of Vice-Chancellor *Malins* (1). The bill was filed by the *Sun Life Assurance Society*, by its public officer, praying a declaration that a policy of assurance for £5000 on the life of Mrs. *Formby* was obtained by her by concealment and misrepresentation, and that the same was void, and ought to be delivered up to be cancelled, and that in the meantime the Defendant, *Thomas Julius Bremridge*, the executor of Mrs. *Formby*, might be restrained from bringing any action against the Plaintiff or the Society in respect of such policy.

(1) Law Rep. 14 Eq. 522.

From the statements in the bill it appeared that the original application for the policy in question was made by Dr. *Lyle*, who was also made a Defendant.

The usual papers sent by the assurance office requiring particulars as to the life of the person intending to effect a policy were filled up by Mrs. *Formby* on the 8th of December, 1870. She stated that she was twenty-seven years of age, that her usual medical attendant was *Arthur Kempe*, whom she had last seen in the previous month of April, when he attended her during her confinement. This form was accompanied by the following certificate: "I do hereby certify that I am now in good health, that I do ordinarily enjoy a good state of health, that I am sober and temperate in my habits of life, and that I am not aware of any circumstance tending to shorten my life or to render an assurance on it more than usually hazardous. And I do hereby certify that I have not had occasion for medical advice or assistance during the last two years, excepting for confinement and passing ailments. Also I know no other medical practitioner so competent to certify as to my health, habits, and constitution as *Arthur Kempe*, to whom I have referred."

It was afterwards arranged that the assurance should be effected in the name of Mrs. *Formby*, Dr. *Lyle* not having sufficient interest, and she accordingly signed a declaration, dated the 13th of December, 1870, to the following effect:—

"I, *Maria Henrietta Formby*, described in a proposal made by me to the *Sun Life Assurance Society* for assuring £5000 on my own life, signed by me, and dated the 8th December, 1870, do hereby declare that my age does not exceed twenty-eight years, that I am now in good health, and that I ordinarily enjoy a good state of health; that I am sober and temperate in my habits of life, that the whole of the statements made by me in the said proposal are true, and that I am not aware of any other circumstance tending to shorten my life or to render an assurance on it more than usually hazardous; and this declaration is to be the basis of the contract between me and the said Society; and if any untrue averment is contained in this declaration, or in the statements made in the said proposal in setting forth my age, state of health, habits, profession, occupation, or other circumstances, then all moneys which shall

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have been paid to the said Society upon account of the assurance made in consequence thereof shall be forfeited."

Dr. *Kempe*, the medical practitioner referred to by Mrs. *Formby*, sent a reply to the questions put to him by the assurance society on the 17th of December, in which he stated that her general state of health was good, that she was not afflicted with disease or disorder of any kind that he was aware of, and that he did not know of any circumstance which might be considered as tending to shorten her life or to render an assurance on it more than usually hazardous. Mrs. *Formby* was also examined by Dr. *Budd*, the medical referee of the assurance society, who reported that he found her to present every indication of a sound constitution, that she appeared to be in perfect health, and he considered her to be quite eligible for life assurance, in fact to be a first-class life.

The policy, which was dated the 30th of January, 1870, was made under seal by three directors, in the ordinary form, and contained a clause providing that "should the assurance have been obtained through any misrepresentation as to the age, state of health, or description of the said assured, or should the said assured die by duelling, suicide, or the hands of justice, this policy, and everything appertaining thereto, shall cease, be void, and of none effect, so far as respects the said assured."

Mrs. *Formby* died on the 1st of February, 1872, having by her will, made in January, 1871, bequeathed the policy of assurance and all the residue of her property to Dr. *Lyle*, and appointed the Defendant *Bremridge*, and another person, since deceased, her executors.

The bill alleged that the Society had recently discovered that Mrs. *Formby* at the time of effecting the policy was not in a good state of health, and that she was afflicted with a disorder tending to shorten life, and with serious disease, and that it was untrue that she was not aware of any circumstance tending to shorten her life or to render an insurance on it more than usually hazardous.

The charges in the bill entered into minute details respecting the disease from which Mrs. *Formby* was suffering when the proposal was made for insuring her life, which had arisen from injuries received in her last confinement, and from the effects whereof she died on the 1st of February, 1872.

It was also alleged that when the proposal for insuring her life was made by Mrs. *Formby* she was well aware of the state of her health, and in order to induce the Society to grant the policy, she concealed the fact of her not having recovered from her last delivery, and of her having been attended by another medical man, and that she did not inform the Society or Dr. *Budd* that she was still suffering from disease; that if they had been so informed they would have refused to insure her life or to undertake any risk upon such a life; but they had no information or intimation of such matters till after the death of Mrs. *Formby*.

This bill was filed on the 14th of June, and on the 21st of June the Defendant *Bremridge* commenced an action against the Society on the policy in the Court of Exchequer.

On the 30th of July, 1872, the Plaintiffs moved before the Vice-Chancellor for an injunction to restrain the action at law, which His Honour refused with costs, and from this decision the Plaintiffs appealed.

The *Solicitor-General* (Sir *G. Jessel*), Mr. *Cotton*, Q.C., Mr. *Bush*, and Mr. *C. Bowen* (of the Common Law Bar), for the Appellants:—

There is no doubt about the jurisdiction of the Court to set aside a policy of assurance on the ground of fraud and misrepresentation, and it has been repeatedly exercised: *Whittingham* v. *Thornburgh* (1); *British Equitable Assurance Company* v. *Great Western Railway Company* (2); *Traill* v. *Baring* (3). Where the Court has refused relief it has been in cases where there was no fraud or other circumstances entitling the Plaintiff to equitable relief, as in *Lee* v. *Lancashire and Yorkshire Railway Company* (4).

There are, besides, in this case special grounds for granting an injunction. In the first place, our bill was filed before the action was commenced, and the onus is therefore on the Defendants to shew some special reason for seeking relief in a Court of Common Law. There is really no conflict of evidence, for none of the important facts alleged by us are denied by the Defendants' answers. There would be great inconvenience in allowing both proceedings to go on independently of each other. In the second place, there

(1) 2 Vern. 206.
(2) 38 L. J. (Ch.) 314.
(3) 4 D. J. & S. 318.
(4) Law Rep. 6 Ch. 527.

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are misrepresentations in the declaration by Mrs. *Formby*, which are not strictly within the proviso in the policy, and therefore would not be considered in the action at law.

Mr. *Glasse*, Q.C., and Mr. *C. Hall*, for the Defendants, were not called on.

LORD SELBORNE, L.C.:—

We all think that there is no sufficient ground in this case for differing from the decision of the learned Vice-Chancellor. Not having heard the counsel on the other side, we do not, of course, decide, but we assume what is undoubtedly our own impression, according to our views of the law, that there is a good equitable case stated in this bill, which, if proved at the hearing, and not displaced, would entitle the Plaintiffs to a decree. I have always understood the law of this Court to be as explained by Lord *Cottenham* in the case of *Simpson* v. *Lord Howden* (1), that if there be a legal defence to a written instrument depending on facts not appearing upon the face of the instrument, the party charged on that instrument with some liability may come into a Court of Equity to get rid of it, notwithstanding the legal defence, because the evidence of those extrinsic facts upon which the defence depends might not be forthcoming at all times and under all circumstances. That would apply even perhaps to cases that were not strictly cases of fraud. But, independently of that, where a case of fraud is alleged, this Court has an original and unquestionable jurisdiction. We proceed, therefore, upon the ground that this Court would have jurisdiction to deal with such a case as this at the hearing. But it is to be observed that it is only in an imperfect sense that a case of this kind is one of concurrent jurisdiction. Each party, to be an actor and to bring forward his own case, is not at liberty to choose this Court or the Court of Law as he pleases, but each, if he would be Plaintiff, must come the one into equity and the other into a Court of Law. Each is *rectus in curiâ*. The assured cannot come into equity to sue on this policy; the office, the insurers, can come into equity only before they are sued, to have it delivered up to be cancelled. Each, therefore, is

(1) 3 My. & Cr. 97.

suing, of necessity, in the proper Court, and in the only Court in which he can sue, to have that which he claims as his right. But what the one claims as his right in equity would constitute his defence at law; what the other claims as his right at law would constitute his defence in equity. That is the true state of the case.

Now, that being so, it is manifest that all discretion which would belong to this Court in a case of concurrent jurisdiction, properly so called, must, *à fortiori*, belong to it in a case in which the whole matter cannot be drawn in the first instance into one jurisdiction, but can only be brought in its entirety into the equitable jurisdiction by imposing terms, the consent to which would be the price of its interference. This Court could, undoubtedly, deal with such a motion as the present by saying, "We will grant the motion, if the Plaintiff in Equity consents to give judgment at law, or to do whatever else may be thought just, and we will refuse the motion, and let the action go on if the Plaintiff in Equity does not consent to do so." It is only by imposing terms partly depending on consent that it is possible in the present state of the law for this Court to bring the whole matter into a single forum. Therefore I say that all discretion which would belong to the Court in a case properly of concurrent jurisdiction, must, *à fortiori*, belong to it in a case of this kind, arising on an interlocutory application. And for my own part, I do not see any reason to doubt the correctness of a passage which I am about to read from Lord *Truro's* judgment in the case of the *South Eastern Railway Company* v. *Brogden* (1) with regard to cases of concurrent jurisdiction in matters of account, which was the nature of the case then particularly before the Court. The Lord Chancellor says: "There are many cases in which it seems to me, looking through the whole of the decisions, that this Court would properly entertain jurisdiction on the matter, where, if the party making the claim proceeded at law, the Court would not, as a consequence because it would itself exercise jurisdiction if appealed to, withdraw it from the jurisdiction of a Court of Law. I do not think the cases at all warrant that." That being so, no authority has been cited to us to shew that this Court has ever in a contested question

(1) 3 Mac. & G. 23.

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determined that, in such a case as this, it would, by interlocutory motion, grant an injunction where a party claiming under a policy of insurance desired to have the opportunity of trying his right by an action at law, and would, in the ordinary course of proceeding, have that opportunity at an earlier date than the time at which it would be tried in the course of proceedings in equity.

It has been suggested by the Solicitor-General that in this case there is no conflict of evidence; but that argument seems to me to assume that the question of merits must be tried on the interlocutory application, and for the purpose of that application, in order to determine the question of the forum in which the trial is to take place. Such a course as that would be highly inconvenient; and it appears to me that a party in the position of an executor coming forward and saying, "In the discharge of my duty I have brought this action, and I desire to have the opportunity of trying the question in the ordinary Courts of Law," is not obliged, in order to get the benefit of such rights as he may have at law, to go for the purpose of such an interlocutory motion into a preliminary rehearsal or trial of the question upon evidence. I am not, therefore, persuaded by that view. It has been also suggested in the course of the argument, that in questions like this, on policies of insurance, the assured prefers a jury, and the office prefers a judge. I do not think that we ought to pay any attention to the preference of the one party or the other. We are bound to take notice that, according to the ordinary course of law in this country, and having regard to the principles upon which trial by jury is established, the jury is not only the most usual, but the most suitable and proper forum for the trial of questions of this description. It is said that the effect of that will be, that while the case is being tried at law the suit will go on in equity. I do not think it is at all necessary that the expense of going into all the evidence in equity should be incurred, pending the trial at law. I can pretty well divine what the effect would be of a motion to dismiss for want of prosecution by a Defendant in equity, if the only default of the Plaintiff was in not proceeding in a manner which would involve, unnecessarily, double expense, while the matter was proceeding, as the Defendant had elected that it should proceed, to trial at law.

Then, with respect to the rest, I am quite satisfied that, if it

were tried at law, this Court would, in such a question as that which is presented to us here, act on the verdict and judgment at law, and not disturb it. A new trial might be moved for at law, if necessary, and it would be granted or not as might be right. But this Court would certainly not try over again, for the purpose of reversal, the question decided between the parties on the trial at law. Costs only would be the matter ultimately remaining to be provided for in equity; and as to costs, it may be assumed that this Court would do justice.

In this case the balance of convenience appears to me clearly to be in favour of the trial at law. It is admitted that it will be more speedy; as far as I can judge, it would be less costly; and also that which is very properly adverted to by the learned Vice-Chancellor in his judgment, the present course of procedure at law, as compared with that in equity, gives an advantage which in cases of this kind is of the greatest value, the advantage of having all the evidence orally taken, and all the cross-examination without rehearsal of any kind. My voice, therefore, is in favour of affirming the learned Vice-Chancellor's judgment.

SIR W. M. JAMES, L.J.:—

I entirely concur in the affirmance of the decision of the Vice-Chancellor, and I think it necessary only to add, that I also equally concur in the judgment of the Lord Chancellor just pronounced, and in the judgment which Mr. *Cotton* read to us of the Vice-Chancellor.

SIR G. MELLISH, L.J.:—

I am entirely of the same opinion.

Solicitors for the Plaintiffs: Messrs. *Ranken, Ford, Longbourne, & Longbourne.*

Solicitor for the Defendants: Mr. *J. Elliott Fox.*

LOCKING v. PARKER. (1872) (8 Ch. App. 30; 27 L.T. 635).
Distinguished. YOUNG v. CLAREY .. .. .. [1948] 1 All E.R. 197

L. JJ.
1872
Nov. 19.

LOCKING *v.* PARKER.

[1871 L. 79.]

Mortgage—Express Trust—Conveyance upon Trust to sell in default of Repayment of Advance—Statute of Limitations (3 & 4 *Will.* 4, *c.* 27), *ss.* 25, 28—*Term of Years—Conveyance of Fee—Implied Surrender.*

A security in the form of a trust for sale is a mortgage within the meaning of the 28th section of the *Statute of Limitations.*

Before 1829 *L.* had demised two estates to *P.* for long terms of years by way of mortgage. On the 11th of February, 1829, *P.* made to *L.* a further advance, and *L.*, by a deed to which *P.* was a party, but not a conveying party, conveyed the fee in those estates and another estate to *C.*, upon trust for *P.*, his heirs, executors, administrators, and assigns, nevertheless upon the further trusts thereinafter declared; which were, to permit *L.* to continue in possession and receipt of rents till the 11th of August, and if *L.* should then repay the further advance with interest, and the other mortgages charged on the property and thereinafter specified, to reconvey to *L.*, his heirs or assigns; but in default of payment, then that *C.*, his heirs or assigns, should immediately, or at their or his discretion, enter into possession, and sell the estates, and stand possessed of the proceeds on trust, in the first place, to pay costs, then the sums due to *P.* with interest, and a sum due on mortgage to another person with interest, and to pay the surplus to *L.*, his executors, administrators, or assigns. *L.* at the same time attorned tenant to *P.* Default having been made in payment, *P.* entered into possession in 1832, and thenceforth received the rents and let the property. Sales were subsequently made of parts of the property, the last being in 1848, and *C.* conveyed to the purchasers, *P.* being a party, and it was agreed that all terms should be assigned in trust to attend. In 1871 *L.*'s heir-at-law filed a bill to have the trusts of the deed of 1829 carried into execution:—

Held (reversing the decision of the Master of the Rolls), that the deed of 1829 did not create a trust of the estate for the benefit of the mortgagor which he could enforce, so as to bring the case within the 3 & 4 Will. 4, c. 27, s. 25, but was a mortgage within the meaning of sect. 28 of the same statute:

Held, also, that there was no implied merger of the terms created by *P.*'s earlier securities, and that those securities remained in force notwithstanding the deed of 1829:

Held, further, that although the deed created an express trust in favour of *L.* of the surplus proceeds of sale after paying incumbrances, no relief could be given to the Plaintiff on this ground, as it was not alleged, nor was there anything to lead to the supposition, that there had ever been any such surplus:

Held, therefore (reversing the decision of the Master of the Rolls), that the bill must be dismissed with costs.

THIS was an appeal by the Defendants from a decree of the Master of the Rolls.

William Locking, being entitled under his father's will to the fee simple of certain real estate in the county of *Lincoln*, subject to the payment of an annuity, by indenture dated the 10th of May, 1822, demised the same to *Lysimachus Parker* for a term of 1000 years by way of mortgage, to secure the repayment of the sum of £800 with interest. On the 10th of November, 1824, *William Locking* charged the estate comprised in the indenture of the 10th of May, 1822, with the payment to *Lysimachus Parker* of £100 and interest, and on the 25th of August, 1826, he again charged the same estate with the payment to *Lysimachus Parker* of a further sum of £100, and interest.

By an indenture dated the 25th of April, 1828, *William Locking* again charged the estate comprised in the indenture of the 10th of May, 1822, with the payment to *Lysimachus Parker* of £100 and interest; and he also demised certain other real estate which he had purchased on the 15th of May, 1822, to *Lysimachus Parker* for a term of 2000 years, by way of further security for the repayment of the last-mentioned £100 and interest. By an indenture dated the 10th of December, 1828, *William Locking* charged the estates comprised in the indentures of the 10th of May, 1822, and the 25th of April, 1828, with the payment to *Lysimachus Parker* of the £1100 owing to him on the security of the indentures already stated, and of a further advance of £100, and of interest thereon.

By indentures of lease and release, dated the 10th and 11th of February, 1829, the release being expressed to be made between *William Locking* of the first part, *Lysimachus Parker* of the second part, and *Cornelius Parker* of the third part, which recited only an agreement by *Lysimachus Parker* to advance to *Locking* £560, upon having the same, with interest, secured upon the premises intended to be assured by the present deed, *William Locking*, by the direction of *Lysimachus Parker*, and in consideration of a sum of £560 advanced to him by *Lysimachus Parker*, conveyed the fee simple of the estates comprised in the indentures of the 10th of May, 1822, and the 25th of April, 1828, and of a third estate, which he had purchased in February, 1829, unto and to the use of *Cornelius Parker*, his heirs and assigns, in trust for the said *Lysimachus Parker*, his heirs, executors, administrators, and

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assigns, but nevertheless upon the further trusts, and for the ends, intents, and purposes thereinafter expressed and declared of and concerning the same. And it was declared that *Cornelius Parker* and his heirs should stand possessed thereof upon trust to permit *William Locking* to take the rents and profits thereof until the 11th of August then next ensuing (being the day fixed for the repayment of the advance of £560); and in case *William Locking* should then repay the £560 with interest, and also the other sums thereinafter specified and then legally charged by the said *William Locking* upon the said hereditaments, or on some part thereof, to reconvey the said hereditaments to *William Locking*, his heirs or assigns, at his or their cost; but in case *Locking*, his heirs, executors, or administrators should make default in payment of the said sums, then that *Cornelius Parker*, his heirs or assigns, should immediately thereupon, or at any time thereafter at his or their discretion, enter into possession of the hereditaments, and receive the rents and profits thereof, and at his or their sole authority absolutely sell and dispose of the same hereditaments, or any part thereof, and the fee simple and inheritance thereof, either together or in parcels, and either by public sale or private contract; and for that purpose make all necessary contracts, conveyances, &c. And it was declared that every sale, &c., should be binding on *Locking*, his heirs and assigns, without his or their concurrence, and that the receipts of *Cornelius Parker*, his heirs or assigns, should be good discharges. And it was declared that *Cornelius Parker*, his heirs, executors, administrators, and assigns should stand possessed of the moneys to arise by the sale of all or any part of the said hereditaments, and of the rents until sale, upon trust, in the first place, to reimburse himself or themselves the expenses of such sale, and in the next place to pay to *Lysimachus Parker* the £560 with interest, and the sum of £1200, secured by the five several mortgage deeds therein referred to (being the instruments already stated), with interest thereon, and also to pay to one *Robert Epworth* the sum of £180 due on the security of certain indentures of mortgage of the 17th of March, 1824, and the 27th of April, 1827, and to pay the surplus to *William Locking*, his executors, administrators, or assigns. This deed was executed by *William Locking* and *Lysimachus Parker*, but not by *Cornelius*

Parker. On the same 11th of February, 1829, *William Locking* executed a declaration of attornment to *Lysimachus Parker* of all the property comprised in the deed of even date. Default was made in payment of principal and interest, and *Lysimachus Parker* entered into possession of the property and the receipt of the rents in or previously to March, 1832.

By an indenture dated the 6th of April, 1832, and made between *Cornelius Parker* of the first part, *Lysimachus Parker* of the second part, *William Bassett* of the third part, and *Samuel Frought* of the fourth part, after reciting that *Cornelius Parker*, as trustee for sale of the hereditaments thereinafter mentioned and described, named, and appointed in the indenture of release of the 11th of February, 1829, had agreed with *William Bassett* for the sale to him of the hereditaments thereinafter mentioned and described at the price of £145, in consideration of the said sum, *Cornelius Parker* granted and assured the hereditaments therein described (being part of the hereditaments comprised in the indentures of the 10th and 11th of February, 1829) to *William Bassett* in fee, and *Cornelius Parker* covenanted to produce the title deeds to the property (including those by which the terms of 1000 years and 2000 years were created), and *Lysimachus Parker* covenanted to indemnify *William Bassett* against an annuity charged on the property by the will of the father of *William Locking*, and against any claim to dower by *William Locking's* wife; and it was agreed between al the parties thereto that all persons possessed of any terms of years subsisting in the property in trust to attend the inheritance should stand possessed thereof and assign the same in trust for *William Bassett*, his heirs and assigns, and to protect the property from such dower, and all other charges and incumbrance, if any; and until such assignments, the same terms should attend the inheritance. This conveyance was executed by *Cornelius* and *Lysimachus Parker*.

It appeared that the sale to *Bassett* was made by auction; that *Cornelius Parker*, on the occasion of such sale, addressed a letter to the auctioneer in which he described himself as owner of the estate intended to be sold, and gave notice that he had appointed *Lysimachus Parker* to bid at the sale on his behalf; and in the agree-

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ment signed by vendor and purchaser *Cornelius Parker* was described as the trustee and owner of the estate.

Similar conveyances of other parts of the hereditaments comprised in the indentures of the 10th and 11th of February, 1829, were executed in 1839, 1840, and 1848.

In August, 1846, on the occasion of an inclosure of common lands, a piece of land comprising 21A. 1R. 0P. was allotted to *Cornelius Parker*, as trustee for *Lysimachus Parker*, in respect of the hereditaments comprised in the indentures of the 10th and 11th of February, 1829.

Subsequently to the time when *Lysimachus Parker* entered into receipt of the rents of the property, he from time to time entered into agreements for letting parts of the property to tenants, and on such occasions he appeared to have acted without consulting *Cornelius Parker*. So far as appeared, *Lysimachus Parker*, from the time of entering into receipt of the rents as aforesaid, continued to receive the same down to the time of his death, which took place in August, 1860. By his will he devised the unsold portions of the property comprised in the indentures of the 10th and 11th of February, 1829, to *Cornelius Parker* and the Rev. *J. P. Parkinson* upon trust for sale, and he appointed them executors of his will. These trustees, upon the death of the testator, entered into and had since continued in possession of the property so devised.

William Locking paid no interest on the sum due from him to *Lysimachus Parker* subsequently to 1830. He died in June, 1870, intestate, and the Plaintiff was his heir-at-law and legal personal representative.

In May, 1871, the Plaintiff filed the bill in this suit against *Cornelius Parker* and the Rev. *J. P. Parkinson*, alleging that all moneys due to *Epworth* under the deed of the 11th of February, 1829, had long since been paid and satisfied; and praying that the trusts of the same deed might be carried into execution under the direction of the Court; for an account of what was due to the Defendants for principal, interest, and costs upon the security of the same deed; for accounts of the purchase-moneys arising from the sale of parts of the property, and of the rents and profits of the unsold portion thereof received by the Defendant *Cornelius*

Parker, or by any person by his order or for his use, or which without his negligence might have been so received; for a sale of the unsold portions of the property comprised in the indenture of the 11th of February, 1829, and payment of the proceeds to the persons entitled thereto under that indenture.

The cause came on to be heard before the Master of the Rolls, who made a decree in favour of the Plaintiff (1).

(1) May 27. *W.N.(1872) 117.*
LORD ROMILLY, M.R.:—

The point to be determined in this case relates to the proper construction to be put on the *Statute of Limitations* of the 3 & 4 Will. 4, c. 27; whether the 28th section of the statute bars the right of the Plaintiff, or whether, under the 25th section, *Cornelius Parker* was at his decease a trustee for the Plaintiff. The facts are these:—[His Lordship then stated them, and read the 25th and 28th sections of the Act 3 & 4 Will. 4, c. 27, and continued:—] It is impossible, in my opinion, on referring to the facts I have mentioned, not to come to the conclusion that, under the deed of the 11th of February, 1829, *Cornelius Parker* was a trustee of these estates and hereditaments for the purposes mentioned in the deed, the last of which was a trust for *William Locking*, his executors, administrators, or assigns. It is also impossible to say that *Cornelius Parker* did not accept the trusts; it is true that he did not execute the deed in question, but he took upon himself to act as trustee, and it is expressly stated that he did so in the deed of 1832, which was executed by him, and in that character he conveyed the hereditaments then sold to the purchasers. He described himself as trustee in the agreement executed on the occasion of the sale, and he was, I think, also in possession of the estate itself as trustee, for I am of opinion that on the authority of *Garrard* v. *Tuck* (8 C. B. 231) the possession of *Lysimachus Parker*, in the circumstances here set forth, must be treated as possession under the deed of the 11th of February, 1829, and consequently as the possession of the trustee who might have called on him to deliver up possession, and might himself have been called upon to account for the receipt of the rents and profits. If a suit had been instituted to recover the property within two or three years after the execution of the deed of February, 1829, it is clear that it would not have been a suit to redeem, but a suit to execute the trusts of that indenture. If all the property had been sold and the money paid into Court, it is clear that the trust would have permanently attached to the money until all the trusts were executed, and that the execution of them would have been enforced by this Court. It can make no difference that only a portion was sold and the produce of that portion paid to *Lysimachus Parker*, which went in discharge *pro tanto* of the mortgage money due to him; it was, in fact, a partial execution of the trusts of the indenture. I am unable to fix any time at which the twenty years mentioned in the 28th section of the statute began to run. It would also, I think, be impossible for *Lysimachus Parker* or his representative to set up the terms of 1000 and 2000 years as a bar to the Plaintiff's claim, for the terms were, in fact, superseded by the provisions of the deed of the 11th of February, 1829, which are

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The *Solicitor-General* (Sir *G. Jessel*), and Mr. *Nalder* (Mr. *Southgate*, Q.C., with them), for the Appellants:—

The question is, whether this was a deed creating an express trust within the meaning of sect. 25 of the *Statute of Limitations*, or a mortgage within sect. 28. The statute does not define what a mortgage is, and we say this is a mortgage. To arrive at the same result as the Master of the Rolls it must be held that this instrument created such a trust, that at the end of six months the mortgagor could have compelled a sale whether the mortgagee liked it or not. This was certainly not the intention of the parties,

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inconsistent with the subsistence of these terms (*Nickells* v. *Atherstone*, 10 Q. B. 944), and they were also, as it appears, assigned to the purchasers from *Cornelius Parker* to attend the inheritance. I think all the cases cited for the Defendant, and on which he relies, are distinguishable. The case of *Burroughs* v. *M'Creight* (1 J. & Lat. 290) is a case between tenants in common and co-parceners, and there was clear adverse possession. In this case I think it clear that the land was vested in *Cornelius Parker* as trustee upon express trust, and that at no period did time begin to run to bar the real owners, *William Locking* and his heirs, except as regards such pieces of the land as were conveyed by *Cornelius Parker* to purchasers for value when first adverse possession began.

I am of opinion, therefore, that the Plaintiff is entitled to a decree declaring that the trusts of the indenture of February, 1829, ought to be carried into execution so far as they remain unexecuted, and also that the Defendant *Cornelius Parker* was a trustee for *William Locking*, his heirs and assigns, of the remainder of the estates after paying the sums stated in the deed, and that he must account accordingly, and that the estate of *Lysimachus Parker* must account for what, if anything, on taking such account, shall appear to have been received by him in excess of what he was entitled to under the trusts of the said indenture. I thought at first I ought to make a decree without costs, considering the time which has elapsed; but the general rule is strict that, where a trustee refuses to account, and disputes the right of his *cestui que trust* to an account, he must pay the costs of resisting such an account. And this case is peculiar, for a lapse of upwards of forty years has taken place without *William Locking* and his heirs calling on the trustee to account. But still I think I must follow the rule, as it is the duty of a trustee to account without being called upon to do so; and as *Lysimachus Parker* has got all the benefit of the transaction, I think that his estate ought to bear the costs. I think, therefore, that in taking the account of his estate, though I have no power in this suit to make such a decree, the Defendant ought to be allowed the costs of resisting this suit; but as I have no jurisdiction over the estate in this suit, I shall only make the decree, with costs up to and including the hearing to be paid by *Cornelius Parker*, but the costs of taking the account will fall on the trust estate itself.

but supposing there was such a trust, it only extended to the reversions expectant on the terms of 1000 and 2000 years, so far as regards the properties comprised in them. The trust is for the benefit of the mortgagee; and a discretion as to sale is given, which is to be exercised by him: *Kirkwood* v. *Thompson* (1). The instrument then is really a mortgage with a trust for sale, which, except as regards foreclosure, does not differ from a power of sale, and there is a complete bar under sect. 28. We do not question *Garrard* v. *Tuck* (2). It is true, indeed, that a *cestui que trust* may oust his trustee: *Burroughs* v. *M'Creight* (3); but we admit that here the statute could not run in favour of *Lysimachus Parker* so as to bar *Cornelius Parker*, for the property was enjoyed according to the rights of the parties. We say, however, that the intervention of *Cornelius*, to whom the property was conveyed to prevent a merger of the terms, leaves the case, as regards the *Statute of Limitations*, just as if the estate had been conveyed to *Lysimachus*. The sales could not operate as part payment, or acknowledgment, so as to stop the statute: *Batchelor* v. *Middleton* (4); *Lucas* v. *Dennison* (5). The terms are subsisting, and *Nickells* v. *Atherstone* (6), *Thomas* v. *Cook* (7), *Davison* v. *Gent* (8), *M'Donnell* v. *Pope* (9), do not shew the contrary.

Mr. *Fry*, Q.C., and Mr. *Marcy* (Mr. *Charles Hall* with them), for the Plaintiff:—

We contend that this is a trust deed, and something more than a mortgage. There is first a direction of trust for *Lysimachus*, but followed by "nevertheless," shewing that the trusts were modified.

[The LORD JUSTICE JAMES:—Are you not on the same footing in this respect as if there had been no prior mortgage and the property had been conveyed to *Lysimachus* on the same trusts?]

We submit not; it cannot be concluded that *Cornelius* was introduced only to prevent a merger, for deeds in the present form

(1) 2 H. & M. 392; 2 D. J. & S. 613.
(2) 8 C. B. 231.
(3) 1 J. & Lat. 290.
(4) 6 Hare, 75.
(5) 13 Sim. 584.
(6) 10 Q. B. 944.
(7) 2 B. & A. 119.
(8) 1 H. & N. 744.
(9) 9 Hare, 705.

3 Jur. N.S. 342.

11 W.R. 11 Jur. N.S. 385.

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are sometimes used when there is no prior mortgage. There is a trust in favour of *Epworth*, of which he could claim the benefit, which shews that the deed is not merely a mortgage. The trusts are such as to effect a conversion: *Re Underwood* (1); *Jefferys* v. *Dickson* (2). The case of *Kirkwood* v. *Thompson* (3) merely decided that, for a particular purpose, the person to whom property was conveyed in this way was not a trustee. A trust of a similar description was held to exclude the *Statute of Limitations* in *Cox* v. *Dolman* (4) and *Shaw* v. *Johnson* (5). The terms are merged, the intention evidently being that the money should be raised only by means of the trusts of the deed, which is inconsistent with the continuance of the terms.

SIR W. M. JAMES, L.J.:—

There are only two points to be determined in this case, on both of which it is my misfortune to differ from the Master of the Rolls: one is, whether this is a mortgagor's suit against the mortgagee; the other is as to whether there was any surrender of the old mortgage terms.

It is quite clear that in this deed there is no express surrender of the terms. They are not referred to as intended to be surrendered, and the gentleman who had the terms in him did not concur in conveying, so as to merge them in the inheritance. It has been urged, however, that there is an implied surrender of them by virtue of the provisions of the deed. Now, it is always to be borne in mind that when the Court implies from a deed anything which is not expressed in it, this is done for the purpose of getting rid of some technicality which interferes with what is obviously the plain intent and meaning of the parties to the transaction. Of course if we could see from the deed itself that it was the intention of the parties that the earlier securities should not be kept on foot, we might give effect to that intention. To my mind *Lysimachus Parker* would have been demented if he had surrendered his terms, and so lost the benefit of his old securities, all of which are referred to in this deed, without any expression of an intention to merge

(1) 3 K. & J. 745.
(2) Law Rep. 1 Ch. 183.
(3) 2 H. & M. 392.
(4) 2 D. M. & G. 592.
(5) 1 Dr. & Sm. 412.

them. I am of opinion, therefore, that there was no surrender or merger of the existing terms, and that there was nothing in the deed which deprived the mortgagee under the earlier deeds of his rights under them. If he had a right to foreclose before, he had a right to foreclose afterwards. If he had a right to assign before, he had a right to assign afterwards. It is possible that the deed of February, 1829, may have operated as a bargain that the old securities should not be enforced during the period of six months, but the Court would have no difficulty whatever in giving effect to such a bargain without in any way further interfering with those securities. Subject to that, it appears to me that the rights of the mortgagee under the old deeds remained unaffected.

Then the next point which has been argued before us is, whether the deed of February, 1829, standing by itself, is anything more than a mortgage deed with a power or trust for sale. I am of opinion that it is nothing more than a common mortgage security taken by way of a trust for sale, and taken, for very obvious reasons, in the name of a third person. Now, if it be a mere mortgage security, it appears to me to fall entirely within the language of the late Lord Chancellor, when Vice-Chancellor *Wood*, in *Kirkwood* v. *Thompson* (1): "I see no difference between the case of an ordinary mortgage and that of a trust for sale. It is not such a trust as would enable the mortgagor to file a bill to have the property sold, because the discretion as to selling or not is in the mortgagee alone. On the other hand, the mortgagee cannot file a bill to foreclose, but is limited to his remedy by sale. But these distinctions make no substantial difference in his position, which is that of mortgagee." If I may be permitted to say so, I entirely concur not only in those words but in the spirit of those words, that it is not for a Court of Equity to be making distinctions between forms instead of attending to the real substance and essence of the transaction. Whatever form the matter took, I am of opinion that this was solely a mortgage transaction between the mortgagor and *Lysimachus Parker*.

It is said, however, that the introduction of a third person, *Cornelius Parker*, as trustee, takes the instrument out of the cate-

(1) 2 H. & M. 392.

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gory of a mere conveyance to a mortgagee on trust for sale. In many cases of mortgage by way of conveyance on trust for sale the conveyance is, for some reason or other, made to a trustee. In the present case I am of opinion that by the very words of the deed itself the contention that the intervention of a trustee makes any difference is excluded, for the conveyance is made to *Cornelius Parker* in trust for *Lysimachus Parker*, his heirs, executors, administrators, and assigns, which clearly shews the meaning of the parties to be, that all things done by *Cornelius Parker* under the subsequent trusts are to be done by him as the nominee and trustee and under the direction of *Lysimachus Parker*, the object of introducing *Cornelius Parker* being to keep the terms vested in *Lysimachus* from being merged in the freehold. I am of opinion that the mortgagor could not have called upon *Cornelius* to enter. I am of opinion that he could not have called upon *Cornelius* to sell, and that the right of *Locking* from the beginning and throughout was simply the right of a mortgagor to redeem. That being so, his right was barred by the *Statute of Limitations*, possession having been taken by *Lysimachus Parker* more than twenty years before the filing of the bill, and there having been no subsequent acknowledgment within the meaning of the statute.

It is said, however, that there is an express trust in the deed with reference to the sale moneys. The Solicitor-General, in his argument, admitted that there might be an express trust with reference to the sale moneys exactly in the same way as where a mortgagee sells under the powers of a common mortgage. In that case when the estate has been sold there is an express trust of the surplus money for the mortgagor. If, then, there had been any allegation in this bill, or any evidence, that there were any surplus moneys, the bill might have been sustained for those surplus moneys. But that is not the frame and intention of the bill. The bill prays the execution of the trusts of the indenture, and is in substance a bill for the redemption of the estate, which, under the circumstances, cannot, according to the view we have taken, be sustained; and I am of opinion that we cannot go out of our way to give any relief in respect of this trifling matter, a case for which is not made in the bill, and an inquiry into which

would simply involve both the parties in a very idle and useless expense.

I am of opinion, therefore, that the bill entirely fails, and must be dismissed with costs.

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SIR G. MELLISH, L.J.:—

I am of the same opinion.

Solicitors: Messrs. *Dickson & Lucas;* Messrs. *Collyer-Bristow, Withers, & Russell.*

In re EUROPEAN BANK.

AGRA BANK CLAIM.

L. JJ. 1872 *Nov.* 8.

Bankers' Account—Separate Accounts—Deposit of Securities—Lien for General Balance.

The *O. Bank* kept three accounts at the *A. Bank*, namely, a loan account, a discount account, and a general account. They from time to time received advances from the *A. Bank*, which were entered in the loan account, and to meet which they deposited securities with the *A. Bank*. In the course of the transactions the *O. Bank* deposited three bills of exchange with the *A. Bank*, accompanied by a letter stating that they proposed to draw upon them for £10,500, but that as their credit would not afford a margin to that extent, they sent these bills as a collateral security. The *O. Bank* became insolvent and was wound up:—

Held (affirming the decision of *Malins*, V.C.), that there was nothing in the course of dealing or in the terms of the letter to exclude the general rule that a banker has a lien on the securities deposited by a customer for the customer's general balance, and that the balance of the loan account being satisfied, the *A. Bank* might retain the bills for the balance of the general account.

THIS was an appeal from an order of Vice-Chancellor *Malins* made in the winding-up of the *European Bank, Limited.*

In the year 1866 the *Oriental Commercial Bank* had three accounts with *Agra and Masterman's Bank*, namely, a loan account, a discount account, and a general account. The *Oriental Commercial Bank* were in the habit of applying to *Agra and Masterman's Bank* for accommodation loans to a considerable amount,

L. JJ. 1872 — *In re* European Bank. — Agra Bank Claim.

which were entered in the loan account, and they from time to time deposited securities to meet these loans. On the 4th of May, 1866, the general manager of the *Oriental Commercial Bank* sent to the general manager of *Agra and Masterman's Bank* a letter in the following terms:—

"4 May, 1866.

"Dear Sir,—I am advised by our correspondents, Messrs. *Felli A. Carava*, of *Patras*, that they have valued upon your bank for our account, pursuant to an antecedent order of ours, for £10,500, by the drafts specified at foot; but since by this time our credit with you will no longer afford a margin to that extent, I hasten to hand to you, to hold by way of collateral security, the following bills, &c.:—

"£1250 on *European Bank*, due 5 August;
"£1500 „ „
"£1750 „ „ ."

[Then followed some bills, with other acceptors; and the letter continued:—]

"I request, therefore, that you will be pleased to honour the drafts of Messrs. *Paiba* as usual; I of course engaging to provide you with funds to meet such drafts before maturity.

"Yours faithfully,
"*Demetrio Pappa*,
"General Manager."

The *Agra and Masterman's Bank* accordingly accepted the drafts of the correspondents of the *Oriental Commercial Bank* to the amount of £10,500, and paid the acceptances when due, and carried the amount to the loan account.

The *Oriental Commercial*, the *European*, and the *Agra and Masterman's Banks* were all now being wound up voluntarily under the supervision of the Court.

After the commencement of the winding-up the assets of *Agra and Masterman's Bank* were transferred to the *Agra Bank*, the present claimants.

The *Oriental Commercial Bank* was largely indebted to *Agra and Masterman's Bank* on all their three accounts, and the *Agra Bank* had received dividends on the joint balance. By means of these

dividends and the securities which they held, all the balance due on the loan account was covered, but a balance still remained due on the general account.

They now claimed a lien on the bills for £4500, so far as they were not required to cover the balance of the loan account, for the deficiency on the general account, and took out a summons in the winding-up of the *European Bank* to enforce their claim.

It appeared from the books of the *Agra and Masterman's Bank* that the securities deposited from time to time by the *Oriental Commercial Bank* were applied to cover the balance due on the loan account, without regard to the particular transaction in respect of which they were deposited, but there was no evidence that they were ever treated as applicable to the balance due on the other two accounts.

It also appeared that the bills had been accepted by the *European Bank* for the accommodation of the *Oriental Commercial Bank*.

The Vice-Chancellor held that the *Agra Bank* were entitled to retain the bills to answer the general balance, and allowed the claim; and from this decision the liquidator of the *European Bank* appealed.

Mr. *Glasse*, Q.C., and Mr. *Graham Hastings*, for the Appellant, contended that the letter of the 4th of May, 1866, and the mode in which the accounts were kept, took the case out of the rule that a banker has a lien, for his general balance, on the securities deposited with him. In this case the bills were deposited for a specific purpose. They were accommodation bills, and the *Agra Bank* could only prove for them to the extent to which they gave value for them; and could not hold them for any other purpose.

Mr. *Higgins*, Q.C., and Mr. *Jackson*, for the liquidator of the *Agra Bank*, were not called on.

SIR W. M. JAMES, L.J.:—

I am of opinion that the order of the Vice-Chancellor is correct. If the matter depended simply upon the letter of the 4th of May, 1866, possibly there might have been some ambiguity which would

L. JJ. 1872 *In re* EUROPEAN BANK. — AGRA BANK CLAIM.

have entitled the *European Bank* to say to the *Agra Bank*, "These are accommodation bills. You never gave any value for them, except by means of that particular transaction, and that value has been repaid." But when we look at the books, it is clear that there was no particular reason for treating these three accounts as distinct matters. It was only for convenience that the loan account was kept separately. It was admitted by the Appellant that the bills in question might have been applied to discharge the balance of the loan account, without regard to the particular transaction in respect of which they were deposited. In truth, as between banker and customer, whatever number of accounts are kept in the books, the whole is really but one account, and it is not open to the customer, in the absence of some special contract, to say that the securities which he deposits are only applicable to one account.

I am of opinion that the *Agra Bank* have a right to hold these bills as security for the general account. The appeal must be dismissed with costs.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

Solicitors: Messrs. *Argles & Rawlins;* Messrs. *Ashurst, Morris, & Co.*

In re CRENVER AND WHEAL ABRAHAM UNITED MINING COMPANY.

Ex parte WILSON.

L. JJ.
1872
Nov. 12.

Companies Act, 1862, *s.* 165—*Loss by Misconduct of Director—Winding-up—Allotment to Infant.*

A director of a company induced three of his children, who were minors, to apply for shares. Shares were allotted to each, and he gave them money to pay the sums payable on allotment. All the shares in the company were allotted. The company never paid any dividend, and an order for winding it up was made before any of the children had attained twenty-one. The infants were placed on the list of contributories, and an order was made against each for payment of an arrear of calls, but, their infancy having been discovered, no attempt was made to enforce it:—

Held (affirming the order of the Vice-Warden of the Stannaries), that the father was liable to pay the amount of these calls, as a loss occasioned to the company by his breach of duty as director in having shares allotted to infants.

THIS was an appeal from a decision of the Vice-Warden of the Stannaries.

The *Crenver and Wheal Abraham United Mining Company* was registered in 1863, under the *Companies Act*, 1862, with limited liability. The capital consisted of 30,000 £5 shares. In November, 1863, the Appellant, *David Wilson*, who was the registered holder of several hundred shares, was one of the directors. Believing that the concern would be prosperous, he advised his four children to apply for shares. They accordingly applied, and on the 5th of December shares were allotted to each. One child was of full age, the other three were minors. Twenty shares were allotted to each of the minors. The Appellant paid by way of advancement to his children the sums which were payable on allotment. In 1865 the Appellant purchased 500 more shares for himself, and they were registered in his name. He retained all his shares till the winding-up.

The company never paid any dividend, and in November, 1866, an order was made for winding up. In April, 1867, the three minors were placed on the list of contributories, and in May a peremptory order was made upon each for payment of £40 for an

L. JJ. 1872

In re CRENVER AND WHEAL ABRAHAM UNITED MINING COMPANY. *Ex parte* WILSON.

arrear of calls. It having, however, been discovered that they were still under age at the time of the winding-up order, no attempt was made to enforce these orders; but in 1870 an application was made to place the name of the Appellant on the list of contributories. This was abandoned, and ultimately a motion was made, under the *Companies Act*, 1862, s. 165, on behalf of the Registrar as liquidator, that *Wilson* should be ordered to contribute to the assets of the company such sum of money as the Court should think just, by way of compensation for the loss sustained by the company by reason of the three children not being liable to pay the calls.

The Vice-Warden made an order that *Wilson* should pay to the Registrar £120, being the amount of unpaid calls on the shares allotted to the three infant children, and should pay the costs. *Wilson* appealed from this order.

It was admitted that *Wilson* had paid all calls which had been made on the shares standing in his own name, and that he had not used the names of his children as nominees for him, in order to avoid liability, but intended them to have, for their own benefit, the shares allotted to them. The appeal was opened under the impression that a large proportion of the shares in the company had never been allotted, but on examination of the share register, which was produced in Court, it turned out to be the fact that all of them had been allotted.

Mr. *Miller*, Q.C., and Mr. *Everitt*, for the Appellant:—

We submit that sect. 165 of the *Companies Act* does not apply to a case like this, but only to misapplication of funds, or some other act of such a nature that a trustee must account to a *cestui que trust* in respect of it. There is no sufficient proof of loss. It ought to be shewn that solvent persons applied for shares after all the shares had been allotted.

[They referred to *Ebbetts' Case* (1) and *King's Case* (2).]

Mr. *Fry*, Q.C., and Mr. *Joseph Dixon*, for the liquidator, were not called upon.

(1) Law Rep. 5 Ch. 302. (2) Law Rep. 6 Ch. 196.

SIR W. M. JAMES, L.J.:—

The 165th section of the *Companies Act*, 1862, which seems to me a very beneficial provision, enacts that, where it appears in the course of the winding-up of a company that any officer of such company has been guilty of any misfeasance, or breach of trust in relation to the company, the Court may examine into his conduct, and compel him to contribute such sums of money, by way of compensation, in respect of such misfeasance or breach of trust, as the Court thinks just. Here the Appellant was a director of the company, and as such director he allowed shares to be allotted to his three infant children, who remained on the register up to the time of the winding-up. Owing to their infancy no contributions could be obtained in respect of their shares under the winding-up. The Vice-Warden of the Stannaries held, that it was just to make the Appellant pay what the children, had they been adult shareholders, would have been compelled to pay, and I am of opinion that he came to a perfectly right conclusion. It certainly was a breach of the Appellant's duty as director, to take a part in having shares allotted to infants. It was argued that there was not sufficient proof of the company having sustained a loss by this breach of duty; but it appears that all the shares were taken, so the fair inference is, that if these shares had not been allotted to the infants, they would have been taken by somebody else, and we cannot speculate upon the possibility that the takers would have turned out insolvent. The appeal must be dismissed with costs.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

Solicitors: Messrs. *Courtenay & Croome*; Messrs. *Gregory, Rowcliffes, & Rawle*, agents for Messrs. *Hodge, Hockin, & Marrack, Truro*.

L. JJ.
1872
Nov. 7.

Ex parte HARRIS. *In re* PULLING.

Bankruptcy—Bill of Sale—Registration—17 & 18 *Vict. c.* 36—*Order and Disposition.*

9 QB 22
5 Ch D. 742
Ch D. 44.

On the 23rd of September *H.* discounted for *P.* two bills of exchange payable on the 12th of October, and *P.* gave *H.* a bill of sale as security, requesting him not to register it unless the bills were dishonoured at maturity. *H.* accordingly did not register it. On the 12th of October the bills were dishonoured, on which *H.* took them up, and *P.* gave him two fresh bills for the same amount, and a new bill of sale of the same chattels. On the 30th of October the new bills were dishonoured, and *H.* gave directions to take possession of the chattels. Early on the 31st a broker went to take possession, but could not on that day get into the house where they were. On the same day the bill of sale was registered, and *P.* committed an act of bankruptcy by filing a petition for liquidation, on which he was subsequently adjudged bankrupt. On the 1st of November *H.* obtained possession of the goods:—

Held (reversing the decision of the Registrar), that the goods belonged to *H.* and not to the trustee in bankruptcy, for that they were not in the order and disposition of the bankrupt with the consent of the true owner at the time of the act of bankruptcy; that the *Bills of Sale Act* did not apply; and that the transaction was not invalid as being a scheme to evade the provisions of that Act.

THIS was an appeal by *Harris*, the holder of a bill of sale, from an order of Mr. Registrar *Spring Rice* sitting as Chief Judge.

On the 23rd of September, 1871, *Harris* discounted for *Pulling* two bills of exchange for £300 and £100, payable on the 12th of October, 1871, and *Pulling* gave him a bill of sale of that date on the furniture in *Pulling's* house. *Pulling* at the same time requested *Harris* not to register the bill of sale until after the bills became due and were dishonoured. On the 12th of October, *Pulling* being unable to meet the bills, *Harris* was obliged to take them up, and as *Pulling* could not repay him, he requested *Harris* to renew the bills, which *Harris* agreed to do. *Pulling* accordingly, on the 12th of October, accepted and gave to *Harris* two fresh bills of exchange for £300 and £100, payable on the 30th of October, and gave him a bill of sale dated the 12th of October on the above-mentioned furniture.

On the 30th of October, when the bills became due, they were

dishonoured; and on the same day *Harris* instructed a broker to go and take possession of the furniture. The broker went to the house at eight o'clock in the morning of the 31st, but could not obtain admission, and in the course of the day *Pulling* filed a petition for liquidation. The broker went again to *Pulling's* house at least twenty times in the course of that day, but could not get in, and at night left men to watch the house. They watched it all night, and on the morning of the following day, the 1st of November, a window being found unfastened, an entrance was effected, and the goods were removed. On the 1st of November one *Stewart* was appointed receiver and manager. Resolutions for liquidation were not passed, and on the 24th of November a petition for adjudication was filed, under which *Pulling* was adjudicated bankrupt, and *Stewart* was appointed trustee. The bill of sale of the 12th of October was registered under the *Bills of Sale Act* on the 31st of October.

The goods were, by consent, sold under an order of the Court, without prejudice to the question who was entitled to the proceeds, and the trustee then applied to the Court of Bankruptcy for an order declaring that the bill of sale was fraudulent and void as against the trustee, or that the goods were in the order and disposition of the bankrupt with the consent of the true owner. The Registrar held that the trustee was entitled to the proceeds on the ground that the goods were within the order and disposition of the bankrupt, and made an order accordingly.

Mr. *De Gex*, Q.C., and Mr. *Gibbons*, for the Appellant, referred to *Smith* v. *Topping* (1); *Burn* v. *Carvalho* (2); *Hollingsworth* v. *White* (3); *Ex parte Cohen* (4).

Mr. *Kay*, Q.C., and Mr. *Finlay Knight*, for the trustee:—

The transaction is void, as a scheme to evade the *Bills of Sale Act* (17 & 18 Vict. c. 36): *Ex parte Cohen*; *Ex parte Fisher* (5); *Bankruptcy Act*, 1869, s. 95; *Stansfeld* v. *Cubitt* (6).

(1) 5 B. & Ad. 674.
(2) 4 My. & Cr. 690.
(3) 10 W. R. 619.
(4) Law Rep. 7 Ch. 20.
(5) Ibid. 636.
(6) 2 De G. & J. 222.

L. JJ. 1872

Ex parte HARRIS. *In re* PULLING.

SIR W. M. JAMES, L.J.:—

This is an appeal from a decision of the Registrar on a question of order and disposition. Every other point raised in the case was decided by him in favour of the Appellant; but he was of opinion that the goods were in the order and disposition of the bankrupt at the time of his committing an act of bankruptcy. I am unable to concur in that view of the facts. The Appellant, before the act of bankruptcy was committed, did all he could to obtain actual possession of the goods, and was only prevented from so doing by being excluded from the house where they were.

But it is said that the assignment to the Appellant was void. It is urged, first, that though the first bill of sale was ineffectual as against the trustee, because it was not registered, it had passed the property, so that the second bill of sale was inoperative, because the debtor had no property upon which it could operate. I think that if authority were wanted, the case of *Hollingsworth* v. *White* (1) completely disposes of this argument. In the next place, it was argued that this was a device to evade the *Bills of Sale Act*. At present I see no evidence of any device of the kind. The bankrupt applied to *Harris* for money. *Harris* said, "Give me a bill of sale as security." The borrower replies, "I will give a bill of sale; but as the Act allows you twenty-one days for registering it, do not register it until it is necessary." Then as to the second bill of sale, it appears to me to have been given under a new arrangement. The bills were dishonoured. The Appellant had to advance money to take them up; new bills were then given him, and a new bill of sale. The case is not hit by the *Bills of Sale Act*, and certainly there is nothing to impeach the transaction as otherwise fraudulent.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

Solicitors: Messrs. *Roscoe, Hincks, & Sheppard;* Mr. *L. Barnett.*

(1) 10 W. R. 619.

Ex parte DORMAN. *In re* LAKE.

L. JJ.
1872
Nov. 14, 21.

Bankruptcy—Order and Disposition—Joint Ownership—Bankruptcy of one Partner—Infant Partner—Protected Dealings with Bankrupt—32 & 33 *Vict. c.* 71, *ss.* 15, 94.

In order to bring goods, in the order and disposition of a bankrupt, within the provisions of the *Bankruptcy Act*, 1869, s. 15, clause 5, they must be in the sole possession and sole reputed ownership of the bankrupt.

Therefore, where two partners, one of whom was an infant, committed an act of bankruptcy, and the adult partner was adjudicated bankrupt:—

Held, that the machinery and trade fixtures in the house where the business was carried on, which belonged to the landlord, and were with his consent in the possession of the firm, did not pass to the trustee in the bankruptcy.

A trader's goods were seized by the sheriff under a judgment obtained after the debtor had committed an act of bankruptcy. The landlord of the house where the trade was carried on gave notice to the sheriff that the goods were his property. Afterwards the trader was adjudicated bankrupt upon the act of bankruptcy:—

Held, that the notice to the sheriff was not a dealing with the bankrupt under the 94th section of the *Bankruptcy Act*, 1869.

THIS was an appeal from a decision of Mr. Registrar *Pepys*, sitting as Chief Judge.

The bankrupt, *Henry Lake*, carried on business as a printer in co-partnership with *Edmund P. Clench*, who, at the time of the bankruptcy of *Lake*, was an infant under the age of twenty-one years. On the 8th of March, 1871, the Appellants, *C. Dorman* and *H. C. Nisbet*, by an indenture of lease, demised to *Lake* and *Clench* certain premises at Nos. 10 and 11, *Crane Court*, *Fleet Street*, together with certain machinery, plant, type, and other effects, for the term of six years. The counterpart of the lease was executed by both *Lake* and *Clench*, and contained the usual covenants and a power of re-entry on non-payment of the rent for twenty-eight days. The two partners took possession of the premises, and the business was carried on there under the management of *Lake*.

On the 29th of September, 1871, both *Lake* and *Clench* committed an act of bankruptcy, by the non-payment of a debt within seven days after the service of a debtor summons. At this time there were two quarters' rent due to the Appellants, *Dorman* and

L. JJ. 1872 *Ex parte* DORMAN. *In re* LAKE.

Nisbet. An action was subsequently brought for the same debt and a judgment obtained by the creditor, and on the 12th of November, 1871, the goods in question were seized by the sheriff under a writ of *fi. fa.* On the 13th of November the Appellants, who had no knowledge of the act of bankruptcy, gave notice to the sheriff that the goods were their property. The sheriff took out an interpleader summons, and on the 15th of November a Judge's order was made directing an issue to try the question whether the goods were the property of the Appellants. The issue resulted in a judgment in favour of the Appellants. On the 23rd of November *Lake* was adjudicated a bankrupt upon the act of bankruptcy committed on the 29th of September, but no petition in bankruptcy was presented against *Clench* on account of his infancy.

The trustee under the bankruptcy claimed the machinery, plant, and type comprised in the lease as having been at the commencement of the bankruptcy in the possession, order, or disposition of the bankrupt, with the consent of the true owners, *Dorman* and *Nisbet*. The Registrar took this view, and declared the trustee entitled to the property. From this order *Dorman* and *Nisbet* appealed.

Mr. *Roxburgh*, Q.C., and Mr. *Finlay Knight*, for the Appellants:—

We contend, in the first place, that the goods in question were not in the possession, order, or disposition of the bankrupt within the meaning of the 15th section of the *Bankruptcy Act*, 1869 (32 & 33 Vict. c. 71). The words of that section are, "all goods and chattels being at the commencement of the bankruptcy in the possession, order, or disposition of the bankrupt, being a trader, by the consent and permission of the true owner, of which goods and chattels the bankrupt is reputed owner, or of which he has taken upon himself the sale or disposition as owner." This is the bankruptcy of *Lake* alone, *Clench* not being capable of being made a bankrupt, but the goods were in the possession, order, or disposition of both partners. The statute was never intended to affect goods in the joint possession of the bankrupt and a solvent person.

Secondly: The Appellants had no knowledge of the act of bankruptcy at the time when they gave notice to the sheriff of their

claim, and this notice had the effect of taking them out of the possession of the bankrupt, and was "a dealing with the bankrupt before the date of the order of adjudication," and consequently protected by the 94th section of the *Bankruptcy Act*, 1869: *Smith* v. *Topping* (1); *Ex parte Baldwin* (2); *Graham* v. *Furber* (3); *In re Styan* (4); *Young* v. *Hope* (5).

Mr. *De Gex*, Q.C., and Mr. *Warmington*, for the trustee:—

As to the first point, the goods were in the order and disposition of each of the partners. The Act does not require the possession to be sole possession. The adult partner managed the business, and had power to dispose of all the assets of the firm. "Disposition" in the statute means apparent disposition: *Horn* v. *Baker* (6). If the Appellants' contention is correct, the section would be rendered almost nugatory, for if two partners committed acts of bankruptcy on different days the section would not affect the partnership goods at all, because in neither case would they be in the sole possession of the partner committing the act of bankruptcy. The present case is completely within the mischief intended to be met by the statute.

[On the second point they were stopped by the Court.]

Mr. *Roxburgh*, in reply, referred to *Reynolds* v. *Bowley* (7).

Nov. 21. SIR G. MELLISH, L.J., delivered the judgment of the Court. After stating the facts of the case, His Lordship continued:—

Two objections were taken before us against the order of the Registrar—first, that the goods were not at the time of the bankruptcy in the sole possession of *Lake* as reputed owner, but in the joint possession of *Lake* and *Clench* as reputed owners, and that the clause relating to goods in the order and disposition of a bankrupt did not apply to such a case; and secondly, that the Appellants were

(1) 5 B. & Ad. 674.
(2) 27 L. J. (Bkcy.) 17.
(3) 23 L. J. (C. P.) 10.
(4) 2 M. D. & D. 219.
(5) 2 Ex. 105.
(6) 9 East, 215; 2 Sm. L. C., 4th Ed. 161.
(7) Law Rep. 2 Q. B. 474.

(2 DeG. J. 230: 4 Jur. N.S. 522.

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protected by the 3rd clause of the 94th section of the *Bankruptcy Act*, 1869, because the goods, before the adjudication, had been taken out of the possession of the bankrupt by a *bonâ fide* dealing with the bankrupt. On the second point we stopped the counsel for the Respondents, being clearly of opinion that the notice served by the Appellants on the sheriff claiming the property in the goods was not a dealing with the bankrupt. On the first point we took time to consider. The first question to be considered is, Is the clause in the *Bankruptcy Act*, 1869, relating to goods in the possession, order, or disposition of a bankrupt (the 5th clause of the 15th section) confined to goods in the sole possession of a bankrupt, and of which he is the sole reputed owner, or does it extend to cases in which the bankrupt and other persons who are not made bankrupt are jointly in possession of goods, and of which he and such other persons are jointly reputed owners? We are of opinion that the clause, according to its true construction, is confined to cases where the bankrupt is in the sole possession of goods as the sole reputed owner. It is obvious that if the clause was held to apply to every case where goods, with the permission of the true owner, are left in the possession of a bankrupt jointly with others as reputed owners, great injustice would be done in every case in which goods are left in the possession of a firm one of whose members becomes bankrupt. It surely never could have been intended that if goods are left by the true owner in the possession of the firm of *A. & B.*, of whom *A.* becomes bankrupt, but *B.* remains solvent, that the goods should become the property of *A.*, divisible among his creditors. Cases have happened in which one member of a most wealthy and solvent firm has, from his private extravagance, become bankrupt, and surely it would be absurd that all persons who had trusted the firm with the possession of their goods should be deprived of their property. Then, does it make any difference that in this particular case the person who was in possession of the goods with the bankrupt as reputed owners was an infant? We think it makes no difference. The fact of *Clench* being an infant did not prevent him from being in possession of the goods jointly with *Lake*, nor from being one of the reputed owners of the goods. The lease to him was not void, but only voidable, and *Lake*, having knowingly entered into a contract of partnership

with an infant, could not deprive him of his rights as a partner. It was argued, indeed, that the case came within the mischief against which the order and disposition clause was intended to provide, and we think it must be admitted that it does, but still a consistent construction must be put on the clause, and we think it must be construed either as confined to cases in which the bankrupt is solely in possession, or as extending to all cases in which the bankrupt is in possession jointly with others. There are no words in the clause which enable us to distinguish between cases which we might think within the mischief intended to be prevented and cases to which the clause was plainly not intended to apply. We cannot, for instance, make a distinction between cases in which the partner of the bankrupt is solvent and cases where he is insolvent, though for some cause he is not made bankrupt, or between cases in which the partner of the bankrupt is an infant and cases in which he is of full age. On the whole, we are of opinion that the order of the Registrar must be reversed, and the summons of the trustee dismissed with costs. The trustee may have his costs both here and in the Court below, out of the estate.

Solicitors: Messrs. *Nisbet, Rooke, & Daw;* Mr. *A. G. Ditton.*

L. C.
1872
Nov. 5

KIMBER *v.* BARBER.

[1870 K. 37.]

Agent—Purchase—Re-sale—Decree for Repayment.

QB 485
L.D. 380
3 B.D. 680

A. being aware that *B.* wished to obtain shares in a certain company, represented to *B.* that he, *A.*, could procure a certain number of shares at £3 a share. *B.* agreed to purchase at that price, and the shares were thereupon transferred, in part to him and in part to his nominees, and he paid to *A.* £3 a share. He afterwards discovered that *A.* was in fact the owner of the shares, having just bought them for £2 a share:—

Held, that, on the facts, *A.* was an agent for *B.*: and *A.* ordered to pay back to *B.* the difference between the prices of the shares.

Decree of the Master of the Rolls reversed.

In the year 1850 a company, called the *Colonization Assurance Corporation*, was formed, but it appeared to have fallen into abeyance. Early in January, 1870, *Kimber*, *Barber*, and others, desired to reorganise the company, and to appoint new directors. Before new directors were appointed it was necessary to acquire a large number of shares, in order to qualify the new directors. The Defendant *Barber* knew that *Kimber* was anxious to acquire shares for this purpose, and on the 19th of January, 1870, called upon him, and told him that he, *Barber*, knew of 264 shares for sale at £3. *Barber* was thereupon authorized by *Kimber* to buy the shares at £3. The shares were accordingly bought; sixty-four of them were transferred to *Kimber*, and 200 to his nominees, one *T. G. Taylor*, a broker, being the transferor, and *Kimber* paying *Barber* £795 for the shares and the transfer duty.

Kimber, as he alleged, subsequently learnt that the shares had been in fact bought by *Barber* from one *T. Jones* at £2 a share, with a view to the sale to *Kimber*, and had been transferred by *Jones* to *Taylor* under the direction of *Barber*. *Kimber* thereupon filed the bill in this suit against *Barber* and a Mrs. *Rutt*, for whom *Barber* alleged he had bought the shares, charging that the 264 shares were purchased from *Jones* by *Barber*, as agent for the Plaintiff, and praying for a declaration that the Plaintiff was entitled to the benefit of the purchase of the 264 shares from *Jones*, and that the Defendants, or one of them, might be decreed to pay to the Plaintiff the sum of £264, being the difference between the prices

paid; or otherwise, that the sale of the shares might be set aside, and that the Defendant *Rutt* might be decreed to repay to the Plaintiff the sum of £795 paid by the Plaintiff, he offering to re-transfer the shares to the Defendant *Rutt*.

It appeared, on the evidence, that *Barber* wrote on the 13th of January to *Jones*, asking, as for a friend, whether he would sell his shares, and on the 17th of January *Barber* concluded an agreement with *Jones* and forwarded him a blank transfer. After the interview of the 19th of January, *Barber* instructed *Taylor* to prepare bought and sold notes to the effect that the shares had been bought through *Taylor* as the broker, and the shares were afterwards tansferred by *Jones* to *Taylor*. As *Barber* had not sufficient money to pay for all the shares, some of them were lent to him by *Taylor*, for the purpose of being transferred to *Kimber*. There was much other evidence in the case, which, for the purpose of this report, is immaterial.

Kimber had transferred ten of the sixty-four shares to other persons, so that at the time when the bill was filed he held only fifty-four shares.

The Master of the Rolls dismissed the bill without costs, holding, that no relief could be given to the Plaintiff, as he had transferred 210 out of the 264 shares, and had thus rendered it impossible to set aside the transaction (1).

(1) 1872. April 18. WN(1872)84

LORD ROMILLY, M.R., after stating the facts of the case, and reading the prayer of the bill, continued:—

I think that the first part of the relief prayed is not within my power to give. It would, in fact, be making a new contract for the parties, which I have no right to do. They were the Defendant's shares which he sold for £3, and I have no right to compel him to sell them for £2, or for any other price than the price he stated. But at the same time it is quite clear that he ought not to be allowed to gain any advantage by the concealment from the Plaintiff of the real facts of the case, and of his interest in the shares. The proper relief, therefore, would be that which is prayed for in the second branch of the prayer; and if the matter stood between the parties exactly as at first, I should have had no hesitation in granting it. I am of opinion that the conduct of the Defendant in concealing the real facts, and in endeavouring to complicate the matter by the introduction of Mrs. *Rutt* and of the stock-broker, Mr. *Taylor*, are such as to entitle the Plaintiff to ask that the whole transaction should be set aside, and the shares restored to the Defendant *Barber*, and the money repaid by him to the Plaintiff, if that be possible. But now arises this difficulty: the Plaintiff is not in a situation to restore the shares, for he has parted with a great portion of them, and has retained only fifty-four of them for him-

L. C. 1872 KIMBER v. BARBER.

The Plaintiff appealed.

Mr. *Fry*, Q.C., and Mr. *Woodroffe*, for the Plaintiff.

Mr. *Shebbeare* (Sir *R. Baggallay*, Q.C., with him), for the Defendants, contended, on the facts, that the Defendant *Barber* was not an agent for the Plaintiff; and that if he was agent, he was so gratuitously, and not bound to the Plaintiff. The Plaintiff knew all about the company and the price of the shares, and could not complain of having been deceived in the price.

LORD SELBORNE, L.C.:—

I am sorry to say that I cannot quite agree with the Master of the Rolls in this case, although it appears to me that in substance His Lordship took exactly the same view of the facts, or, at all events, very nearly the same view of the facts, as I do.

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self, the rest having been transferred to persons, no one of whom is a party to this suit. The consequence is that the Plaintiff has precluded himself from obtaining the relief prayed for in the second branch of the prayer of the bill.

The view that I take of this case is fully represented in the case of *Great Luxembourg Railway Company* v. *Magnay* (25 Beav. 586), which came before me in 1858. In that case the Defendant, Sir *William Magnay*, having been supplied by the *Luxembourg Railway Company* with a large sum of money to buy a concession made by the Belgian Government, it turned out that he was himself the owner of that concession, and that he sold it to the company for his own benefit as the vendor. I held that the transaction could not stand, and that the only proper relief would be to annul the whole transaction, and to order the concession to be returned and the purchase money to be repaid. But pending the suit, the *Luxembourg Railway Company* had themselves sold this concession to another person, and had thereby adopted the transaction, assuming and acting on its validity; and consequently I held that, having done so, they were no longer in a position to restore the Defendant to the position in which he was before the suit was instituted; and thereupon I dismissed the bill in that case, but without costs. I take the same view of this case, and adopt the observations I made in that case.

I am of opinion that the only proper relief is to restore the shares and repay the money; but the Plaintiff has rendered this impossible. I have no control over the holders of the other shares, and do not even know, if they were parties, whether they would, without exception, consent to restore the shares transferred to them. Most certainly I could not compel them so to do, and no decree of mine could touch the holders of these 210 shares, between whom and the Defendant there is not any privity.

The Plaintiff has therefore precluded himself from obtaining the relief prayed for; but as the suit was occasioned by what I consider to have been the misconduct of the Defendant *Barber*, the bill must be dismissed without costs.

[His Lordship then stated that he agreed with the Master of the Rolls in thinking the whole case as to Mrs. *Rutt* fictitious. His Lordship believed the statements of the Plaintiff, and held it to be established that there was as to these shares a fiduciary relation between him and *Barber*. *Barber* knowing the wish of the Plaintiff to get some shares, wrote to *Jones*, applying as for some one else. *Barber's* case was that this application was for Mrs. *Rutt*, but his Lordship agreed with the Master of the Rolls that that case had failed. His Lordship commented further on the evidence as shewing that *Barber* was throughout the agent of the Plaintiff, and had not even been able to pay for the shares until he got the Plaintiff's money.]

To my mind, with the greatest deference to the Master of the Rolls, if His Lordship thought otherwise, this is a very clearly established case of agency. That being so, I see no difficulty in the relief which is asked by the first part of the prayer. It seems to me the common relief, the relief which was given in *Hichens* v. *Congreve* (1), *Bank of London* v. *Tyrrell* (2), and in other cases too numerous to mention.

It is unnecessary to inquire, therefore, whether, if I had been obliged to consider the alternative part of the prayer, I should have been pressed with the difficulties which weighed upon the mind of the Master of the Rolls. I will not go into that farther than to say that, as it appears to me, the case of *Great Luxembourg Railway Company* v. *Magnay* (3) is, assuming it to be well decided, a case in its circumstances very different from the present case. On the view which I take of the facts in this case, there is no difficulty in granting the relief sought by the first portion of the prayer.

I am obliged, therefore, to reverse the decree made by the Master of the Rolls, and to substitute a decree in the terms of the first part of the prayer of the bill, for the payment by the Defendant *Barber* of the sum in question, and that he also pay the costs of the suit.

Solicitors for the Plaintiff: Messrs. *Kimber & Ellis.*

Solicitor for the Defendants: Mr. *A. T. Hewitt.*

(1) 4 Russ. 562, 577. (2) 10 H. L. C. 26. 6 Jur. N.S. 849.

(3) 25 Beav. 586; 4 Jur. (N.S.) 839.

L. C.
1872
Nov. 6.

Ex parte BAILEY.

Patent—Rival Applicants—Priority—Delay—Date of Patent.

An applicant for a patent two months after the date of his provisional protection applied for the Great Seal to be affixed. A week afterwards a caveat was entered, but the applicant did not, until six months from his original application had nearly elapsed, present a Petition for the Great Seal:—

Held, that his delay was not an objection to the sealing of his patent.

B. applied for a patent, and obtained provisional protection on the 30th of March; *C.* on the 3rd of April. *B.* applied for the Great Seal on the 21st of May; *C.* obtained letters patent on the 22nd of May, antedated, according to the usual practice, to the 3rd of April. The patents appearing to be partially for the same matter:—

Held, that, whether the conduct of *C.* had or had not been fraudulent, the letters patent granted to *B.* must bear date on the 21st of May, and not on the 30th of March.

W. H. BAILEY, on the 30th of March, 1872, applied in due form for letters patent for an invention of a pyrometer, and obtained provisional protection. On the 3rd of April *J. L. Cassartelli* applied for letters patent for an invention of a pyrometer, and obtained provisional protection. On the 23rd of April *Bailey* gave notice of his intention to proceed, and on the 21st of May he applied for the Great Seal to be affixed to letters patent for his invention. On the 22nd of May the Great Seal was affixed to letters patent for *Cassartelli's* invention, which were dated the 3rd of April, 1872; and on the 29th of May *Cassartelli* entered a caveat objecting to the sealing of *Bailey's* letters patent, upon the ground that his invention was wholly or in part the same as *Cassartelli's*.

On the 27th of September *Bailey* presented a Petition, alleging that *Cassartelli* had improperly endeavoured to obtain priority, and had, besides, improperly made use of information as to experiments made by *Bailey*, and had obtained letters patent by fraud; and praying that the Great Seal might be affixed to letters patent for *Bailey's* invention, to bear date the 30th of March, 1872, when his first application was made, or that the time for sealing his

letters patent might be extended. Evidence was entered into in support of the allegations in the Petition.

The Petition now came on to be heard.

Mr. *Aston*, Q.C., and Mr. *Kekewich*, for the Petitioner, proceeded to argue that the conduct of *Cassartelli* had been fraudulent.

The LORD CHANCELLOR said that he should decide, as was decided in *Ex parte Bates & Redgate* (1), that even if the conduct of *Cassartelli* had been as alleged, *Bailey's* patent could not on that ground be antedated.

Mr. *Aston* and Mr. *Kekewich* then proceeded to argue that the inventions were different, and that in this case the existence of one patent was not an objection to the granting of other letters patent.

Mr. *Fry*, Q.C., and Mr. *North*, for *Cassartelli*:—

Even if an inquiry was directed, and it was found that any part of *Bailey's* invention was not covered by the other patent, still the date of his patent must be that of his application for the Great Seal. *Bailey* applied on the 21st of May for the Great Seal to be affixed, the caveat was entered on the 29th of May, and *Bailey* could then have presented his Petition; but instead of doing so, he has waited till the middle of the long vacation, knowing that before the Petition was heard our specification would be published, and he would have the opportunity of seeing it. He is now too late, and his patent ought not to be sealed. *Cassartelli* exercised only due diligence: *Lee* v. *Walker* (2). *Bailey* says that the inventions are dissimilar, and if so, it cannot signify what is the date of his patent.

Mr. *Aston*, in reply:—

Unless the identity is admitted, *Ex parte Bates & Redgate* does not apply. Unfortunately, in these cases one side does not know what is the invention on the other side, and is quite in the dark until the complete specification is filed.

(1) Law Rep. 4 Ch. 577.

(2) Law Rep. 7 C. P. 121.

L. C. 1872 *Ex parte* Bailey.

Lord Selborne, L.C.:—

In dealing with this case I shall certainly not in any way whatever assume fraud on the one side or any improper motive on the other side for such delay or other course of conduct as may have taken place. The case must be decided on grounds quite independent of any such views.

First of all, it has been suggested, but I think not very confidently, by Mr. *Fry* and Mr. *North*, that it is no longer in my power to seal this patent. I say I do not think the suggestion was made very confidently, because the same learned counsel appeared to concede that if the patent were dated on the 21st of May last they would be satisfied. But if the argument which is addressed to me were valid, I hardly see how I could have any power to seal the letters patent at all.

As I understand the 20th clause of 15 & 16 Vict. c. 83, an applicant has ordinarily the whole six months of protection in which he may apply to have his letters patent sealed. Consequently *Bailey*, the present applicant, would not, as I read the clause, have been in default if he had deferred his application for sealing until the month of September, 1872, whereas some time before the six months had elapsed he presented his Petition to the Lord Chancellor that the sealing might be proceeded with. Then is he, under this clause in the Act, put in a worse position because he has given his notice to seal some months before he was obliged to do so? I think not. I think he was quite entitled to take the first step on any day within the time which the statute allowed him. For the second step, I am certainly not going to decide that if the application to seal had been made in due time, and then a caveat had been presented, and then the applicant had allowed his provisional protection to run out, and had waited for an indefinite time without any explanation, he would afterwards be permitted to say that the caveat prevented him from getting the patent sealed. I am not going to say, on the other hand, what would be proper to be done, or that under no conceivable circumstances the caveat would be admissible as a cause of delay. I am not going to pronounce any opinion on such a case, and I merely say that it would require consideration whether the Act of Parliament would or would not be fatal to the application.

But in this case the Petition to the Lord Chancellor was presented within the six months, and it was presented in the long vacation. The application now comes on for decision, and that objection appears to me wholly to fail.

That brings me to the next important question, and that is, whether, assuming there to be here matter justifying the application for the sealing of the patent, that patent should be dated as in the usual manner, with the date of the original application, or according to the principle laid down in *Ex parte Bates & Redgate* (1), with the date of the application for sealing, that is, the 21st of May, 1872. Now, *Bailey* has sworn that some objects will be accomplished by his invention which will not be accomplished by the invention of *Cassartelli*, of which the complete specification is on the file; and no answer has been made to that statement. It must, therefore, be taken that *Cassartelli* is not able to assert, or at all events has not proved, that the invention for which he has obtained a patent comprehends those particular improvements and matters which are sworn to on *Bailey's* part as distinctions in his invention. I take that as enough for the present purpose to shew that *Bailey's* invention comprehends some matters not in the invention of *Cassartelli*, and that those may be useful and important, and proper subjects of a patent. I therefore think that *Bailey* is entitled to have a patent for those things.

But the question is, whether, being entitled to have a patent for those things which he has shewn to be distinctions between his own invention and the invention of *Cassartelli*, he is therefore entitled to have a patent which shall override retroactively the patent which *Cassartelli* has obtained, and shall thus enable him to file a specification comprehending matter which is in *Cassartelli's* patent, thereby putting *Cassartelli* to the proof of earlier invention as against the *primâ facie* evidence of a patent of earlier date.

The Crown cannot with knowledge grant a second patent in derogation of a former grant; nor can I, without *scire facias*, at once assume that the first patent is void. This is what I understand to be decided in *Ex parte Bates & Redgate*, a decision which I shall certainly follow, even if it produced a novelty in the practice, as Mr. Justice *Grove*, a very great authority on the subject, appears to

(1) Law Rep. 4 Ch. 577.

L. C. 1872 *Ex parte* BAILEY.

have thought: *Lee* v. *Walker*. (1) That seems to be the principle of the decision, and I do not see any sound answer in law to that principle. But however that may be, the case was so decided, and has been followed, and I do not intend to depart from it. The rule laid down in that case, as I understand it, so far as it applies to a case like the present, is, that if an application to seal a patent is made after the sealing of another, and the second patent appears to comprehend some things not comprehended in the patent already sealed, then for those things the new patent ought to be granted. Care must, however, be taken that the new patent does not cover the ground which is covered by the earlier patent. I do not mean that the Court is to surmise such to be the case, but where the facts of the case give reasonable ground to apprehend that it may be so, then I understand the authority of *Ex parte Bates & Redgate* (2) to mean that in order to prevent the possibility of doing one thing when another thing is intended, care shall be taken so to date the patent that it shall not operate on the subject matter of the patent previously granted.

Now, so far from finding in this case any evidence whatever, even on *Bailey's* part, that if the patent were made to override in point of date the patent of *Cassartelli*, it would not include any matter comprehended in *Cassartelli's* patent, I am, from a perusal of the Petition and from a perusal of *Bailey's* own affidavit and the affidavits in support of his claim, compelled to come to the conclusion that it would probably do so, and that his very object in desiring to have the earlier rather than the later date is to give him, in the possible case of a contest between himself and *Cassartelli* as to the validity of *Cassartelli's* patent, the advantage of a patent in some respects covering the same matter and bearing the earlier date. I hold, therefore, that *Bailey* is entitled to have his patent sealed, but that I am bound by the principle and by the rule in *Ex parte Bates & Redgate* to decide, and I do decide, that the patent granted to *Bailey* shall bear date the 21st of May, 1872, when he applied for the Great Seal to be affixed.

Solicitors for Mr. *Bailey*: Messrs. *Gregory, Rowcliffes, & Rawle.*
Solicitor for Mr. *Cassartelli*: Mr. *W. W. Wynne.*

(1) Law Rep. 7 C. P. 121. (2) Law Rep. 4 Ch. 577.

WARD *v.* LAWSON.

L. C.
1872
Nov. 18.

[1872 W. 128.]

Taxation of Costs—Special Agreement—Jurisdiction—Petition under 6 & 7 *Vict. c.* 73, *s.* 37—*Bill in Chancery—London Agency Business—Demurrer.*

Bill filed by a country solicitor against a *London* solicitor, alleging that the Defendant had made a special agreement with the Plaintiff to transact certain business for him on agency terms, and charging that the Defendant falsely pretended that the agreement was one not for agency but for partnership in the particular business. The bill charged that, on either construction of the agreement, the Plaintiff was entitled to an account, and prayed that Defendant might deliver his bills of costs as Plaintiff's agent, and also for a general account of all dealings and transactions between them.

The Defendant demurred, on the ground that the proper remedy of Plaintiff was by petition under the *Solicitors' Act*:—

Held (affirming the decision of the Master of the Rolls), that the demurrer ought to be overruled.

THIS was an appeal from a decision of the Master of the Rolls, overruling a demurrer to the Plaintiff's bill.

The bill stated that the Plaintiff, who was a solicitor at *Sheerness*, was in 1856 appointed solicitor to the *Sittingbourne and Sheerness Railway Company*, of which he was a promoter. That in the year 1859 he entered into an arrangement with Messrs. *Eyre & Lawson*, solicitors in *London*, that they should be his *London* agents, on the usual agency terms; and that it was agreed that the bills of costs for business transacted by *Eyre & Lawson*, as the Plaintiff's agents in respect of the said railway company, should be kept separate from the Plaintiff's general agency bills, and that they should not call upon the Plaintiff to pay any of their agency bills until the Plaintiff had obtained payment of his bills of costs from the company (par. 4).

That in 1867 the firm of *Eyre & Lawson* dissolved partnership, and thenceforth the Defendant, *A. S. Lawson*, acted alone as the agent of the Plaintiff in business connected with the company, and in a suit of *Coutts* v. *Acworth*, upon the terms before stated (par. 6).

The bill then stated applications which the Plaintiff had made to the Defendant to send him his bills of costs for business done in

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connection with the company, in order that he might obtain payment of them from the company, and the refusal of the Defendant to send him such bills of costs.

The bill then alleged that the Plaintiff had an interview with the Defendant, in which the Defendant admitted that he was the Plaintiff's agent in the business of the company, and agreed to continue to act as such agent upon the terms before stated, and that Plaintiff had accordingly confided to the Defendant, as his agent, most of the deeds and documents relating to the company (par. 11).

That the Plaintiff had recently ascertained that the Defendant had received considerable sums of money from the company on account of his costs, but refused to disclose the particulars to the Plaintiff (par. 12).

That the Defendant now pretended that the Plaintiff was not the solicitor of the company, but that the Defendant was the solicitor of the company, and that since the month of September, 1867, the Defendant had not acted as the agent of the Plaintiff, but had conducted the business of the company under a special agreement with the Plaintiff that the Defendant should conduct the business independently, and should share the profits with the Plaintiff, which pretences the Plaintiff denied to be true (pars. 13 and 14).

The bill charged that, whether the Defendant had transacted the business of the company as agent for the Plaintiff or on his own behalf, subject to a division of the profits thereof with the Plaintiff, the Defendant was liable to account to the Plaintiff for such business and profits (par. 15).

The bill further stated that the Defendant, acting for the company, had obtained the common order to have the Plaintiff's bill of costs against the company delivered and taxed, which the Defendant well knew the Plaintiff could not do, as the Defendant refused to make out his bill of costs for business transacted as the Plaintiff's agent (par. 17).

The bill also charged that if the accounts were taken a large balance would be found due to the Plaintiff (par. 19).

The bill prayed that the Defendant might make a full discovery of the business transacted by him, as agent of the Plaintiff, in respect of the railway company since the dissolution of the firm of

Eyre & Lawson in September, 1867; and that he might deliver to the Plaintiff his bill of costs for such business, and that it might be referred to the Taxing Master to tax any bill payable by the Plaintiff (pars. 1, 2).

That accounts might be taken of all moneys received by the Defendant on account of the Plaintiff, and all dealings and transactions between them, since September, 1867 (par. 3).

That in taking such accounts the Defendant might be charged with all moneys come to his hands in respect of business transacted by him for the railway company as agent for the Plaintiff; and (par. 4) that he might not be allowed to charge the Plaintiff with any bill of costs for such business unless or until such bill of costs had been actually paid to the Plaintiff (par. 5).

The bill also prayed that the balance on taking the accounts might be paid to the Plaintiff, and the Defendant might be restrained from taking any proceedings, at law or otherwise, in respect of the matters aforesaid.

To this bill the Defendant demurred, on the ground that the proper remedy of the Plaintiff was by an application to the Court in a summary way against the Defendant as a solicitor.

The Master of the Rolls overruled the demurrer, and the Defendant appealed.

Mr. *Fry*, Q.C., and Mr. *Bevir*, for the Appellant:—

It is entirely irregular for a solicitor to file a bill against his *London* agent for an account of his bills of costs and the cash transactions between them. Such a bill was dismissed with costs in *Harvey* v. *Mayhew* (1). In *Parry* v. *Owen* (2) and in *Maw* v. *Pearson* (3) demurrers were allowed to bills praying an account against a solicitor for money received for costs. In *Allison* v. *Herring* (4) a demurrer was allowed to a bill by a solicitor to recover his costs. The Plaintiff's remedy is by petition under the 37th section of the 6 & 7 Vict. c. 73. The allegation that there was a special agreement makes no difference, for the order may direct the Taxing Master to have regard to the agreement.

It is true that the bill prays generally for an account of all

(1) 2 W. R. 128.
(2) Amb. 109.
(3) 28 Beav. 196.
(4) 9 Sim. 583.

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dealings between the Plaintiff and the Defendant, but that must be taken in connection with the allegation in the bill, but the Defendant acted in such dealings as the Plaintiff's agent.

Mr. *Southgate*, Q.C., and Mr. *Gill*, for the Plaintiff:—

The ordinary jurisdiction of the Court of Chancery is not excluded by the statutory mode of proceeding. *Harvey* v. *Mayhew* (1) was decided at the hearing, not on demurrer, and there were equitable grounds which influenced the Court besides the question of jurisdiction. *Hyde* v. *Edwards* (2) and *In re Smith* (3) are in our favour. Wherever there is any complication in the accounts or the relations between the parties, a demurrer will not lie.

A petition may be resorted to if there is simply an agreement as to the amount of the costs to be charged, but where there is a special agreement which affects the mode of taxation there must be a suit: *In re Rhodes* (4); *In re Thompson* (5); *In re Clark* (6); *Alexander* v. *Anderdon* (7); *Makepeace* v. *Rogers* (8). In the present case there is a dispute whether the Defendant was the agent or the partner of the Plaintiff, and the Plaintiff's case is that in either alternative he is entitled to relief.

Mr. *Fry*, in reply, referred to *In re Ransom* (9); *In re Ingle* (10); *In re Gedye* (11); *In re Hartley* (12); in all which cases there was a special agreement.

Lord Selborne, L.C.:—

This case arises upon a demurrer, and the Master of the Rolls, a Judge of great experience in all matters relating to solicitors' costs, has thought it right, on the special facts, to overrule the demurrer. Before I express my opinion on this particular case I wish to say a few words as to the principle upon which I ought to act in deciding questions on demurrer. If it is quite clear, on the allegations in

(1) 2 W. R. 128.
(2) 12 Beav. 160.
(3) 4 Ibid. 309.
(4) 8 Ibid. 224.
(5) Ibid. 237.
(6) 1 D. M. & G. 43.
(7) 6 Beav. 405.
(8) 34 L. J. (Ch.) 396.
(9) 18 Beav. 220.
(10) 21 Ibid. 275.
(11) 23 Ibid. 347.
(12) 30 Ibid. 620.

the bill, that the substance of the case is stated in a manner not likely to receive elucidation by the cause proceeding to a hearing, I do not feel the same objection which some Judges have felt to deciding a case upon demurrer. On the contrary, if there is nothing to lead to the conclusion that there will be any miscarriage of justice by a hasty decision upon the allegations in the bill, I think it much better that an end should be put to the litigation at an earlier stage than the hearing. But when the nature of the controversy appears by the bill to be such, that it would probably be decided at the hearing upon a fuller and clearer view of the rights of the parties, then it is not fit to be determined on demurrer.

I understand from the judgment of the Master of the Rolls that he thought this to be a case of that nature, and I am not prepared to dissent from his opinion. There are several special circumstances in this case. In the first place, the bill asks that one particular matter may be kept separate from the other transactions between the parties, and asks for discovery and the delivery of a bill of costs as to that matter. I do not say that this is relief which might not be obtained on a petition. In the second place, the bill alleges a particular contract as to the mode in which the bills of costs should be made out and paid. I doubt whether, if the bill rested on that alone, it could be supported. There was a special agreement as to the terms and mode of payment. If that were all, it might come within the principle of *In re Ransom* (1) and *In re Gedye* (2), and other cases of that class, cited by Mr. *Fry*, namely, that where there is no question as to the relation of solicitor and client, but there is a question as to the effect of a particular agreement respecting the *quantum* of the costs payable, the Taxing Master may take that agreement into consideration on a petition under the Act. But all those cases presuppose that it is a case between solicitor and client, that the bills are proper for taxation, and that the only question is as to the amount to be paid.

Here there is not only an agreement more or less special, as stated in the fourth paragraph of the bill, but the bill goes on to allege that the Defendant, admitting the business to have been transacted, pretends that there was an agreement that there should

(1) 18 Beav. 220. (2) 23 Beav. 347.

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be a partnership between them with regard to this particular business; in which case there is no doubt a bill, and not a petition, would be the proper remedy. The Plaintiff then charges that whether the Defendant transacted the business as agent or as partner, in either case he is liable to account to the Plaintiff, but refuses so to do; and the third paragraph of the prayer seems to refer to this charge, and to be adapted to the state of the case, if the Defendant's view should turn out to be well founded.

There appears, therefore, to be here, as in *In re Thompson* (1), a question whether the special agreement constituted the relation of agency, or that of partnership, between the parties; and the prayer being such that the Court can give relief in either view, having regard to all the statements in the bill, I think the Master of the Rolls has arrived at a sound conclusion, and that the appeal must be dismissed with costs.

I wish it, of course, to be understood that I give no opinion as to what ought to be done with the bill at the hearing, if it should turn out that the Plaintiff cannot substantiate the allegations which it contains.

Solicitors for the Plaintiff: Messrs. *Taylor, Mason, & Taylor.*
Solicitor for the Defendant: Mr. *Warriner.*

L. C. 1872 *Nov.* 19, 20.

WAITE *v.* LITTLEWOOD.

[1872 W. 73.]

Will—Construction—Survivor—Other.

A testator gave a sum of money in sixths, and directed his trustees to hold one sixth in trust for each of his six daughters for life, with remainder to her children, to be transferred and vested at twenty-one or marriage; and he provided that in case any of his daughters should die without leaving a child, then her share should go in trust for his surviving daughters in equal shares, if more than one, during their respective lives, and after their decease for their respective children *per stirpes* and not *per capita*, in the same manner as the original shares:—

Held, that on the death of a daughter without leaving a child who attained

(1) 8 Beav. 237.

twenty-one or married, the children of other daughters who had predeceased her took shares in her one-sixth.

The principles upon which the Court considers the word "survivor" as not completely expressing the testator's intention, discussed.

Decision of the Master of the Rolls reversed.

THIS was a special case stated for the opinion of the Court upon the construction of the will of *John Waite*.

John Waite, who died in 1820, by his will bequeathed to trustees the sum of £23,333 6*s*. 8*d*. consols, upon trust as to one sixth part thereof to apply the dividends for the maintenance of the testator's daughter *Jane* until she should attain the age of twenty-one years or be married, and afterwards to pay the dividends to the separate use of *Jane Waite;* and after her decease upon trust to transfer the same sixth part unto her children as she should appoint, and in default of appointment, then unto her child or children; the shares of a son or sons to be transferred to him or them respectively at the age of twenty-one years, and the shares of a daughter or daughters to be transferred to her or them at her or their like age or respective days of marriage; their respective interests to become vested on their respectively attaining the age of twenty-one or marrying, as aforesaid. The testator then gave directions for the maintenance of such children, and for the accumulation of the surplus income.

The will contained a similar provision for each of the five othe daughters of the testator, and contained the following clause:— "Provided always, and my will and mind further is, that in case any of my said daughters shall happen to die without leaving a child, who being a son shall live to attain the age of twenty-one years, or being a daughter to attain that age or be previously married, then and in every such case the part or share, parts or shares, of such of my said daughters as shall so die and of whom there shall be such failure of children as aforesaid, shall, after her or their decease or respective deceases, and such failure of children as aforesaid, go and be in trust for my surviving daughters in equal shares, if more than one, during their respective lives for their separate use and benefit respectively; and after their respective deceases for their respective children *per stirpes* and not *per capita*, in the same shares and at the same times, and with and subject to

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the same powers of appointment and provisions for maintenance and advancement, and in the same manner in all respects and to all intents and purposes as hereinbefore declared or expressed of and concerning the said original shares intended for them respectively; and such benefit of survivorship shall extend as well to the share or shares accruing by virtue of this clause or direction as to the said original share and shares respectively."

The will next contained a gift over of the said sum of consols in case none of the testator's daughters should have a child, who being a son should live to attain the age of twenty-one years, or being a daughter to attain that age or be previously married.

The will contained a general residuary bequest, and contained bequests and directions in which the words "survivors or others" were used.

All the six daughters attained the age of twenty-one years.

Rosanna Derby Waite, one of the daughters, married the Rev. *H. C. Radclyffe*, and died in 1866, without having made any appointment under her power, and leaving one child only, who died in 1871 unmarried and under the age of twenty-one years. At the time of the death of Mrs. *Radclyffe* two of her five sisters were dead, each leaving children who had attained the age of twenty-one years. The question for decision in this case was, whether the one sixth of Mrs. *Radclyffe* was to be divided between her sisters who were living for their lives with remainder to their children, or between them and the children of the two sisters who were dead.

The Master of the Rolls was of opinion that by the direction in the will that the surviving daughters should take during their lives only, the testator shewed an intention that only living daughters and their children would take shares.

The children of the deceased daughters appealed.

Mr. *Southgate*, Q.C., and Mr. *Millar*, for the Appellants:—

It is clear on the authorities that "survivor" must here be read "other": *Wilmot* v. *Wilmot* (1); *Badger* v. *Gregory* (2); *Hurry* v. *Morgan* (3).

(1) 8 Ves. 10. (2) Law Rep. 8 Eq. 78.
(3) Law Rep. 3 Eq. 152.

Sir *R. Baggallay*, Q.C., and Mr. *Phillimore*, for the Respondents:—

In all these cases it is very probable that the testator would have provided differently for the events which happened if his attention had been drawn to the matter, but he has not, and we must take the will as we find it, and not construe it by conjecture: *Smith* v. *Osborne* (1). In none of the cases cited are the expressions the same as those used here, and there is no reason to construe "surviving" otherwise than in its literal sense.

Mr. *Dauney*, for the trustees.

LORD SELBORNE, L.C.:—

There can be nothing more certain than that every will is to be construed by itself, not with reference to other wills; and all the light that can be got from other decisions serves only to shew in what manner the principles of reasonable construction have by Judges of high authority been applied in cases more or less similar.

Now I do not know whether any of the cases which have been cited are very closely like the present, but the present case seems to me to have in it circumstances tending much more strongly than in most of those cases to the conclusion that the testator did not mean the gifts over to be dependent upon the accident of the survivorship of tenants for life whose children were to take after them. He seems to have meant that wherever there was a failure of a particular *stirps* the share of that *stirps* should accrue to the other *stirpes*, and go in the same manner as the original shares.

I do not entirely assent to language which is to be found pervading almost all the cases upon questions of this kind, that the question is whether the word "survivor" is to be read "other." I think there is certainly a very strong probability that any one using the word "survivor" does not precisely mean "other" by it, but has in his mind some idea of survivorship; and if the question is simply whether you are to turn it into "other," and say it is used merely by mistake for the word "other," which is the true word to express the testator's meaning, there is undoubtedly a strong *onus*

(1) 6 H. L. C. 375.

L. C. 1872 WAITE v. LITTLEWOOD.

probandi cast upon any one who would do that violence to the literal meaning of the word. It would be a strange thing to hold that so many testators were in the habit of using the word "survivor" when they simply meant "other." Generally speaking, a reason of some kind will be found for the use of the word "survivor" where it occurs, though it may very possibly be, and often in these cases is, an imperfect expression, not expressing completely and exhaustively the whole intention. If no such explanation can be suggested, it is a strong argument against any construction that would reject the word in its proper and primary meaning altogether, and substitute a word which has a different meaning.

His Lordship then expressed his opinion that upon the whole scheme of the will it was very improbable that the grandchildren were to take only if there should happen to be tenants for life to precede them. It must also be considered that there was a just disposition of the Court in doubtful cases to lean to that construction which made a complete provision for all those children or descendants who were manifestly the objects of the testator's bounty. Moreover, it was quite manifest that the last of the daughters dying might die without leaving a child, in which case the word "survivor" could not apply; and the children of more than one of them who might die leaving children might be living at the death of the last survivor of the daughters, and might afterwards die under age and unmarried. Therefore the argument which was thought conclusive in the case of *Smith* v. *Osborne* (1) applied, though with rather less force, because in that case there were two children only. Still that construction must be preferred which gave effect to the bequests over in every case which might occur. No one could read the sentence in question as a whole and not see plainly and distinctly that the general intention of the testator was to keep the property together, and continually to subdivide the accruing shares between the same persons remaining who were to take the original shares, and to refer to the gifts of the original shares as the scheme which was to govern the devolution of the accruing shares.

Nor was there any serious difficulty arising from the introduction of the words "my surviving daughters." The difficulty, instead of being increased, was very much diminished by the addition of the

(1) 6 H. L. C. 375.

words "during their respective lives for their separate use and benefit respectively," because of course a tenant for life could not possibly take in possession unless he was living. This made the case very much like *Key* v. *Key* (1). In that case a reasonable construction prevailed, and here also the reasonable construction was, that there were to be tenants for life in the cases in which there were surviving daughters to take for life; if not, then the remainders to their children were to take effect. This construction was strengthened by that circumstance which has frequently been held conclusive, that the whole was to go over in case none of his said daughters should have a child who should fulfil the specified conditions. It could not go over if there had been a child of any daughter who fulfilled the conditions.

The fact of there being a residuary gift can make no difference. The words "in equal shares if more than one" seemed to create a difficulty, but that was cleared away by considering that there was an uncertainty as to the number of the daughters from whom the *stirpes* were to spring, as the daughters seemed all to have been minors when the will was made, and until they attained the age of twenty-one, or were married, they were to be maintained, at the discretion of trustees, out of the income; the surplus being directed to accumulate in augmentation of the capital, and the shares of the capital being given only on the attainment of majority or marriage to each daughter. So that when the testator made his will it was possible that any given number of his daughters might have died in minority and unmarried, and then the trusts for the daughters as tenants for life, with remainders over, as to any particular daughter, might not have arisen, and this by itself seemed quite enough to account, if explanation were necessary, for the introduction of those words of contingency, "if more than one."

His Lordship was unable to come to the conclusion in this case at which the Master of the Rolls arrived, and made a declaration that the share of the deceased daughter was divisible in fifths between the surviving daughters for life, with remainders to their children, and the children of the two daughters who had died leaving issue.

Solicitors: Messrs. *Walters, Young, & Co.*; Mr. *Murray*.

(1) 4 D. M. & G. 73.

L. C.
1872
Nov. 23, 25.

ADDISON *v.* COX.

[1871 A. 7.]

Sale of Commission—Mortgagee—Notice—Priority—Costs of Appeal.

An officer in a regiment assigned the money to arise from the sale of his commission to two assignees separately. He obtained leave to sell out, and the two assignees gave to the agents of the regiment simultaneous notices of their incumbrances. £450, forming part of the money which the officer would receive, came from a particular fund in the hands of the agents, held by them subject to the directions of the *Horse Guards*. Six days after the notices had been given, a letter was sent from the *Horse Guards*—the purport of which was communicated by the agents to the officer—requesting the agents to transfer £450 from the fund to the officer. The first assignee then gave a second notice. The agents sent a form of receipt to the officer, which was returned by him signed, before which the £450 was not issuable by the agents. The second assignee then gave a second notice:—

Held (reversing the decision of the Master of the Rolls), that the first assignee had priority over the second assignee.

Where a mortgagee appeals from the decision of a Court below, and the decision is reversed, he will be allowed to add his costs of the appeal to his mortgage charge.

Followed in Addison v Cox

By an indenture dated the 27th of October, 1869, *Reginald Pretor*, then a lieutenant in the 40th Regiment, mortgaged to the Plaintiff *Addison*, by way of security for the repayment of £400 and interest, all the moneys to arise from the sale of his commission, or such moneys as might come into the hands of the agents of the regiment and be placed to his account with them.

By an indenture, dated the 1st of January, 1870, Lieutenant *Pretor* assigned to the Defendant *Mountain*, by way of security for the repayment of £700 and interest, all the moneys that should become payable on the sale of his commission.

The full regulation price of a lieutenancy in the 40th Regiment was £700, whereof £250 was payable by the ensign promoted and £450 was payable by the gentleman appointed to the ensigncy vacated; or when the ensigncy was absorbed instead of being filled up, then out of a fund called the Reserve Fund, kept by Messrs. *Cox & Co.*, who were the regular agents of the regiment, and acted under the direction of the military authorities at the *Horse Guards*.

On the 30th of September, 1870, Lieutenant *Pretor* was permitted to retire from the army by the sale of his commission, and his retirement was gazetted on the 1st of October.

Messrs. *Cox & Co.* had then in their hands the sum of £250, paid in by the ensign to be promoted, and carried by them to an account kept by them under the direction of the military authorities, and called the "Sales of Commissions Account," but it did not become their duty to issue to Lieutenant *Pretor* the £250 until the 1st of October, 1870.

In the morning of the 1st of October, 1870, Messrs. *Cox & Co.* received from *Addison*, from *Mountain*, and from other incumbrancers, simultaneous notices of incumbrances on the proceeds of the sale of Lieutenant *Pretor's* commission.

On the 6th of October, 1870, *Cox & Co.* received a formal letter from the *Horse Guards*, requesting them to transfer £450 from the Reserve Fund to Lieutenant *Pretor*. Previously to the receipt of this letter they had no authority in regard to that sum; and under the regulations of the *Horse Guards* they were not authorized to issue out of the Reserve Fund any sum to any officer or to any person claiming under him, except upon a written receipt for the amount signed by him; and such receipt was the only voucher accepted by the *War Office* for such payment.

On the same 6th of October *Cox & Co.* sent to Lieutenant *Pretor* a form of receipt for the £450.

On the 14th of October *Addison* gave to *Cox & Co.* a second notice of his charge.

On the 20th of October the receipt was returned to *Cox & Co.* signed by Lieutenant *Pretor;* and thereupon, and not before that time, the £450 became issuable by *Cox & Co.*

On the 4th of November *Cox & Co.* received from *Mountain* a second notice as to his charge, and on the 24th of January, 1871, they received from *Addison* a third notice as to his charge.

After some correspondence *Addison* filed the bill in this suit against *Cox & Co.*, *Mountain*, and the other incumbrancers, praying that the proceeds of the sale of the commission now in the hands of *Cox & Co.* might be applied in payment to the Plaintiff of the principal and interest due to him, and of his costs.

Mountain claimed priority over the Plaintiff as to the £450, but

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admitted that, as to the balance of the £250 (after deducting *Cox & Co.'s* charges), the Plaintiff's security being prior in date and the notices being simultaneous, the Plaintiff's claim must prevail.

The facts of the case and the manner in which Messrs. *Cox & Co.* held and were bound to deal with the fund in question, as above stated, appeared from their answer.

The Master of the Rolls thought that the £450 was not held in trust for Lieutenant *Pretor* or his assigns until the receipt for it came into the possession of Messrs. *Cox & Co.*, before which time it was, as they stated, not issuable to him. And His Lordship held that the claim of *Mountain* must therefore be allowed, and made a decree accordingly.

The Plaintiff appealed.

Mr. *Fry*, Q.C., and Mr. *Bradford*, for the Plaintiff:—

The question is, whether, when our notice was given, the relation of trustee and *cestui que trust* existed, and we say that it existed as soon as the letter appropriating the money was received, and as our notice of the 14th of October came first after that, our claim must have priority. The cases on the subject are *Buller* v. *Plunkett* (1); *Webster* v. *Webster* (2); *Somerset* v. *Cox* (3).

Mr. *Chitty*, for *Cox & Co.*

Mr. *Ince*, for the Defendant *Mountain*:—

A similar case was before the Master of the Rolls in *Yates* v. *Cox* (4). The money did not pass to Lieutenant *Pretor's* account until certain formalities had been gone through. Until he gave the receipt *Cox & Co.* would not part with the money, as that was the only voucher they would have. There was in this case a condition precedent to be performed, and nothing passed until that was done. Our notice of the 4th of November was the first after the receipt had been given, and the money was really payable, and that notice gives us priority.

Mr. *Fry*, in reply.

(1) 1 J. & H. 441.
(2) 31 Beav. 393.
(3) 33 Beav. 634.
(4) 17 W. R. 20.

LORD SELBORNE, L.C:—

I must say that I am unable to reconcile the judgment which has been given in this case with the broad and plain principles of the law of equitable assignment as understood in this Court.

There is no question as to the sufficiency of the assignment as between the assignor and assignee. It is a mere question of competition between two assignees, one prior and one subsequent in date, depending of course upon the question whether the first assignee did all which he ought to have done, and which it was in his power to do, to complete his assignment by notice.

I think that on the broad principles of the law of equitable assignment, it ought to be enough for priority—enough to complete the equitable assignment of a chose in action—if notice be given to the person by whom payment of the assigned debt is to be made, whether that person is himself liable or is merely charged with the duty of making the payment. Nor, in my judgment, is it material whether the right to receive the money and the consequent obligation to pay it is, at the time when the notice is given, absolute or conditional, so long as the person who receives the notice is himself bound by some contract or obligation, existing at the time when the notice reaches him, to receive and to pay over, or to pay over, if he has previously received, the fund out of which the debt is to be satisfied.

The cases which Mr. *Ince* cited as to the sale of commissions, all, when they come to be examined, turn upon the fact that the notice was given to a mere possible agent before he was an actual agent—before the time at which he was in any sense liable to make payment, neither being himself a debtor, nor at that time charged with the duty of paying the money in question. If the present case were similar, I should certainly, not only because the authorities would bind me, but because I should entirely assent to their principles, follow those decisions; but the present case appears to me to be wholly unlike them.

In the first place, I must consider what was the position of the assignor, and what was the subject of the assignment when it was made. It is, I apprehend, clear upon the evidence before the Court that the assignor was, at the time when the assignment was completed by notice, a creditor of the Crown. [His Lordship

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then read from the answer of *Cox & Co.* the circumstances, as stated above.] The result is simply this: By the Crown Regulations in force at that time, the lieutenant whose retirement was permitted by the Crown had a right to receive the regulation price from the purchaser of his commission; and if the Crown thought fit to absorb, as it is called, the lowest commission, the Crown became itself the purchaser of the absorbed commission. Accordingly, as soon as the election of the Crown to absorb the ensigncy commission was declared, £450 became actually payable as a debt by the Crown to the officer whose retirement had been accepted. But how was this debt payable? and were *Cox & Co.* strangers to the duty of paying this debt? On this question again their answer is conclusive. They say they were under a positive obligation to act according to the directions of the military authorities at the *Horse Guards* and *War Office*, and that when the commission is absorbed, then the price is payable out of a fund kept by them under the direction of the military authorities, and called the "Reserve Fund." So that it appears to me very difficult satisfactorily to distinguish this case from the case of *Row* v. *Dawson* (1), decided by Lord *Hardwicke*, even if the letters had never been written, and if the matter rested simply upon this, that by the acceptance of the retirement of the officer, and by the election to absorb the ensign's commission, £450 actually became payable out of a fund kept by *Cox & Co.* under the direction of the military authorities, and called the "Reserve Fund."

On what principle could it be said that notice to the persons who had in their hands the fund, out of which the absolute debt due from the Crown to this gentleman had become payable, would not be sufficient? The case of *Row* v. *Dawson* seems to me quite inconsistent with such a supposition. [His Lordship then stated the facts of that case, and read portions of the judgment of Lord *Hardwicke.*]

So the matter would have stood, as it seems to me, merely upon the course of the office, and upon the statement of *Cox & Co.*, that, where the Crown absorbed a commission, the regulation price for the commission absorbed was payable out of a fund kept by them under the direction of the military authorities.

(1) 1 Ves. Sen. 331.

But the case does not rest at that stage. It goes much further; for *Cox & Co.* say that, "The said sum of £450, which by reason of the aforesaid absorption of the said ensigncy, became payable out of the said Reserve Fund, did not become issuable before the 26th of October." But money which is absolutely due and payable out of a particular fund may be only issuable upon compliance with certain regulations, which do not affect the right to the debt, but the right to the payment. And here there is no answer whatever, as it seems to me, to the remark so justly made by Mr. *Fry*, in reply, that the argument on the other side goes the full length necessarily of saying, that this Crown debt due to the officer was not in equity assignable at all as long as it retained the character of a Crown debt, unless indeed it had been contended, which it was not, that the assignee ought to have gone somewhere else, namely, to the Secretary of State for War, or to the *Horse Guards*, to give his notice, which would, I apprehend, have exposed him to greater difficulties.

However, that was not distinctly argued; but the result of the argument must be, that this was not an assignment in equity such as to be capable of completion, inasmuch as the money was not to be regarded as payable until it was issuable, and was not issuable until a receipt for it had been given. But, on the very face of the evidence, the distinction between the time when it is payable and the time when it is issuable is plainly taken, and the requiring of a receipt before it is issuable means only that it will not be actually paid without a receipt.

What does "issuable" mean? It means, to be paid over the counter; to be actually paid in cash, if it is claimed, or if any other arrangement is made which is equivalent to that, as far as the Crown is concerned, as, for example, by the officer being content to have it carried to his credit with *Cox & Co.*, which comes to the same thing. The meaning of the receipt is, that when the money is actually issued—in other words, when the Crown pays the debt through its agent—then a receipt is to be given, but in the meantime the debt is assignable like any other debt.

The sole question is whether, being assignable, *Cox & Co.* are the proper persons to receive the notice? But if it were necessary to go beyond that, we are carried further, because on the

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6th of October, 1870, the proper officer of the *Horse Guards* wrote to *Cox & Co.* (who have told us that "as such agents we act, and are bound to act, under the direction of the military authorities at the *Horse Guards* and *War Office*,") in these terms: [His Lordship then read the letter.] Why that, if communicated —and it was immediately communicated, evidently in the ordinary and regular course of business, by *Cox & Co.* to Lieutenant *Pretor* —was a communication which, I must take it, was made from the Commander-in-Chief by the authority and as agent of the Crown. It was in itself an equitable assignment by the Crown to Lieutenant *Pretor* of a certain part of the Reserved Fund in the hands of *Cox & Co.* for the payment of this particular debt. Any one who will refer to what Lord *Eldon* says in *Ex parte South* (1) will see that in equity, if a creditor gives an order on his debtor to pay a sum in discharge of his debt, and that order is shewn to the debtor, it binds him; and Lord *Eldon* went on to say that, according to some decisions at law, unless the person who receives the order has entered into some contract, or enters into some promise upon it, an action cannot be maintained against him; but that is not the rule in a Court of Equity. In that particular case he also notices that what had passed between the parties—which, in my judgment, was not more than what passed in this case between *Cox & Co.* and Lieutenant *Pretor* —would be in itself sufficient to remove that difficulty, and shew an assent in point of law and authority to make the payment.

The same doctrine was laid down by Lord *Cottenham* in *Burn* v. *Carvalho* (2), that "in equity an order given by a debtor to his creditor upon a third person, having funds of the debtor, to pay the creditor out of such funds, is a binding equitable assignment of so much of the fund."

The Crown, therefore, when that order was written and communicated to Lieutenant *Pretor*, had actually made what this Court considers a binding equitable assignment to Lieutenant *Pretor* of that portion of the Reserve Fund in *Cox & Co.'s* hands, which was requisite to pay the £450; and we have, as it seems to me, everything necessary to make *Cox & Co.*, from that time forth at all events, stakeholders of the agreed and appropriated

(1) 3 Sw. 392. (2) 4 My. & Cr. 690–702.

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fund for Lieutenant *Pretor's* payment. If that be so, there is an end of the case, because the notice was promptly given after that date, and was given first by the present Plaintiff. I feel it, therefore, my duty to vary the order under appeal, and to make a decree in the Appellant's favour, giving him the first charge, and he will add to his charge the costs of this appeal.

Mr. *Ince*, for *Mountain*, objected that this would in fact be making the Respondent (contrary to the settled rule) pay the costs of the appeal as his security was insufficient.

HIS LORDSHIP said that he did not consider that rule to apply so as to deprive the holder of a security of his right to add his costs to his security.

Solicitor for the Plaintiff: Mr. *Peard.*

Solicitors for *Cox & Co.*: Messrs. *Fladgate, Clarke, & Co.*

Solicitors for the Defendant *Mountain*: Messrs. *Edwards, Layton, & Jaques.*

ELLIS *v.* SILBER.

L. C.
1872
Nov. 30.

[1872 E. 32.]

Bankruptcy—Trustees—Jurisdiction—Bankruptcy Act, 1869 (32 & 33 *Vict.* c. 71), *ss.* 65, 66, 72, 130.

Where a suit would, but for the fact of a bankruptcy, be fit to be entertained by the Court of Chancery, the jurisdiction is not taken away by the *Bankruptcy Act*, 1869. Therefore when a trustee in bankruptcy has, in respect of the bankrupt's estate, a claim against a third person, that claim may be prosecuted at law or in equity, and is not subject to the jurisdiction of the Court of Bankruptcy.

Decision of the Master of the Rolls reversed.

Ex parte Anderson (1) distinguished.

THE bill in this case was filed by the trustees of the inspectorship deed of *George Cannock* against *A. M. Silber* and *N. H. Fleming*, late partners of *Cannock*; and contained allegations that, at the time when the deed of dissolution of the partnership between them was executed, *Cannock* was in such a state of ner-

(1) Law Rep. 5 Ch. 473.

L. C. 1872 ELLIS v. SILBER.

vousness and alarm as not to be accountable for his actions; and that the deed contained false recitals. The bill contained charges that the deed of dissolution was void on the various grounds stated, and also because it was not competent for *Cannock*, in his then state of insolvency, to execute any deed which would prejudice the rights of his creditors over his estate. The bill also stated the provisions of a deed of inspectorship, dated the 23rd of December, 1869, by which *Cannock*, *Tait*, and others who were his partners in another business empowered the trustees of the deed to get in their estate and apply it to the payment of their creditors; and it was declared that the deed should operate as a deed of inspectorship within the meaning of the 192nd section of the *Bankruptcy Act*, 1861. And the bill stated that this deed was duly assented to and registered in the Court of Bankruptcy on the 31st of December, 1869, under the *Bankruptcy Act*, 1861, and the *Bankruptcy Amendment Act*, 1868. That by another deed, dated the 29th of August, 1870, *Cannock*, *Tait*, and their partners assigned all their estate to the trustees on the trusts of the deed of inspectorship. That by an order of the Court of Chancery under the Trustee Acts, other trustees of the inspectorship deed had been appointed. And the bill prayed a declaration that the deed of dissolution of the partnership between *Cannock*, *Silber*, and *Fleming*, was fraudulent and void; and that the Defendants might be decreed to pay the Plaintiffs, as trustees of the inspectorship deed, two sums of £3400 and £4702 in the bill mentioned, with interest, as due to *Cannock* on taking the accounts between him, *Silber*, and *Fleming*.

To this bill the Defendants demurred for want of equity, and also because the matter was within the jurisdiction of the Court of Bankruptcy.

The Master of the Rolls, after stating the allegations in the bill, said that he was of opinion that upon the bill there was no case made for relief in equity, and that if this suit came before the Court upon the facts stated, he could not make a decree in favour of the Plaintiffs. His Lordship had preferred to proceed upon the merits rather than upon the technical question whether the proper course for the Plaintiffs was to proceed before the Court of Bankruptcy; and His Lordship allowed the demurrer.

The Plaintiffs appealed.

Mr. *Fry*, Q.C., and Mr. *H. M. Jackson*, for the Appellants.

Sir *R. Baggallay*, Q.C., and Mr. *W. W. Karslake*, in support of the demurrer:—

The design of the Legislature was that all such matters should be left to the Court of Bankruptcy, which has complete jurisdiction. Under sects. 129 and 130 of the Act of 1869 (32 & 33 Vict. c. 71), and the *Bankruptcy Rules*, 1870, the trusts of this deed are to be administered according to the Act of 1869, and the jurisdiction then belongs to the Court of Bankruptcy: *Ex parte Anderson* (1). The only restriction is in the 20th section of the *Bankruptcy Repeal Act*, 1869 (32 & 33 Vict. c. 83), and that does not apply. We also rely on sects. 65, 66, 72, and 96 of the Act of 1869. Even under the Act of 1861 such a matter would have been left to the Court of Bankruptcy: *Martin* v. *Powning* (2). No doubt this Court may appoint a receiver, if necessary: *Riches* v. *Owen* (3); but it will not administer the estate.

Stone v. *Thomas* (4) and *Phillips* v. *Furber* (5) both shew that where an estate is being administered in the Court of Bankruptcy all questions ought to be left to that Court.

LORD SELBORNE, L.C.:—

Sir *Richard Baggallay* has argued—very carefully and fully argued—a point on which the Master of the Rolls in no degree whatever relied, that is, the second ground taken by the demurrer, that the jurisdiction to administer justice in this case between the parties is in the Court of Bankruptcy, and ought not to be exercised here. But Sir *Richard Baggallay* quoted no authority, as it appears to me, tending in the slightest degree whatever to support that proposition. The effect of the provisions in the several Acts of Parliament relating to bankruptcy is, that in these cases of arrangement-deeds which have been registered in bankruptcy, the trustee for the purpose of administration under the deed has all the powers and all the rights in the Court of Bankruptcy which

(1) Law Rep. 5 Ch. 473.
(2) Ibid. 4 Ch. 356.
(3) Law Rep. 3 Ch. 820.
(4) Ibid. 5 Ch. 219.
(5) Law Rep. 5 Ch. 746.

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assignees or trustees under a regular bankruptcy would have, and that for all the purposes of administration in bankruptcy the Court of Bankruptcy is armed with very large powers, both legal and equitable,—as large as may be necessary to do complete justice. But there was no case cited and no clause quoted from any Act of Parliament to the effect that whenever the trustee of a deed or the trustee or assignee in bankruptcy has a demand against a third person, which but for the bankruptcy would be proper to be prosecuted in a Court of Law or in a Court of Equity, the jurisdiction of the Court of Law or of the Court of Equity is as against that third person transferred to the Court of Bankruptcy. I apprehend that there is nothing whatever in the Acts relating to bankruptcy which in an ordinary case not governed by the special clauses of the Acts has any such effect.

That which is to be done in bankruptcy is the administration in bankruptcy. The debtor and the creditors, as the parties to the administration in bankruptcy, are subject to that jurisdiction. The trustees or assignees, as the persons intrusted with that administration, are subject to that jurisdiction. The assets which come to their hands and the mode of administering them are subject to that jurisdiction; and there may be, and I believe are, some special classes of transactions which, under special clauses of the Acts of Parliament, may be specially dealt with as regards third parties. But the general proposition, that whenever the assignees or trustees in bankruptcy or the trustees under such deeds as these have a demand at law or in equity as against a stranger to the bankruptcy, then that demand is to be prosecuted in the Court of Bankruptcy, appears to me to be a proposition entirely without the warrant of anything in the Acts of Parliament, and wholly unsupported by any trace or vestige whatever of authority.

It was admitted very frankly by Sir *Richard Baggallay* that the cases which he cited, with the exception of two of them, are as remote as possible from touching this question, being merely cases in which an attempt was made to transfer the proper administration from the Court of Bankruptcy into this Court, the subject of the suit relating to the bankrupt's estate. One of them is *Ex parte Anderson* (1), in which some pictures had been transferred by

(1) Law Rep. 5 Ch. 473.

the debtor to his nephew, but that nephew had come in and made certain arrangements as to those pictures with creditors of the bankrupt, and therefore the matter was *primâ facie* brought by his own submission and his own acts under the administration in bankruptcy.

The other case, *Phillips* v. *Furber* (1), appears to me, when examined, to have, if possible, even less reference to the matter than the preceding, because there was really no question at all with *Furber*, the third party, who was merely a stakeholder having assets in his hands; and the suit, which was very properly dismissed in principle, though for the convenience of administration it was not dismissed in form, was merely a suit of competition between the trustees under one of these deeds prior in date and assignees under a later bankruptcy; and the question in the suit was whether the assets were to be administered under the deed or in bankruptcy. That was properly considered to be a question for the Bankruptcy Court to decide; so that there is no authority whatever in favour of the proposition that if, in other respects, this be a suit fit to be entertained by the Court of Chancery, the jurisdiction is taken away, or ought not to be exercised by reason of anything coming within the bankrupt laws.

[His Lordship then stated and commented on the allegations in the bill, and came to the conclusion that as to the £4702 no case was made by the bill; but that as to the £3400, though the bill might be improved by amendment, he could not say that, if the suit came to a hearing and the allegations in the bill were proved, no relief would be given. The demurrer must, therefore, be overruled.]

Solicitors for the Plaintiffs: Messrs. *Simpson & Cullingford.*
Solicitor for the Defendants: Mr. *H. Skynner.*

(1) Law Rep. 5 Ch. 746.

L. C.
and L. JJ.
1872
Dec. 17.

LLOYD *v.* PUGHE.

[1869 L. 3.]

Husband and Wife—Separate Estate—Chose in Action—Account at Bank.

A wife being executrix of her father paid money she received as such into a bank to an account in her own name as executrix. Her husband paid money of his own to this account, and the wife had drawn cheques upon the account for payment of debts due by the husband and for payment of household expenses. The husband died:—

Held, upon the facts of the case, that the wife was merely the agent of the husband, and that the money remaining in the bank belonged to his estate and not to the wife's.

Decision of *Malins*, V.C., reversed.

MRS. *LLOYD* was the executrix and residuary legatee of her father, Mr. *Hugh Jones*. She had received various sums of money as such executrix, and had paid them into the *North and South Wales Bank* to the account of "Mrs. *Elizabeth Lloyd, Llanwrst,* sole executrix of the late Mr. *Hugh Jones*." The account was opened in May, 1862. It was continued in the same form after it ceased to be wanted, or used, for executorship purposes. It was in evidence that other sums were paid by her husband into the bank to the same account, and that cheques were drawn by her for the payment of debts due by her husband, and for payment of tradesmen and other creditors on account of household expenses.

The husband died in July, 1868, when £374 was in the bank on this account; and the wife died in September of the same year.

Suits were instituted for the administration of the estates of both husband and wife, in the course of which suits the Vice-Chancellor *Malins* held that the husband intended this money to be the wife's, and that it formed part of her estate and not of her husband's estate; as reported (1).

The creditors of the husband appealed.

Mr. *Kay*, Q.C., and Mr. *Rigby*, for the Appellants, cited *Dummer* v. *Pitcher* (2).

(1) Law Rep. 14 Eq. 241. (2) 2 My. & K. 262.

Mr. *Cotton*, Q.C., and Mr. *Bradford*, for the executors of the wife:—

This money was intended by the husband, who was then quite solvent, to be the wife's, and the bankers recognised her: *Dalton* v. *Midland Counties Railway Company* (1); *Gosling* v. *Gosling* (2). At all events this is a chose in action to which the wife had a legal right, and there is nothing to take it out of her. In *Hoyes* v. *Kindersley* (3) the wife died in the lifetime of the husband.

Mr. *Kay*, in reply, said that it was a clear case of agency, and cited *Philliskirk* v. *Pluckwell* (4); *Lucas* v. *Lucas* (5).

LORD SELBORNE, L.C., said that there were many cases in which a husband, or a stranger, had transferred property into the name of a married woman, or had placed it in the hands of a third party, upon a contract that it was to be for the benefit of the wife. His Lordship would be sorry to suggest, without necessity, any doubt as to the validity of such transactions, whether intended to create a trust or to give a legal title. Of course no such title could be created in favour of the wife as against the true owner if he did not consent to the transaction. But if he did, his impression was, that there was nothing in the law to prevent the wife, if she survived the husband, from having the property.

It was, however, unnecessary, in the present case, to decide any such question, for this was an ordinary case of an agency account opened by a husband with bankers for the purpose of convenience, and the husband did not intend to give the wife any title at law or in equity which she had not before. His Lordship then stated the facts of the case, drawing the conclusion, from the evidence, that the account was intended as a mere agency account by the husband, without any contract which could give the wife any interest in the money; and the order must be varied accordingly.

SIR W. M. JAMES, L.J., was of the same opinion. There were, no doubt, various modes by which a husband could make a gift to his wife so as to be effectual in this Court, but the question was

(1) 13 C. B. 474.
(2) 3 Drew. 335.
(3) 2 Sm. & Giff. 195.
(4) 2 M. & S. 393.
(5) 1 Atk. 270.

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whether there was evidence of such a gift in this case, and His Lordship thought that there was not.

SIR G. MELLISH, L.J., was of the same opinion. The right of action at law was here in the administration of the husband and not in the wife. The rule at law was very well settled that a married woman could make no contract, but if a chose in action was given to the wife, either before or after marriage, the husband might either reduce it into possession or not, and if not, then it remained the wife's. But an ordinary banking account, supposing the husband to open it in the name of his wife, was, in fact, money lent with an obligation to repay it to the order of either the husband or the wife. That was a contract between the husband and the bankers that they would honour the cheques of either husband or wife, but that was all. If the wife drew a cheque which the bankers refused to honour, any action brought upon that refusal could only be brought in the name of the husband. The contract must be pleaded, and could only be stated as with the husband, and not with the husband and wife. That had been the rule at law for a great many years, as appeared from the old case of *King* v. *Basingham* (1), where it was held by the Court that such an action could not be brought by husband and wife, because it was impossible that a wife could lend money.

His Lordship did not think it necessary to determine whether, if the money was not lent but paid on a deposit account, or if the husband desired to make a present of it to the wife, and induced a third person to hold it to the use of the wife, and wrote to that effect, the case might not be different. The circumstances would then be the same as in *Fleet* v. *Perrins* (2). It was, however, not necessary to decide that question, and it was quite sufficient for the decision of this case to say that where money is lent upon a contract with the husband, it makes no difference that the account is opened in the name of the wife. That being the case at law, it was plain that there was here no equity, and the money must go to the estate of the husband.

Solicitors: Messrs. *Cole, Cole, & Jackson;* Messrs. *Rooks, Kenrick, & Harston.*

(1) 8 Mod. 199. (2) Law Rep. 4 Q. B. 500.

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L. JJ.
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[1872 H. 117.]

Trade Name—Dissolution of Partnership—Use of Old Name of Firm—Tendency to deceive.

A trader, who has been a manager or a partner in a firm of established reputation, has a right, on setting up an independent business, to make known to the public that he has been with that firm; but he must take care not to do so in a way calculated to lead the public to believe that he is carrying on the business of the old firm, or is in any way connected with it.

The Plaintiff, an old-established tailor, took the Defendant, who had been his foreman, into partnership, and the business was carried on under the name of *H. & P.* The partnership was afterwards dissolved by a decree of the Court, in which it was provided that the business of the partnership should belong to the Plaintiff. The Plaintiff accordingly kept up the shop under the name of *H. & Co.* Subsequently the Defendant set up a shop only a few doors from the Plaintiff's shop, and painted over the door the words "*P.*, from *H. & P.*":—

Held (affirming the decree of *Malins*, V.C.), that, having regard to the manner in which the names were painted up, the Defendant had done that which was calculated to lead the public to suppose that he was still connected with the old firm, and that the Plaintiff was entitled to an injunction.

THIS was an appeal from a decision of Vice-Chancellor *Malins*.

The Plaintiff, *Richard Parsley Hookham*, had been carrying on the business of a tailor and draper at No. 3, *Corn Market, Oxford*, since the year 1836, and his predecessors had carried on the same business for more than a century. The business was carried on in the Plaintiff's own name from the year 1836 to 1839, when he took a partner, who afterwards retired.

The Defendant, *Samuel Pottage*, was originally a foreman of the Plaintiff, who in 1851 took him into partnership. Differences arose which led to the filing of a bill by *Hookham* and a cross bill by *Pottage*, and to the decree made by Vice-Chancellor *Wickens* in June, 1871, by which it was declared that the partnership between these persons should be dissolved as from the 3rd day of June, 1871; and it was by consent ordered that the said *Hookham* should continue in the possession of the shop, stock, business, and

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assets of the partnership, and that it should be referred to an arbitrator to value the stock and effects of the partnership, and to ascertain the amount due to the Defendant up to the date of the dissolution. Accordingly, the Plaintiff continued to carry on the old business, and substituted the name of *Hookham & Co.* over the shop front for the name of the old firm, *Hookham & Pottage.*

In the month of April, 1872, the Defendant took a large shop on the same side of the *Corn Market*, seven doors from the Plaintiff's, the appearance of which was very similar to that of the Plaintiff's shop.

On the 26th of April the Defendant, who had, in consequence of remonstrance from the Plaintiff, obliterated the names which he originally placed over the shop front, painted up the words "*S. Pottage*, from *Hookham and Pottage.*" The words "from" and "and" were in small capitals; but the words "*S. Pottage*," "*Hookham*," and "*Pottage*," were all in large Roman capitals, "*S. Pottage*" being rather larger than the other two. The word "*Hookham*" was just over the door of the shop. The letters were gold on a dark green ground; the letters over the Plaintiff's shop being gold on a red ground.

The Plaintiff immediately remonstrated with the Defendant, and threatened proceedings against him, and in May, 1872, filed the present bill, praying that the Defendant might be restrained from painting or otherwise affixing the name of the Plaintiff on or to the door or outside of the Defendant's shop, or on the bill-heads, circulars, or advertisements used in his business, or from otherwise using the Plaintiff's name in such a manner as to lead to the belief that the Defendant was carrying on his former partnership business with the Plaintiff, or that the Plaintiff was in any way interested in the Defendant's business.

The Plaintiff moved for an injunction in the terms of the prayer, and it was agreed that the motion should be considered as the hearing of the cause.

Evidence was produced on the part of the Plaintiff that two gentlemen and a little girl had been misled by the names or by the appearance of the shop, and had entered it by mistake for *Hookham & Co.'s* shop.

The Vice-Chancellor granted the injunction prayed, and the Defendant appealed from the decision (1).

(1) 1872. June 6. WN(1872)135
SIR R. MALINS, V.C. :—

The question I have now to decide is, whether the manner in which the Defendant uses the name of the Plaintiff is or is not calculated to deceive. It is not necessary that I should come to the conclusion that there is any intention on the part of the Defendant to mislead—that is immaterial. If it is calculated to mislead—that is, to lead the public into the shop of the Defendant while it is their intention to go into the shop of the Plaintiff—that is an injury done to the Plaintiff. Then is it calculated to deceive, or is it not? My attention has been drawn to the fact that the affidavits are not very strong of any actual deception, and this is perfectly true; but there are some instances, and although they may have occurred since the filing of the bill, yet I apprehend it is now well established that it is not necessary to prove acts of deception.

If the trade-mark or the name is used in such a manner over a shop, as in *Glenny* v. *Smith* (2 Dr. & Sm. 476) which was the case so much relied on by counsel for the Plaintiff, as that it is calculated to deceive, the Court will restrain it. All these cases proceed upon this principle, that the thing done is calculated to deceive. Now, is the name in this case calculated to deceive? [His Honour then referred to the evidence in the case, and continued :—]

In all these cases I think common honesty requires that traders should so conduct themselves as not to do anything calculated to mislead the public. These tricks in trade, of one man trying by unfair means to get the customers of another, are very much to be reprobated. I am satisfied that this Defendant is not so much anxious to let it be known that he has come from Mr. *Hookham's* shop as he is anxious to get Mr. *Hookham's* customers. Therefore I think that it is calculated to deceive; and being of that opinion, it cannot be permitted to continue.

Then with regard to the cases which have been cited upon the subject. Probably the only case which has any particular bearing upon this immediate question is that of *Glenny* v. *Smith*. The present case is rather a stronger one for the interference of the Court. There it was stated that *Thresher & Glenny*, and their predecessors, had carried on business for 150 years. The house of business had always been in the *Strand*, and you can hardly suppose it possible that anybody wishing to deal with *Thresher & Glenny* would be misled by finding the name in *Oxford Street*, where the Defendant *Smith*, who had been in their employ, opened his shop. He put up a brass plate under his shop window with his own name in small letters transversely, "From *Thresher & Glenny*," and on the blind which he let down in warm weather there was the name "From *Thresher & Glenny*," and not his own name. Any person taking the trouble could see that it was not *Thresher & Glenny* of the *Strand*, for it was of *Oxford Street*. Upon what ground did the Vice-Chancellor grant the injunction? He says: "I am bound to come to the conclusion, even assuming that there was no intention on the part of the Defendant to do wrong, that what he has done is calculated to mislead the unconscious, unwary, and heedless portion of the public into the impression that the shop of

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Mr. *Cotton*, Q.C., and Mr. *E. Cutler*, for the Appellant:—

The Defendant has done nothing more than he is entitled to do. He has a right to state that he was formerly in the house of *Hookham & Pottage*. He had been for many years manager of that business, and was probably better known to the customers than Mr. *Hookham*. He had a right to avail himself of the position which he had so gained, and the only course was to adopt the words, "From *Hookham & Pottage*." To support such an injunction as this there must either be actual intention to deceive, or such an imitation of the Plaintiff's trade-name as necessarily leads to deception: *Lee* v. *Haley* (1); *Williams* v. *Osborne*. (2) In the present case the evidence of persons being really deceived is most trivial.

Mr. *Glasse*, Q.C., and Mr. *Jackson*, for the Plaintiff:—

It is not necessary for us either to prove cases of actual deception, or that the Defendant is acting fraudulently, if his conduct manifestly tends to mislead. By the terms of the dissolution of partnership the Plaintiff is entitled to the goodwill of the old business, and the Defendant has no right to make the public think either that his present business is a continuation of the old business, or that the Plaintiff has any interest in it. The name *Hookham* is the valuable name in the business, having been so long known at *Oxford*, and that name is placed in the most prominent place over the Defendant's door. The Defendant has

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the Defendant is the shop of the Plaintiffs."

Therefore, looking at all the circumstances of this case, and to the manner in which the Defendant has selected a shop close to the Plaintiff's, I think it was his duty to avoid anything that could be calculated to deceive. He has put the name of "*Hookham*" in such a manner that it is not only calculated to deceive, but I think it was intended to deceive. There is evidence, certainly not very strong, that three persons at least have been deceived. Now that which has deceived in so short a time three persons, is obviously calculated to deceive others. Therefore, in my opinion, what the Defendant has been doing is wrong, and he must be restrained. I must therefore grant a perpetual injunction, and order the Defendant to pay the costs of the suit.

I desire it to be understood that I do not in the least degree interfere with the well-established rule that a man having been in the employ of a trader of reputation is entitled in a fair manner to say that he comes from him.

(1) Law Rep. 5 Ch. 155.

(2) 13 L. T. (N.S.) 498.

brought himself within the decisions in *Wotherspoon* v. *Currie* (1); *Hudson* v. *Osborne* (2); *Labouchere* v. *Dawson* (3); and *Glenny* v. *Smith.* (4)

Mr. *Cotton,* in reply.

SIR W. M. JAMES L.J.:—

I quite agree with Mr. *Cotton* that the Defendant had a right to state that he was the *Samuel Pottage* who was formerly manager and afterwards a partner in the firm of *Hookham & Pottage,* and that he had a right to avail himself, by the statement of that fact, of the reputation which he had so acquired. But it is equally clear to me that he had no right to make that statement or to avail himself of that reputation in such a way as was calculated to represent to the world that the business which he was carrying on was the business of *Hookham & Pottage,* or that *Hookham* had any interest in it. The truth is, that the question to be decided is one of fact: whether the conduct of the Defendant was calculated to mislead a casual passer by. The Vice-Chancellor was of opinion that it was so calculated, and I cannot say that I differ from that opinion. As a matter of fact, it appears to me that the Defendant has not taken the care which he ought to have taken to distinguish his own name from the name of the partnership, so as to prevent the public from being misled. Having regard to the position of the name "*Hookham,*" and to the fact that the words "*Hookham and Pottage*" are in almost as conspicuous characters as "*S. Pottage,*" I think that a stranger or an undergraduate who was not acquainted with *Hookham's* shop would be not unnaturally misled. The Defendant might have made his own name far more conspicuous than that of the firm, either by making the name of the firm much smaller or of a different colour; and if he could, it was his duty to do so, in order to make a clear distinction between them. It is a mere question of fact, and I have come to the same conclusion as the Vice-Chancellor, namely, that the mode in which the Defendant has placed the names over his shop is calculated to deceive the

(1) Law Rep. 5 H. L. 508.
(2) 39 L. J. (Ch.) 79.
(3) Law Rep. 13 Eq. 322.
(4) 2 Dr. & Sm. 476.

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public. The Plaintiff is therefore entitled to an injunction, and the appeal must be dismissed with costs.

SIR G. MELLISH, L.J., concurred.

Solicitors for the Plaintiff: Messrs. *Pownall, Son, Cross, & Knott.*
Solicitors for the Defendant: Messrs. *J. & R. Gole.*

L. JJ. 1872 *Nov.* 14, 15.

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[1871 W. 136.]

Specific Performance—Separable Contract—Agreement for Building—Leases.

C. agreed to let to *W.* several plots of ground for ninety-nine years, at one given rent, to be apportioned as thereinafter mentioned. *W.* agreed to build on plot P twenty houses, on plot B eight, on plot G ten, and on plot Y five; and it was agreed that a separate lease of plot B, at a given rent, should be granted as soon as four of the houses on that plot and two of the ten houses on plot G were covered in, and that a separate lease of plot G should be granted as soon as five of the ten houses on that plot were covered in. *W.* mortgaged this contract to the Plaintiff, and afterwards became insolvent. The Plaintiff covered in the requisite number of houses on plots B and G, and applied for leases of them, denying at the same time his liability to take upon himself the other parts of the agreement, upon the performance of which the granting of leases of plots B and G did not by the terms of the contract depend:—

Held, by *Wickens*, V.C., that the Plaintiff could have no relief, except on his assuming *W.'s* obligations under the original contract, and that as the Court could not enforce these obligations, relief could not be granted:

Held, on appeal, that as by the terms of the contract the right to have leases of plots B and G depended only on conditions which had been fulfilled, the Plaintiff, as assignee of *W.*, was entitled to have leases of those plots granted to him, without assuming *W.'s* obligations under the entire contract.

THIS was an appeal by the Plaintiff from a decree of Vice-Chancellor *Wickens* dismissing his bill without costs.

An agreement, dated the 21st of July, 1869, was entered into between the Defendant *Clements* of the one part, and *Edmund Wood* of the other part, the stipulations of which were to the following effect:—(1) That *Clements* should grant to *Wood*, his executors, administrators, and assigns, and that *Wood*, his executors, administrators, or assigns, should accept, such distinct and separate

leases as were thereinafter mentioned, of a piece of ground at *Turnham Green*, delineated in an annexed plan, and coloured pink, green, and yellow, for ninety-nine years from Midsummer Day, 1869, at the rent of a peppercorn for the first year, £50 for the second year, and £100 for every subsequent year, the rents to be apportioned in manner thereinafter mentioned, and paid on the usual quarterly days. (2) That *Wood* should build on the pink plot, on the east side of an intended new road shewn on the plan, not less than twenty houses, and on the green plot, on the west side of that road, not less than seventeen houses, each house to be of the prime cost of £200 at least, and to be of not less than certain dimensions therein mentioned. (3) That *Wood* would build on the yellow plot not less than five houses, such as therein mentioned. (4) That each house should be of the prime cost of not less than £200, and should be built of good, sound, substantial and new materials, in a workmanlike manner, and according to such plans and specifications as should be approved by *Clements* or his surveyor. (5) That twelve houses should be finished, and fit for occupation, by Midsummer Day, 1870; twelve more by Midsummer Day, 1871; and the rest by Midsummer, 1872. (6) That *Wood* should make the road, as shewn on the plan, to the satisfaction of *Clements'* surveyor, and keep it in repair till taken to by the parish. (7) That *Wood* should make all drainage and sewerage at his own cost, and in such a manner as would best serve the interest of the estate, and to the satisfaction of *Clements'* surveyor. (8) That *Wood* should be entitled to two separate leases of the plot coloured pink as soon as he had built thereon and finished, ready for occupation, ten houses to the satisfaction of *Clements* or his surveyor, at the yearly rent of £25 for each plot coloured pink; and two separate leases of the plot of land coloured green, as soon as he had built thereon and finished, ready for occupation, eight houses to the satisfaction, &c., at the yearly rent of £20 for each plot coloured green; and a separate lease of the plot coloured yellow, as soon as he had built thereon and finished five houses to the satisfaction, &c., at the yearly rent of £10. (9) That the leases should be prepared by the solicitor of *Clements*, his heirs or assigns, and be in the form agreed upon by *Wood* and *Clements*, and signed by them on the execution of the

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agreement. (10) That the plans and elevations should be submitted to *Clements* or his surveyor for approval, and his signature or that of his surveyor should be conclusive of such approval. (11) related to fire insurance. (12) reserved to *Clements* certain rights over the road. (13) provided for *Woods'* putting up fences and gates in front of all the houses, building garden walls, &c. (14) That until all the land comprised in the agreement had been demised, *Wood*, his executors, administrators, and assigns, should, as to so much of it as should not have been included in any demise, pay the rent agreed, or so much thereof as should remain after allowing for the separate rent or rents payable under any lease or leases which should have been granted, and would observe all the covenants on the part of *Wood*, his executors, administrators, and assigns, contained in the draft lease thereinbefore referred to, so far as they were applicable to so much of the premises as should not have been separately demised and the buildings to be erected, or which should have been erected thereon, and the works and things to be done or omitted with reference thereto, and that *Clements*, his heirs and assigns, should have a power of distress for rent in arrear upon the lands not demised, as if it had been reserved by a lease. (15) provided for reference of disputes to the arbitration of the lessor's surveyor. (16) That the agreement should not operate as an actual demise. (17) gave a power of re-entry for non-payment of rent in respect of lands not actually demised, and (18) provided that the lessee should not call for the lessor's title.

The form of lease referred to in the agreement purported to be a lease by *Clements* to *Wood* of a piece of ground situate on the side of a new street, intended to be called *Belmont Road*, at *Turnham Green*, as the same was shewn in the plan thereon, and all those messuages thereon, for the agreed term, at the rent of £ , and contained covenants by the lessee that the lessee, his executors, administrators, and assigns, would forthwith, at his and their own expense, complete and finish, fit for habitation and use in every respect, the said messuages or tenements thereby demised, according to the plan, elevations, and specifications already approved by the lessor's surveyor, and would at all times during the term bear and pay a reasonable proportion, to be

assessed by the lessor's surveyor, of the expense of supporting, cleansing, and repairing *Belmont Road*, and of making, cleansing, and repairing all sewers, drains, party walls, &c., used or capable of being used in common by the lessee and the lessees of other parts of the estate. It contained no covenant as to constructing the road, or any drainage thereon.

Wood commenced building on the plot coloured yellow, and being in want of money applied to the Plaintiff, and by an indenture dated the 5th of August, 1869, *Wood* assigned to the Plaintiff, by way of mortgage, all the right, title, and interest of the mortgagor under the agreement, with full power and authority to do all necessary acts, deeds, and things for obtaining the leases thereby agreed to be granted, and for that purpose to use the name of the mortgagor in any suit or proceeding relating thereto; to hold the premises to the mortgagee for all the residue of the term mentioned in the agreement, subject to a proviso for redemption on payment by the mortgagor of such sums as should be due from him to the mortgagee, with interest, according to the covenant thereinafter contained. There followed a covenant by the mortgagor for payment of all sums which should be owing from him, with interest, and a covenant to complete the houses, with power to the mortgagee to enter if the mortgagor made default in observing any of the covenants in the mortgage.

The Plaintiff soon afterwards purchased from *Wood* and *Clements* the plot coloured yellow, with the houses which *Wood* had built upon it, and it was absolutely conveyed to the Plaintiff by indenture of 30th of April, 1870.

On the same 30th of April, 1870, an agreement was entered into between *Clements* of the first part, the Plaintiff of the second part, and *Wood* of the third part, which recited the original agreement, the mortgage and the conveyance of the yellow plot to the Plaintiff, and recited that *Clements* and *Wood*, with the concurrence of the Plaintiff, had agreed to make certain variations in the agreement, and that the Plaintiff had agreed to join therein for the purpose of testifying his assent to the variations in the agreement, but not so as to make himself responsible in respect thereof. The only stipulations which need be referred to for the purposes of this report were: (4) That the ground rent to be

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received in respect of the land coloured green on the plan annexed to the former agreement should be increased from £40 to £45, and that £25 thereof should be charged on such part thereof as was in the plan annexed to the second agreement coloured blue, on which eight houses were to be built, and no more, and the remaining £20 thereof, on the part thereon coloured green, on which ten houses were to be built, and no more; and that the lease of the land coloured blue was to be granted by *Clements* as soon as four of the eight houses thereon and two of the ten to be erected on the land coloured green in the second plan were severally covered in; and the lease of the land coloured green was to be granted as soon as five of the ten houses to be erected thereon were covered in. (9) That, except as altered by the second agreement, the former agreement should remain in force.

On the same 30th of April, 1870, *Clements* signed and gave to the Plaintiff a letter:—"Sir,—I shall be willing to extend the time mentioned in the agreement of the 21 July, 1869, from Midsummer, 1870, to Christmas, 1870."

By an agreement dated the 30th of June, 1870, between *Clements* of the first part, the Plaintiff of the second part, and *Wood* of the third part, it was agreed that moneys advanced and to be advanced by *Clements* up to a certain amount to *Wood* to enable him to complete thirteen of the houses on the green and blue plots, with interest, as thereinafter mentioned, should take precedence of the Plaintiff's security, and should be repaid by *Wood*, with interest at £7 per cent., at the time the leases were ready for execution; and that if *Wood* was not then prepared to pay the amount, and the Plaintiff should fail to pay it for two months after demand, the amount of principal and interest should be satisfied by increasing the amount of ground rent to be reserved by the leases.

Wood, in the course of 1870, became insolvent, and the Plaintiff proceeded with some of the houses. On the 19th of October, 1870, six of the houses on the green plot in the second agreement having been covered in, except the back offices or additions in the rear, the Plaintiff wrote to *Clements*, asking him to have the leases prepared. After some correspondence, *Clements*, on the 25th, wrote to say that the lease of the green plot would be granted at once when the buildings were advanced as required by the second

agreement. On the 23rd of November, Mr. *Smith*, the Plaintiff's solicitor, wrote to Mr. *Avis*, the solicitor of *Clements*, for a draft of the lease of the green plot. In reply, Mr. *Avis* sent a copy of a letter from *Clements*, inclosing one of a letter from *Clements'* surveyor to *Wood*, complaining that *Wood* was not proceeding in accordance with clauses 4, 7, and 10 of the first agreement, and declining to certify for a lease unless *Wood* adhered to the plans prepared for him, and fulfilled the clauses generally. On the 12th of December, 1870, Mr. *Smith* wrote to Mr. *Avis*, repeating his request for a draft lease of the green plot, and also asking for a draft lease of the blue plot, as the Plaintiff would be entitled to a lease of it in the course of the week. On the 20th of December Mr. *Avis* wrote to Mr. *Smith*, stating that *Clements* had been over the ground with his surveyor, and found (1) that the drainage and sewerage had not been commenced; (2) that the rain-water pipes had not been put up; (3) that three division walls had not been put up; (4) that the boundary walls were not finished; (5) that the back offices in the blue plot were not finished; all which things he alleged must be done before the leases could be granted.

After some correspondence of rather a hostile character, the draft leases were furnished on the 3rd of January, 1871. They contained covenants to complete fit for habitation the messuages thereby demised (being seven on the blue plot and six on the green) by Midsummer, 1871, according to the specification which was sent along with them; and the draft lease of the green plot contained a covenant, on or before Midsummer, 1871, to erect, complete, and finish fit for habitation four other messuages according to the specification. The specification, beside other provisions to which the Plaintiff objected, contained a provision as to laying down a twelve-inch stoneware pipe in the roadway, and completing the roadway. Mr. *Smith* settled the draft leases and specification, making the Plaintiff liable for only half the roadway, as the property demised lay wholly on one side of the road, and varying the covenant to complete the fresh houses by Midsummer, 1871, into a covenant to finish them forthwith, on the ground that it was now impossible to complete them by Midsummer, 1871, and the covenant in the signed form was to finish forthwith. On the 13th of March the drafts were returned by Mr. *Avis* with a letter, refusing

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to assent to the above alterations. Further correspondence and communications ensued, and on the 4th of April, 1871, *Clements* wrote to the Plaintiff, saying that if the leases were not taken up within fourteen days, he should proceed in ejectment, and that, referring to the clause in the original contract which required twelve houses to be fit for occupation by Midsummer, 1870, twenty-four by Midsummer, 1871, and the rest by Midsummer, 1872, he should not grant any further extension of time. The parties being unable to come to any understanding, *Clements*, on the 6th of May, 1871, commenced an action of ejectment, his solicitor writing on the same day to the solicitor of the Plaintiff, saying that, as the Plaintiff declined to accept the leases in the proposed form or to approve the specification, and as a quarter's rent was in arrear, *Clements* had instructed him to issue a writ in ejectment. The Plaintiff thereupon filed the present bill, praying that it might be declared that the Plaintiff, as assignee and nominee of *Wood*, was entitled to leases of the plots coloured green and blue in the plan annexed to the supplemental agreement of the 30th of April, 1870, together with the houses or carcases thereon, such leases to be according to the form of lease referred to in the original agreement, at the increased ground rents provided for by the agreement as to *Clements*' advances, and that such leases, and if necessary a proper specification and plan to be therein referred to, might be settled by the Court, the Plaintiff offering to execute counterparts and pay the ground rent, and that, so far as necessary for the purposes aforesaid, *Clements* and *Wood* might be decreed specifically to perform the original agreement as varied by the subsequent documents, and for all necessary inquiries, and for foreclosure against *Wood*, and for an injunction to restrain the action of ejectment.

A motion for injunction was ordered to stand over till the hearing, the Plaintiff giving judgment in the ejectment to be dealt with as the Court should direct.

At the hearing on motion for decree, Vice-Chancellor *Wickens* dismissed the bill without costs (1).

(1) 1872. May 29.

SIR JOHN WICKENS, V.C., after shortly stating the circumstances of the case, continued:—

The position, at Christmas, 1870, of *Wilkinson*, if he stood in *Wood's* place, was, that the whole of the agreement was to be performed by him, but that

Mr. *Karslake*, Q.C., and Mr. *Bagshawe*, for the Plaintiff, in support of the appeal:—

We admit that where a contract is one and indivisible, an

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he was entitled, before it was performed, to certain privileges which, at least, in the hands of an assignee for value from him of the lands actually leased, would make the title to those lands independent of any subsequent failure by him to do his part.

It was indeed argued that the spirit of the arrangement between *Clements* and *Wilkinson* was, as between them, to separate the green and blue lands (which by common consent were to be first built upon) from the rest, so that *Wilkinson* might claim the leases when part of the agreement was performed, without liability to perform the rest of it. But this view seems not maintainable.

In general, a mortgagee by assignment, or any other assignee of a complete agreement of this sort, could enforce no term against the lessor without undertaking to do what the assignor had bound himself to do, and nothing short of an express agreement could relieve him from this. A mere reference by the lessor to the advantages which the assignee might obtain, without mention of the liabilities which he would incur by stepping into the assignee's place, seems wholly insufficient for the purpose; and this is the utmost of what is to be found here.

No doubt *Wood*, if he had completed the nine houses on green and blue, might have got leases of those lands, which he could have sold or mortgaged to *Wilkinson*, and which would have imposed on *Wilkinson* no liability beyond what was actually to be done upon the lands leased—for example, no liability to make the road or to build on pink—and *Clements* must have relied on *Wood* for the completion of this latter part of his contract; but this was not the course which things took.

The only title of *Wilkinson* was under the assignment by *Wood* of the whole of the contract, and *Wood* was treated by both parties as having dropped out of sight in August or September, 1870, leaving *Wilkinson* in his place.

The mode in which the pink land is dealt with in the subsequent correspondence is an illustration of this. It would seem to follow, as already mentioned, that *Wilkinson* could not claim the blue and green leases except on condition of assuming all *Wood's* liabilities under the agreement. How this should have been done in point of form might have been doubtful.

Clements was entitled, before granting the blue and green leases, to some express recognition by *Wilkinson* of an equitable liability which *Wilkinson* would come under by claiming it. He was not entitled to have any stipulations inserted in the leases, except those affecting the lands leased, since the express object of the contract for anticipated leases was to separate the leased lands from the rest; or even, perhaps, to a covenant by *Wilkinson*, since the original agreement was not under seal. No wonder that when *Wilkinson* claimed the leases of blue and green, and an attempt was made to provide for the rights of the parties by stipulations in them, difficulties arose which proved insoluble. In their contentions as to these, both parties seem to me to have misunderstood their positions. Who was right and who

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assignee who stands in the place of the contracting party cannot obtain specific performance of part; but if the parties have made the contract divisible, the assignee may divide it. In the present

was wrong upon this special point, is not now of importance. I think it, however, clear that, by the discussion as to the leases and what took place during it, *Clements* waived any right to insist on the exact times of completion which were mentioned in the contract. And having waived one, viz., that which required six houses to be completed and fit for occupation at Christmas, 1870, he was not entitled, I think, to announce on the 31st of March, 1871, when it was too late to complete eighteen houses by Midsummer, that he would insist on this being done. Time may be *primâ facie* of the essence of a contract like this, and a waiver of it as regards one date might not in all cases waive it generally; but here, where *Clements* had held out that the leases should be granted, and encouraged *Wilkinson* to go on after he knew that the required six houses would not and could not be completed at Christmas, he could not fairly give such short notice that he should stand on his strict rights as to the second term.

Therefore, when the bill was filed the rights of the parties were these: *Wilkinson*, supposing the evidence to shew that nine houses had been covered in, was entitled to leases of green and blue containing no stipulations except those as to what remained to be done on these particular lands; but, as a condition of getting them, he was bound to assume *Wood's* liability for the performance of the rest of the agreement, including the making of the road and the building on pink, and *Clements* could not refuse the leases on the ground that six houses had not been completed fit for occupation at Christmas, 1870, or that it was impossible to complete eighteen houses fit for occupation by Midsummer, 1871, although he was entitled to a guarantee by *Wilkinson* for the completion, not only of the eighteen houses on blue and green, but of the twenty to be built upon the pink, and of the road, within a reasonable time.

Under these circumstances *Clements* brought ejectment to determine the agreement altogether; the pretext was that there was rent unpaid; but I am convinced that this was not the ground on which the ejectment was really brought.

On the case stated above the Plaintiff would seem to have fair ground of complaint, and this Court would desire to aid him if possible; but relief in equity could only be given on his assuming *Wood's* liabilities—amongst others, that of building on pink according to plans to be submitted to and approved of by the surveyor of *Clements*—and this Court could not enforce specific performance in his favour unless it could see a mode of enforcing this liability.

This seems to be clear on principle, and also conformable to *Gervais* v. *Edwards* (2 D. & War. 80) and *Ogden* v. *Fossick* (4 D. F. & J. 426), both cases of the highest authority, and the latter of peculiar importance, because it was decided after *Lumley* v. *Wagner*, which might have been thought, notwithstanding the express disclaimer of Lord *St. Leonards*, to qualify what was laid down by the same learned Judge in *Gervais* v. *Edwards*. Now, according to *Brace* v. *Wehnert* (25 Beav. 348;

(4 D & J. 549.

case *Wood* could have insisted on separate leases of the blue and green plots before he had performed the rest of the contract, and so can the Plaintiff. The Vice-Chancellor was in our favour on the question of fact, whether the houses were covered in within the meaning of the contract. If the Vice-Chancellor is right in his view of the law, the whole system of contracts for building leases will be upset. *Oxford* v. *Provand* (1) is in our favour, and *Ogden* v. *Fossick* (2) is inapplicable, for there the contract was not made separable.

Mr. *Greene*, Q.C., and Mr. *Graham Hastings*, for the Respondent *Clements*:—

We do not rely on *Ogden* v. *Fossick*, which we admit to be distinguishable, but we do rely on *Gervais* v. *Edwards* (3), which is, we submit, precisely in point. The agreement was one complete thing, and the Court will not enforce any part of it in favour of the Plaintiff when it cannot force him to perform his part: *Stocker* v. *Wedderburn* (4); and specific performance of an agreement to build cannot be decreed: *Brace* v. *Wehnert* (5). It is true that in some cases the Court will oblige a party to enter into a covenant to do certain acts, though it could not decree him to do the acts; but that doctrine does not apply where the party seeking relief is repudiating part of the agreement. There is no authority in support of the proposition that an assignee of a contract can get any relief here if he repudiates part of the contract. The evidence shews that the rain-spouts were not set up in time,

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a liability such as that of building on the pink plot (I say nothing of the road and sewers) is unenforceable in equity. It does not appear that anything which took place can be considered as an implied approval by *Clements* or his surveyor of the plans for those buildings.

It follows that the Court can only give relief to *Wilkinson* on conditions of which it cannot compel the performance by him, which is tantamount to saying that it can give him no relief at all. The result is, that the bill must be dismissed as against *Clements*, but necessarily without costs. If the Plaintiff has a right to relief elsewhere, he will be at liberty to pursue it. I determine nothing for or against his right in this respect. As against *Wood*, the Plaintiff is entitled to the ordinary foreclosure decree if he thinks it worth while to take it.

(1) Law Rep. 2 P. C. 135.
(2) 4 D. F. & J. 426.
(3) 2 D. & War. 80.
(4) 3 K. & J. 393.
(5) 25 Beav. 348.

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and that houses are not considered "covered in" until the spouting is complete.

SIR W. M. JAMES, L.J.:—

This is an appeal from a decree of the Vice-Chancellor *Wickens* dismissing the Plaintiff's bill without costs. The judgment of the Vice-Chancellor proceeded upon one ground, an important ground, as applicable to this particular kind of contract. But, independently of that ground, other defences were taken by the evidence, there being no pleadings except the bill. I think it proper to deal first with a defence, which, if true, would have been a complete defence to the bill, namely, that the buildings were not covered in by the time and in the manner which were required by the agreement before the lease of this particular part of the property should be granted. The only evidence in support of this defence is that there were not water-pipes put up, and evidence is given by several surveyors that water-pipes ought to be put up before a house can be said to be, strictly speaking, "covered in." What that amounts to, whether it is anything more than the mere trivial expense of pence or shillings, is not stated. It is, however, reasonably clear that a water-pipe to a cottage costing £200 must be a matter causing only a trifling expenditure, much too trivial, I think, to afford a ground for saying that a builder who had omitted it had not completed his contract for the present purpose. It might almost as well be said that if a slate had been blown off the houses were not covered in. On the other hand, a great number of witnesses say that the houses were covered in "according to the plans." They do not, indeed, apply themselves directly to the question of the water-pipes; but they have not been cross-examined. It is, moreover, quite clear, from the specification sent in on the 3rd of January by the Defendant's surveyor to the Plaintiff, that the houses were then treated as covered in, although no water-pipes were then fixed, and that the surveyor, who is the best witness as to what was understood between themselves as to covering in, does not in any way say that the buildings were not covered in at that date. I think, therefore, there is no weight in this objection.

It is then said that it would be utterly impossible to perform

this agreement, because it provided that the buildings were to be according to the plans and specifications that were to be submitted to the surveyor and approved of by him, and that such plans and specifications were not submitted and approved. The surveyor says that a plan was submitted to him by *Wood*, upon which improved plans were subsequently prepared by him and copies furnished to *Wood*, and that the houses which have been in part erected are in accordance with such plans. If there was any default on the part of the Plaintiff or *Wood* as to sending in plans and specifications, it was committed at the very beginning, and not only did the Defendant allow the building to go on, but he superintended it, and was party to an arrangement by which the benefit of the agreement was assigned to the Plaintiff by way of security; and, by a tripartite arrangement between *Wood*, the Plaintiff, and *Clements*, the Defendant, *Clements* himself advanced money and took a security, for which he obtains precedence over the Plaintiff's security upon these very houses, which, of course, therefore, must be understood to have been built to his satisfaction. The only object of the stipulation that plans and specifications are to be sent is, that the ground landlord may have sufficient control over the nature of the buildings, and as he has practically approved what has been done, I am of opinion that he has entirely waived the stipulations as to plans and specifications.

The question then resolves itself into this, Is the decision of the Vice-Chancellor correct that the Plaintiff, being assignee of the whole of the contract, is unable to obtain specific performance in this Court without putting himself under an obligation to perform the whole of what the agreement bound *Wood* to perform? I am of opinion that there is no authority, and I am unable to find any principle, for imposing that term as a condition precedent upon a person in the Plaintiff's position in respect of a contract of this kind. The contract is made in its terms a divisible contract. It is made separable with respect to the leases, and it is so made, as it appears to me, for the very purpose of avoiding the application of any such rule. In truth, if that rule were held to apply in this case, all contracts of this nature would come to an end—a landlord could not enter into a building agreement of this kind with any chance of its being carried into effect. It is well known

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that a builder is seldom a person with money enough to complete the whole of the buildings which, by a contract of this sort, he undertakes to erect; in order, therefore, to enable him to raise funds for the purpose, the contract is made divisible, and provides that as soon as he has built to a certain extent on certain portions of the land, he shall have separate leases of them, which he can take into the market for the purpose of raising money to enable him to complete the rest of the contract; that as soon as he has built upon other portions he shall have a lease of them; and that when he has completed the whole he shall have leases of the remaining part, all distinct and separate leases, the lessees in which would be under no obligation whatever to perform the obligations of the others. Then it appears to me if *Wood* had come here and said, "I have completely covered in the buildings on the green and blue plots according to the terms of the contract, and I am now entitled to have leases granted to me of those plots," it would have been no answer to him to say, "We do not know whether you will ever perform the rest; we cannot grant specific performance of this, as we are unable to grant specific performance against you of that part which remains unperformed." This would be entirely inconsistent with the true meaning of the parties, which was that he was to have leases of those plots as soon as he had covered in the houses on them, whether anything could or could not be done as to the other parts. If such would have been *Wood's* position, is the Plaintiff in any worse position? I am of opinion that as soon as *Wood* was entitled to a lease of a particular plot he could have assigned that right to the Plaintiff, and he might have made a separate assignment to somebody else of his right to a lease of a second part and have retained the third part to himself. If he had done that, it would, as it seems to me, have been impossible to say that specific performance is not to be granted to the assignee of part, because he does not take upon himself to perform the whole residue of the original agreement. It appears to me that if *Wood* had performed the conditions as to these plots, he would have been in a position to ask for specific performance as to them, and could have been put on no new terms or conditions whatever with respect to the residue; and if the Plaintiff had filed this bill in the name of *Wood*, which, it appears to me, he might very well have

done under the power of attorney given to him in his mortgage deed, asking the landlord to grant a lease to *Wilkinson* as the nominee of *Wood*, it would be no answer to say, "You, *Wood*, have entered into an agreement with *Wilkinson*, by which he may be entitled to the whole agreement; and I will not do anything until *Wilkinson* has put himself in some way in your place." That would have been no answer, any more than it would have been an answer to an action at law in the name of *Wood* for breach of the undertaking of the landlord to grant a lease. It cannot make the slightest difference what the form of agreement was between *Wood* and *Wilkinson*, that being a matter with which *Clements* really had nothing whatever to do. *Wood* and *Wilkinson*, the day before the bill was filed, might have altered the whole arrangement as to the mortgage, and confined it to this specific portion. If so, the landlord could not have said, "No doubt at present you are only assignee of part, but there was a time at which you were assignee of the whole; and if you had been assignee of the whole, and had sued as such, I could have insisted upon your entering into some undertaking or agreement to perform the covenants; and because that once existed, I say you have no right to go to your mortgagor and try to put yourself in the position of assignee of part." It appears to me that this would have been perfectly idle. No injury is done to the ground landlord by treating the contract as separable; he has got a particular portion of his property covered with houses, finished to a certain extent, and he will have a lessee of those houses, who, having laid out money already to a considerable amount upon them, will, for his own sake, be anxious to complete them, and make them fit for habitation, and will be bound to pay him the ground rent. With regard to the remaining ground, he still retains exactly the same right he had under the agreement, that is to say, he has got the right against *Wood* which he always had; and I cannot find any obligation or condition implied in this contract, that if the intended lessee shall assign to anybody, that assignee shall enter into a distinct and separate agreement and covenant on his part to perform the whole agreement. *Wood* remains liable to perform it as to the rest of the property; if he does not perform it, the landlord gets the property, and in this case he has got possession, which he will retain because *Wilkinson* does

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not seek to interfere with it. That being so, I differ from the Vice-Chancellor in the ground of his decision, and I hold that the Plaintiff was entitled to specific performance of the agreement, so far as it relates to the distinct leases of these two particular portions of ground upon which he has built the houses, and that he was not required, in order to entitle him to that, to enter into any agreement or obligation or undertaking of any kind to take upon himself the liability of *Wood* with respect to the remaining part of the property. It appears to me that the cases which have been cited, and which are to this effect, that if the thing must be performed at all, it must be performed *in toto* by this Court, can have no application to an agreement like this, which in its very terms, and from its very nature, contemplated successive performances of successive parts independently of one another.

I am of opinion that the Plaintiff is entitled to a decree for specific performance, with a declaration that the clause as to plans and specifications has been waived. Refer it to Chambers to settle a lease, and the Plaintiff must have his costs of suit.

SIR G. MELLISH, L.J.:—

I am of the same opinion, and wish only to add a few words as to the important question upon which the Vice-Chancellor has decided this case. I quite agree that as a general rule all agreements must be considered as entire. Generally speaking, the consideration for the performance of the whole and each part of an agreement by one party to it is the performance of the whole of it by the other, and if the Court is not in a position to compel the Plaintiff, who comes for specific performance, to perform the whole of it on his part, the Court will not compel the Defendant to perform his part or any part of the agreement. As a general rule, therefore, an agreement is entire. I can also conceive that a Court of Equity might treat an agreement as entire even in cases where a Court of Law would say that the performance of one part is not a condition precedent to the performance of the other part, because the Court might see that those rules as to conditions precedent, which to a certain extent are technical, might not meet the real justice of the case. But, on the other hand, I do not find it laid down anywhere that it is impossible for the parties so to frame an

agreement that there may be a specific performance of part. For instance, if they had said in terms, "This agreement is to be construed as if it were three separate agreements for the several portions," nobody, I suppose, would doubt that the Court would treat it as if there were three separate agreements, and would not say, "If you meant them to be separate agreements you ought not to have put them on the same piece of paper, but on three separate pieces." That being so, it is really a question of construction whether practically that is not what the parties have done, and the Court ought to carry out the agreement according to what it sees is really the intention and object of the parties in making it.

Looking at this agreement, it is in a form not at all unusual in agreements for a large amount of building between a ground landlord and a builder, and it appears to me that the agreement that separate leases should be granted, not at the same time, but at different times, with a considerable interval between the time when the lease of one plot is to be given and the time when the lease of another plot is to be given, evidently shews the parties to have contemplated that the houses were to be built in succession, and that those on the pink plot were to be built last. That is done that the builder may have an opportunity of raising money by selling or mortgaging a part before he has completed his agreement for the whole. That is obviously for the benefit of both parties, because it is a plan which makes it most probable that the builder who makes the agreement with the ground landlord will be enabled to fulfil the whole of his agreement. If he does not fulfil the whole of it, at any rate he will fulfil a part of it, and the ground landlord will obtain what he desires to obtain, namely, leases, with houses built upon his land so as to secure to him the ground rent. When such an agreement has been made, and a person who is willing to advance money to the builder for the purpose of performing it, having seen the agreement and seen the object of it, is willing to assist him by lending him money for building houses on some part, it appears to me that it would be most unjust if, after he had advanced his money upon the footing that there was to be a separate lease granted when a certain number of the houses were built, his object were to be defeated, and the landlord to be held entitled to say, "I shall not grant you a

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lease of that part unless you will undertake to build the whole." I confess I do not see how, if he did give that undertaking, he could even then be entitled to the specific performance of part, because the rule, when an agreement is really entire, is, that the Court will not perform a part unless it can compel the actual performance of the whole. Now it is settled that, as a general rule, the Court will not compel the building of houses. Therefore, if this were to be treated as being an entire agreement, it seems to me that no specific performance could be granted at all until the whole of the houses had been built. That appears to me entirely contrary to the agreement of the parties, for their intention appears to me clearly to have been that the landlord should be compelled, as between him and *Wood*, to grant a lease of a part when a sufficient number of houses were covered in upon that part; and that being the agreement with *Wood*, why should *Wood* not be able, according to the ordinary rule of law, to assign, either by way of sale or mortgage, that part to which he was so entitled, for the purpose of raising money? It appears to me that he must be so entitled. How can it make any difference that in fact he mortgaged the whole of the agreement to the Plaintiff instead of mortgaging a part? I cannot see that it makes any difference. The cases decide that where an agreement is entire the Court cannot grant any specific performance unless it is in a position to grant specific performance of the whole, but I do not find any case which says that an agreement cannot be so worded that a party may have specific performance of a particular part of it, although he has not performed, and possibly never will perform, the rest of it; nor do I find any case which says that an assignee may not be in the same position. I therefore cannot agree with the judgment of the Vice-Chancellor, and I think we should do great harm to all parties interested in such agreements, and especially to ground landlords, if we held that this agreement could not be carried out according to what appears to me to be the true meaning of the parties.

Solicitors: Mr. *F. R. Smith*; Mr. *H. Avis*.

In re ASHMEAD'S TRUSTS.

L. JJ.
1872
Dec. 16.

Re-transfer of Stock transferred to National Debt Commissioners—Accumulations —Legal Holder—National Debt Act, 1870 (33 & 34 *Vict. c.* 71, *ss.* 54, 55.

Stock standing in the name of a deceased trustee having been transferred to the Commissioners for the Reduction of the National Debt, a person claiming to be the legal personal representative of the beneficial owner petitioned for a re-transfer:—

Held (reversing the decision of *Malins*, V.C.), that an inquiry, who was entitled, could not be directed in the absence of the personal representative of the trustee:

Held, also, that a claimant who establishes his claim has no title to any accumulations arising from the investment of the dividends, his right being to have the stock re-transferred and the amount of unpaid dividends paid to him in cash, without interest.

THIS was an appeal by the Attorney-General and the Commissioners for the Reduction of the National Debt from an order of Vice-Chancellor *Malins*.

Charles Ashmead, by his will, dated the 5th of December, 1840, bequeathed a leasehold house to the Petitioner, *William Ashmead*, and *G. B. Ashmead*, upon trust to sell and invest the proceeds in the Government funds, and during the life of his daughter *Eliza Maria* to pay the dividends to her for her separate use; and after her decease, then, subject to any life interest which she might give to any husband surviving her, under a power given her for that purpose, the testator directed the trust funds to be held in trust for all the children of his daughter who should attain twenty-one, and in default of such children, in trust for his sons, *Charles B. Ashmead* and *W. J. Ashmead*, their executors, administrators, and assigns, to be divided between them; or if one of them should be dead at the decease of his daughter and failure of her issue, then to the survivor. And the testator gave the residue of his personal estate and effects to the Petitioner and *G. B. Ashmead* upon trust as therein mentioned, and appointed them executors of his will.

By a codicil dated the 4th of April, 1844, the testator revoked the appointment of the Petitioner as one of the trustees and executors of his will, and appointed his son-in-law, *F. Preston*, to be a trustee and executor in the place of the Petitioner.

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The testator died on the 15th of April, 1844, and his will was proved by both his executors, who sold the leasehold house and invested the proceeds in the purchase of £2313 14*s.* 9*d.* £3 per Cent. Annuities.

The testator's daughter married *F. Preston* in July, 1841, and by her will, dated the 8th of October, 1845, she gave her husband a life interest in the fund, and appointed him her sole executor.

In 1849 *F. Preston* and his wife went to *Australia*. The wife died in July, 1853, without leaving issue.

George B. Ashmead died in September, 1859, leaving *F. Preston*, his co-trustee, surviving. *F. Preston* married again in August, 1861, and by his will, dated in 1860, he appointed his wife his executrix. In 1861 *F. Preston* sold out £500 from the settled fund for his own use, which reduced the amount of stock to £1813 14*s.* 9*d.* *F. Preston* died in January, 1863, at *Adelaide*, and his will was proved by his widow in *Australia* in March, 1872; but no representation had been taken out to him here.

The testator's sons, *Charles B. Ashmead* and *W. J. Ashmead*, had died intestate, and letters of administration had been granted in both cases to the Petitioner.

No dividends had been received upon the £1813 14*s.* 9*d.* annuities since the year 1861, and the stock had been transferred to the National Debt Commissioners in accordance with the 51st section of the *National Debt Act*, 1870.

The Petition prayed that the *Bank of England* might be ordered to transfer such stock into the Petitioner's name, and also to transfer all investments arising from the dividends which had accrued thereon since the transfer to the Commissioners, and the accumulations thereof, and to pay over to him any uninvested dividends, and that, if necessary, such inquiries as to the persons entitled to the said sum of bank annuities might be made, and directions, given as to the Court should seem right.

Vice-Chancellor *Malins* (1) directed an inquiry who was or were

(1) 1872. July 17. W.N.(1872) 177
SIR R. MALINS, V.C.:—

This Petition is presented by the person who, if the statements in the Petition turn out to be true, is absolutely entitled to the stock. Therefore, if no objection had been made, and I had every one here legally and actually entitled, it would be my duty now at once to make an order to transfer the stock

entitled to the £1813 14*s.* 9*d.* Bank £3 per Cent. Annuities standing in the names of *G. B. Ashmead* and *F. Preston*, and afterwards transferred to the Commissioners for the Reduction of the National

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received by the Commissioners for the Reduction of the National Debt to the Petitioner. But the legal personal representative of the surviving trustee, *Frederick Preston*, is not present, and the National Debt Commissioners have urged before me that I ought not on that account to make a reference to Chambers to inquire who is entitled to the stock. In my opinion that is no reason whatever for not directing the inquiry, because the legal personal representative may be constituted during the inquiry, and I may have it answered that the person legally entitled is the legal personal representative of the surviving trustee, and that the Petitioner is the legal personal representative of the two beneficiaries, and is beneficially entitled to the stock. If I were to accede to Mr. *Hemming's* argument there would be a delay of a year in order to get the presence of the legal personal representative, and then at the end of the year I should be applied to, to direct the inquiry, which I think might just as well be directed now. I therefore have, on the one hand, the great advantage of preventing delay, and I have on the other hand the advantage that it is impossible that the inquiry can do any mischief to anybody, because the inquiry will be attended both by the Attorney-General and by the Commissioners for the Reduction of the National Debt. I shall then have the persons before me, and I shall be able to make an immediate order if necessary for the transfer, instead of allowing the delay which would take place if I adopted the course suggested.

Mr. *Hemming* has said that such an order is never made except in the presence of the legal personal representative of the owner of the stock. That is not according to my recollection or experience, and it will not, in my opinion, make the least difference. I do not think it is the principle of the Court that it will not make the order except in the presence of the legal owner or in the presence of the legal personal representative of the owner. If this had been an application for a vesting order, that is, if the stock had not been transferred to the Commissioners for the Reduction of the National Debt, I should have been able, upon these materials, to make an order vesting the stock in the person entitled. If the result of the inquiry shews, and if it should turn out that this Petitioner is absolutely entitled to the stock, and that the only difficulty in the way is the absence of the legal personal representative, I shall then, under the *Trustee Relief Act*, be able to declare that there is a trust, and to make a vesting order, and in that way the Attorney-General will be relieved, and the Commissioners will be relieved, of all difficulty. I think this is a clear case for a reference to Chambers. I shall use the old form, except that I shall avail myself of the additional language of the new statute of 1870, which includes the dividends and stocks arising from the investment of the money—because that is what the National Debt Commissioners are directed to hold for the public subject to the claim of the owners. The inquiry will therefore be, who is or are entitled to the £1813 14*s.* 9*d.* Bank 3 per Cent. Annuities standing in the names of *G. B. Ashmead* and *F. Preston*, and afterwards transferred to the Commissioners

L. JJ. 1872 *In re* ASHMEAD'S TRUSTS.

Debt, and to the dividends which had accrued due thereon since July, 1861, or should accrue due thereon, and to the stock arising from the investment thereof.

The Commissioners appealed.

The *Solicitor-General* (Sir *G. Jessel*), and Mr. *Hemming*, in support of the appeal:—

The order cannot be made in the absence of the legal personal representative of the person in whose name the fund was standing. A claimaint is first to apply to the bank, and the bank, if satisfied as to his title, may re-transfer to him; if the bank is not satisfied, he is put to his Petition. Now no one but a legal owner could apply to the bank for a re-transfer. The Vice-Chancellor appears to have misapprehended *Ex parte Ram* (1). That case decided that the *cestui que trust* must be before the Court, not that the legal holder need not. Then the order is wrong in dealing with the accumulations: 56 Geo. 3, c. 60; 33 & 34 Vict. c. 71, ss. 54, 55. There is no difference (beyond mere verbal improvements or supposed improvements) between the two statutes. The Act of 1870 is on this subject only a consolidation Act.

Mr. *Bristowe*, Q.C., and Mr. *Wintle*, for the Respondent:—

The old Act only ordered payment of the dividends, but the recent Act deals also with the accumulations. *Edgar* v. *Reynolds* (2) supports the claim. Then, as to the necessity of having the legal personal representative here, the case is like that of a sole trustee out of the jurisdiction, in whose absence a vesting order could be made. The inquiry ought to go on, for the stock cannot be received until a legal personal representative is constituted, so no harm can be done.

[The *Solicitor-General*:—There is no one to check the inquiries.]

The bank can do so. The observations of Lord *Cottenham* in *Ex parte Ram* are strong in our favour. In *Ex parte Gillett* (3)

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for the Reduction of the National Debt, and to the dividends which have accrued due thereon since July, 1861, or shall accrue due thereon, and to the stock arising from the investment thereof.

(1) 3 My. & Cr. 25.

(2) 4 Drew. 269.

(3) 3 Madd. 28

an inquiry was directed to ascertain in effect whether one of the Petitioners was the legal owner, and this in the absence of another person alleged to be the legal owner in trust for the other Petitioner.

SIR W. M. JAMES, L.J. :—

The first objection made by the Appellants to this order is, that it ought not to have been made in the absence of the legal owner of the fund. I am of opinion that this objection is well-founded, and that no inquiry ought to have been directed in the absence of the legal owner, he being the person whose duty it is to watch the inquiry as to who are beneficially interested. The case *Ex parte Ram* (1) only decides that the fund will not be paid to the legal owner in the absence of the persons beneficially interested. As to the accumulations, with all respect to the Vice-Chancellor, I am unable to see any ground for holding that the person who establishes his title has a right to anything more than a re-transfer of the stock, and payment of the unpaid dividends. I see nothing in the Act of 1870 to give him any right to the stock in which the dividends have been invested. Such a right would be an entirely new right—a title in a creditor to investments made by a debtor with the money remaining in his hands. This would give him the profits of the investments, if good, without his being liable to loss if they turned out unprofitable. The order of the Vice-Chancellor must be discharged with liberty to amend the Petition, and bring the personal representative of the deceased trustee before the Court.

SIR G. MELLISH, L.J. :—

I am of the same opinion. I think that sect. 54, if standing alone, would not be sufficient to give the owner of the stock a right to the accumulations. But if there be any doubt upon that section, it is removed by sect. 55, which says plainly that he is to get back the stock and the dividends upon it, and this is not consistent with a title to the accumulations.

Solicitors: Messrs. *Raven & Bradley;* Messrs. *Edwards, Layton, & Jaques.*

(1) 3 My. & Cr. 25.

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TORRANCE *v.* BOLTON.

[1870 T. 68.]

Vendor and Purchaser—Sale by Auction—Misleading Particulars of Sale—Conditions of Sale read but not printed.

Certain property was put up for sale by auction, and in the particulars which were advertised was described as an immediate absolute reversion of a freehold estate falling into possession on the death of a lady in her 70th year. By the conditions of sale, which were read in the auction-room just previously to the sale, but were not printed or circulated among those present, the property was stated to be subject to three mortgages. The property was bought by the Plaintiff, who stated that he was deaf and did not understand that he was buying an equity of redemption:—

Held, on a bill filed by the Plaintiff to have the contract for sale rescinded, that the description of the property in the particulars of sale was misleading, that the *onus* was therefore on the vendor to shew that the purchaser was not actually misled, and that as he had failed to do so the Plaintiff was entitled to have the contract rescinded and his deposit returned.

The decision of *Malins*, V.C., affirmed.

There is no general rule that actual fraud is necessary to induce a Court of Equity to rescind a contract for sale. The Court acts on the same principle in rescinding contracts for sale as in setting aside other contracts and dealings which it considers unconscientious.

THIS was an appeal from a decision of Vice-Chancellor *Malins* (1).

The bill was filed by Dr. *Torrance*, living at *Rugby*, to be relieved from a contract to purchase some land from the Defendant under the following circumstances.

On the 8th of January, 1870, the Defendant's solicitor inserted in the *Rugby Advertiser* the following advertisement:—

"*Clifton-on-Dunsmore, Warwickshire.*

"Preliminary Announcement.

"Mr. *W. Cropper* will offer for sale by auction on an early day the absolute reversion to all that valuable freehold estate situated as above, and containing 75A. 2R. 19P., or thereabouts, now in the possession of Mr. *W. Bull.* The reversion falls into possession on the death of a lady now in her seventieth year. For further particulars apply to Mr. *Edmund Harris*, solicitor, or to the auctioneer, *Rugby*."

(1) Law Rep. 14 Eq. 124.

Soon afterwards fresh advertisements were issued in the following terms:—

"*Clifton-on-Dunsmore, Warwickshire.*

"Valuable Freehold Estate.

"Mr. *William Cropper* begs to announce that he is instructed to offer for sale by auction (unless the same is previously disposed of by private contract, of which due notice shall be given,) on Tuesday, the 8th of February, 1870, at the *Laurence Sheriff Arms Hotel, Rugby,* at 4 o'clock in the afternoon, and subject to the conditions of sale to be then read, all that the immediate reversion in fee simple of and in all the valuable farm and lands, containing 75A. 2R. 19P., with suitable farmhouse and buildings thereon, situate and being at *Clifton-on-Dunsmore* aforesaid, as the same is now in the occupation of Mr. *William Bull* as tenant from year to year.

"The reversion falls into possession on the death of a lady now in her 70th year.

"For further particulars, and to treat for the purchase, apply to Mr. *Edmund Harris,* Solicitor, *Rugby.*

"Dated 14th January, 1870."

The Plaintiff read these advertisements, and in consequence applied to Mr. *Hefford,* a clerk of Mr. *Harris,* the Defendant's solicitor, and asked him for information as to the property. It was asserted by *Hefford,* but denied by the Plaintiff, that *Hefford* informed him of the fact that the property was mortgaged to the extent of £2499. There was also a conflict in the evidence as to the real value of the property, and as to the estimate of the value given by *Hefford* to the Plaintiff.

No further particulars of the property were published, and no conditions of sale were issued. The auction was held on the 8th of February, 1870, and the Plaintiff attended the auction. Before the property was put up, the auctioneer's clerk read aloud the particulars and conditions of sale from a manuscript, but no copy of the document was handed to the persons who attended the sale.

The particulars as stated in the document were as follows:—

"All that the immediate absolute reversion in fee simple of and in all the valuable farm and lands, containing 75A. 2R. 19P., with suitable farmhouse and buildings thereon, situate and being at

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Clifton-on-Dunsmore aforesaid, as the same is now in the occupation of Mr. *W. Bull*, as tenant from year to year, falling into possession on the death of a lady now in her seventieth year."

The first condition of sale reserved the right to the vendor or his agent to bid once for the property.

The fourth condition was as follows:—

"The estate, the absolute reversion to which is the subject of the present sale, is subject to two several mortgages, created by the vendor's predecessors in title: one for securing the principal sum of £1500, and interest at the rate of £4 15*s.* per centum per annum, and the other for securing the principal sum of £499 and interest at the rate of £4 10*s.* per centum; and the vendor has by an indenture bearing the date of 13th June, 1869, charged the reversionary estate with a sum of £500, and interest at the rate of £5 per cent. per annum. The purchaser shall take a conveyance subject to the three said several mortgages, and shall pay interest to the mortgagees on the said principal sum of £500, from the 25th March next, all interest on the said sum up to that day being paid by the vendor. The interest on the said respective sums of £1500 and £499 is paid by the person entitled to the rents and profits of the said estate for life. The sale is also made subject to any claims made for succession or other duty which may arise on the death of the tenant for life."

The Plaintiff, who was in his seventy-third year, and very deaf, was, as he alleged in the bill, unable to hear the conditions distinctly, but believing them to be merely of a formal character, he bid at the sale, and the property was knocked down to him at £2500. The Plaintiff made the first bid, which was £2000, and he stated that he did not observe any one else besides himself bidding, but the auctioneer from time to time called out an advanced price, whereupon the Plaintiff continued his bidding.

The deposit was not, however, in fact, paid till the next day, when the Plaintiff's solicitor called at the office of the Defendant's solicitor, and gave him a cheque for £250. Before paying the money he was shewn a copy of the conditions of sale, and at once stated that he believed the Plaintiff did not know that he was buying subject to incumbrances.

On the 10th of February, the Plaintiff's solicitor was furnished with a copy of the conditions of sale, and the Plaintiff then, as he alleged, first became aware of the effect of the 4th condition.

On the 26th of February, the Plaintiff's solicitor wrote to the Defendant's solicitor the following letter:—

"Dear Sir,—I have had a very long interview with Dr. *Torrance*, who is anxious to be released from his contract, in consequence of the misapprehension he was under both previous to and at the sale, as to any incumbrances being on the property which the purchaser would be liable to pay. Previous to the sale Dr. *Torrance* had read only the particulars of sale, which described the property sold as an absolute reversion, whereas it turns out that it is only an equity of redemption of and in such reversion. Dr. *Torrance* had not read the conditions of sale; being very deaf he did not hear them read at the sale, and knew nothing of the mortgages mentioned in the fourth condition, but being misled by the description of the property in the particulars of sale, he supposed he was purchasing the absolute reversion therein mentioned, and bid accordingly for it, and not for a mere equity of redemption, subject to mortgages which would double his purchase-money. He was also induced to bid up to the amount he did, in consequence of a conversation he had with Mr. *Hefford* previous to the sale, when he informed Dr. *Torrance* that your reserve was £3000. Under these circumstances, Dr. *Torrance* is desirous of having the contract rescinded and his deposit returned, and is willing in such case to pay all the expenses of and incident to the sale."

The Defendant declined the offer contained in this letter, and commenced an action against the Plaintiff on his contract, which however he afterwards withdrew; and after some further correspondence the Plaintiff filed the present bill on the 30th of May, 1870, praying that the contract of the 8th of February, 1870, might be declared to be rescinded, and might be delivered up to be cancelled, and that the Plaintiff might be declared to have a lien upon the Defendant's interest in the property comprised in the sale for the amount of the deposit and the costs of the suit.

The Vice-Chancellor declared the Plaintiff entitled to the relief prayed, and from this decision the Defendant appealed.

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Mr. *Pearson*, Q.C., and Mr. *Nugent*, for the Appellant:—

The onus is on the Plaintiff to prove that he made the contract under a mistake, which he has failed to do. The Defendant's witness swears that he told the Plaintiff that the property was subject to mortgages. The Plaintiff cannot complain if he did not understand the conditions of sale. He knew that they were being read, and it was his duty to listen to them, and if necessary, to have them explained. The evidence shews that it is the custom in that part of the country for conditions of sale to be so read without being printed, and that custom is recognised in *Lee* v. *Dawson* (1). It is said that the mortgages ought to have been mentioned in the particulars of the property, but it is very usual to mention incumbrances, such as rights of way or the reservation of minerals, in the conditions of sale only. And even if the Plaintiff had clearly proved that he was under a mistake, the Court would not on that ground rescind the contract. For that purpose it is necessary that there should be fraud: *Onions* v. *Cohen* (2), *Sugden's* Vendors and Purchasers (3). The case relied on by the Vice-Chancellor in his judgment, *Stanton* v. *Tattersall* (4), was not a simple case of mistake. There was an actual misdescription of the property sold. It was stated to be a house in *Pall Mall*, whereas it was not in *Pall Mall* at all; the purchaser therefore did not get what he bargained for. The price in the present case is not preposterous, and the allegation that the vendor ran up the price by bidding more than once, is no ground for setting aside the contract: *Dimmock* v. *Hallett* (5). At any rate the Plaintiff delayed too long before filing his bill. He ought to have repudiated the contract at once.

Mr. *Kay*, Q.C., and Mr. *Rigby*, for the Plaintiff, were not called on.

SIR W. M. JAMES, L.J.:—

Since the close of the arguments by the Appellant's counsel we have had an opportunity of considering this case, and we do not

(1) 4 L. T. (N.S.) 464.
(2) 2 H. & M. 354.
(3) 14 Ed. p. 244.
(4) 1 Sm. & Giff. 529.
(5) Law Rep. 2 Ch. 21.

think it necessary to call upon Mr. *Kay* to say anything to us. Being of opinion, as I am, that the decree of the Vice-Chancellor ought to be affirmed, and concurring as I do entirely in the judgment which the Vice-Chancellor pronounced, it is not necessary, I think, to say much by way of reason for affirming that decision.

I agree with the Vice-Chancellor that the description of the property in the particulars of sale was an improper, insufficient, and not very fair description. It was not right to describe as an absolute reversion, or as an immediate reversion, expectant on the death of the tenant for life, that which was intended to be offered for sale, which was in truth an equity of redemption in a reversionary interest, which was itself a reversionary interest in an equity of redemption. Such a description, in my judgment, was calculated if not intended to entrap—was calculated if not intended to mislead persons who would thereby be entrapped into the auction-room. A person reading such a description as this, who would be disposed to invest in such a property, would naturally first of all go and inquire what the value of the property was, and would naturally then apply to an actuary, or some other person whom he thought competent to give him advice upon such a subject, what was the proper deduction to be made in respect of the outstanding life interest. If he had at the same time been informed that what he was buying was an equity of redemption a prudent man would consult with his solicitor, or some other person capable of advising him in such a matter, as to what were the exact rights and the exact liabilities which he was acquiring and taking upon himself as purchaser of an equity of redemption.

There being, then, this improper and misleading description in the particulars of sale, I am of opinion that the burden of proof is cast entirely on the Defendant to shew that the Plaintiff was not in fact misled by what he had read, and of that burden the Defendant has not, in my judgment, discharged himself. It was not sufficient to read, in the midst of a long paper of conditions, a condition, not even the first, following immediately the particulars of sale, but the fourth condition—which merely told him that the property was subject to several mortgages, and which contained a very long story as to what he was to do; as to which it might very well happen, as in this case it did happen, that it

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failed to convey to the purchaser's mind this information, which ought to have been conveyed to him, namely, that what he was buying was the right of instituting two or three suits in Chancery, an immediate liability to a sum of £500, which he might be called upon to pay at any moment, and an immediate liability to one or two other Chancery suits, which the mortgagees of the property might at any time have instituted for the purpose of foreclosure. I am of opinion, from all the circumstances of the case, and from the conduct of the purchaser, that he never did know what he was buying, and that he never had his mind sufficiently clear of that misrepresentation which was infused into it by the particulars of sale, and in consequence of which he was led to bid as he did.

It is also suggested that he went on with the transaction for some days after he had bid, with some notice of what he had done. In my opinion, when a man has been induced to sign a document under these circumstances, and has found himself entangled in the matter, he has a right to a reasonable time to ascertain his position, and to take advice from persons capable of advising him as to what he ought to do; and in this case the Plaintiff seems to have acted with all reasonable promptitude in making his objection to the contract into which he had been induced to enter, and in repudiating that contract into which he had so entered.

It was very strongly impressed upon us that Lord *St. Leonards* had said in his book (1) that contracts for sale, although they might not be enforced in this Court, could only be set aside on the ground of fraud. The word "fraud" there is *nomen generalissimum*, and it must not be construed so as to mislead persons into the notion that contracts for the sale and purchase of lands are in any respect privileged, so as to be free from the ordinary jurisdiction of the Court to deal with them as it deals with any other instrument or any other transactions, in which the Court is of opinion that it is unconscientious for a person to avail himself of the legal advantage which he has obtained. Indeed the books are full of cases in which the Court has dealt with contracts of that kind—contracts obtained by persons from others over whom they have dominion, contracts obtained by persons in a fiduciary position, contracts for the sale of shares obtained by directors through mis-

(1) *Sugden's* Vendor and Purchaser, 14th Ed. p. 244.

representation contained in the prospectus, in respect of which it was never necessary to allege or prove that the directors were wilfully guilty of moral fraud in what they had done. A contract for sale, like every other contract, is subject to the ordinary rules and jurisdiction of this Court, and that passage of Lord *St. Leonards* must be understood as meaning that the same kind of case must be made when a party comes here to set aside a contract for sale as must be made in setting aside any other contract or dealing between the parties.

In my opinion, therefore, the decree of the Vice-Chancellor was right, and this appeal ought to be refused, and refused with costs.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

Solicitors for the Appellant: Messrs. *Iliffe, Russell, & Iliffe.*
Solicitors for the Plaintiff: Messrs. *Cole, Cole, & Jackson.*

CLOWES *v.* STAFFORDSHIRE POTTERIES WATER-WORKS COMPANY.

[1870 C. 185.]

Injunction—Pollution of River—Abuse of Parliamentary Powers—Waterworks Act, 1847 (10 & 11 *Vict. c.* 17), *s.* 6.

A waterworks company were authorized by their private Act to take and use the water of certain springs which supplied a river upon the banks of which certain mills were situate. The Act provided that the company should not abstract more than a certain amount of water before they had constructed a compensation reservoir for storing the water during floods for the benefit of the millowners. The Act gave the company compulsory powers for acquiring land, streams, and springs for their undertaking, and powers to acquire by consent lands for constructing their compensation reservoir. The Act contained a reservation of the rights of the owners and occupiers of any lands, mills, or works, to the use of the waters of the stream, except so far as provided and declared by the Act. The *Waterworks Clauses Act*, 1847 (10 & 11 Vict. c. 17), was incorporated with this Act.

The company constructed a compensation reservoir, and a subsequent Act of Parliament which gave them further powers, including powers of empty-

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ing and cleansing the reservoir, recognised this reservoir as a sufficient compensation reservoir for the millowners, and directed it to be maintained.

The owner of some dye works situate on the river below the reservoir filed a bill against the company, complaining that the effect of the reservoir was to make the water of the river more muddy than it was before its construction, and to render it unfit for the process of dyeing, and praying for an injunction to restrain the Defendants from fouling the stream. These allegations being in the judgment of the Court established:—

Held (reversing the decision of *Malins*, V.C.), that the Acts gave the Defendants no power to foul the water; that the compensation clauses in the *Waterworks Act*, 1847, did not apply, inasmuch as the injury was such as the company were not authorized to commit; and that the Plaintiff was entitled to an injunction.

Quære, whether sect. 6 of the *Waterworks Act*, 1847, gives compensation for injuries to the lands of third persons caused by works on land which could be taken only by consent.

THIS was an appeal from a decree of Vice-Chancellor *Malins*.

The Plaintiff, *Ann Clowes*, was the tenant for life of certain dye-houses and premises situate in the town of *Leek*, in *Staffordshire*, on the bank of the River *Churnet*, which were leased to Messrs. *Hammersley* at a rent of £120 a year.

The premises had been used for more than one hundred years for washing and dyeing silk, and the Plaintiff alleged that for this purpose great purity and softness in the water was requisite.

The *Staffordshire Potteries Waterworks Company* was incorporated by the 10 & 11 Vict. c. cciv. for the purpose of taking water from certain springs, called the *Seners* springs, for supplying the inhabitants of the pottery towns near *Leek* with pure water. These streams previously fed the River *Churnet*, and the abstraction of the water from them diminished the supply of water in the river to the detriment of the millowners on its banks. Accordingly the company constructed a compensation reservoir at *Deep Hays*, a little below the Plaintiff's works, but that proving insufficient, a fresh application was made to Parliament.

By the *Staffordshire Potteries Waterworks Act*, 1853 (16 & 17 Vict. c. cxcviii.), with which the *Waterworks Clauses Act*, 1847 (10 & 11 Vict. c. 17), and the *Lands Clauses Consolidation Act*, 1845 (8 Vict. c. 18), were incorporated, the company established by the previous Act was dissolved, and a new company was incorporated under the same name with additional powers. The 26th section of that Act was as follows:—

"It shall be lawful for the company, subject to the provisions of this Act, to make and maintain the said works hereby authorized, in the line and according to the levels defined on the sections, and upon the lands delineated on the said plans and described in the said book of reference, and to enter upon, take, and use such of the lands, streams, and waters mentioned in the said plans and book of reference as shall be necessary for that purpose: provided that the maximum quantity of water to be abstracted by the company for the purpose of the said undertaking shall not exceed 1,500,000 imperial gallons in a day of twenty-four hours, until an additional compensation reservoir or additional compensation reservoirs shall have been made, completed, and certified, as hereinafter mentioned." The 54th section enacted, "that before the company shall abstract or take from the said springs or streams, or from any other sources or tributary streams of the River *Churnet* a greater quantity of water than 1,500,000 imperial gallons in any one day, the company shall and are hereby required within four years from the passing of this Act to construct for the use and benefit of the owners and occupiers of the said mills such additional compensation reservoir or reservoirs, with proper embankments, waste-weirs, watercourses, discharge-pipes, gauges, and other works, as shall, together with the existing reservoirs at *Deep Hays Valley*, be capable of constantly discharging into the said River *Churnet* such quantity of water as shall be equal to the maximum quantity of water required to be taken by the company exclusive of the ordinary flow of the *Deep Hays* stream, and of the stream or streams on which the additional reservoir or reservoirs shall be constructed, and which additional reservoir or reservoirs shall, as to the capacity and sufficiency thereof, be made and completed to the satisfaction of an engineer, to be appointed by the owners and occupiers of the said mills, as hereinafter mentioned, who upon the completion thereof to his satisfaction shall give a certificate in writing of such completion."

The 62nd section gave power to the company, for the purpose of constructing such additional compensation reservoir or reservoirs, and the works connected therewith, to purchase and acquire, with the consent of the owners and occupiers thereof, any land which might be necessary, not exceeding eighty acres, in addition to the

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lands authorized to be acquired by the Act, or by the Acts incorporated therewith.

The 66th section enacted that the company should make good to the owners and occupiers of the several mills and manufactories for the time being situated upon or contiguous to the River *Churnet*, and to the owners or occupiers of any other buildings, lands, or grounds, and to all other premises, all damage and injury, as well immediate as consequential, which they might sustain "by reason or in consequence of the bursting, leaking, failure, or insufficiency" of any reservoirs or other works then or thereafter to be constructed by the company under the authority of the Act.

The 72nd section was as follows:—"That nothing in this Act contained shall be construed to affect, diminish, abridge, prejudice, or alter, in any manner whatsoever, any right which, before the passing of this Act, the owners, lessees, or occupiers of any lands, canals, mills, or works, or of any of the springs or streams authorized to be taken or used for the purposes of this Act, had or have possessed or enjoyed, or might lawfully have, possess, or enjoy, to the use of the waters of the said springs or streams, or of the tributary waters, springs, or streams flowing into the same, except so far as is provided and declared in and by this Act."

In pursuance of this Act the company constructed the *Tittesworth* reservoir, which was situate about a mile and a half above the Plaintiff's works, for damming up and storing the flood-water of the *Churnet*.

In 1861 the company obtained a fresh Act (the 24 & 25 Vict. c. cxlvi.), by which powers were given them to take fresh springs and streams for the purpose of their undertaking, and to construct fresh works.

The 27th section of that Act enacted that "the present *Deep Hays* and *Tittesworth* reservoirs shall, from and after the passing of this Act, be compensation reservoirs, and the same, and the gauges and other works connected with the same respectively shall for ever be maintained by the company for the protection and benefit of the owners of the navigation from the *Trent* to the *Mersey*, and the owners and occupiers from time to time of the *Churnet Mills*," and certain other mills therein specified.

The 34th section provided that the company might draw and

let off the water of either of the compensation reservoirs as often as it should be requisite, for the purpose of repairing or cleansing the same, or any part thereof, or for any other necessary purpose, the company thereby doing as little damage as possible.

The *Tittesworth* reservoir extended over an area of about forty acres, and was from thirty to forty feet deep. The stream of the *Churnet* flowed into it at the upper end, and was discharged at the lower end by a series of pipes. The Plaintiff complained that, whereas before the construction of this reservoir the water of the *Churnet* was quite pure, except for two or three days after a flood, since its construction the water continued in a muddy state for ten or fourteen days after a flood, and was often on the eighth or tenth day after rain more impure than on any of the days preceding.

The result was, as stated by the Plaintiff, that the Plaintiff's tenants had been unable to dye the silk sent to them by manufacturers with the same brilliant colours as before the construction of the reservoir, and had lost some of their customers in consequence. They therefore threatened to give up the works, and the Plaintiff's interest in the property was thereby seriously diminished. Under these circumstances the Plaintiff filed the present bill against the company, praying that they might be restrained from fouling the water in the *Churnet*, and that they might be ordered to restore the water to the same condition as it was in before the construction of the *Tittesworth* reservoir.

The increased impurity of the stream was clearly proved by the Plaintiff's evidence, and was, in fact, admitted by the Defendants; and it appeared that they had put up a filter for Messrs. *Hammersley*, and that other plans had been suggested by their engineer for mitigating the evil, but they denied that the Plaintiff's interest in the property had been materially affected; and they submitted that the reservoir had been constructed under the powers of their Acts of Parliament, and that if the Plaintiff had any ground of complaint, her remedy was not by suit in equity, but under the statutes.

The Vice-Chancellor dismissed the bill with costs, and from this decree the Plaintiff appealed (1).

(1) 1872. May 29. W.N. 1872/126 SIR R. MALINS, V.C., after referring to the facts of the case, continued:—

It is admitted on the part of the Plaintiff that the reservoir, the work of the Defendants, was finished in the year 1857, in compliance with the Act of Parliament; that the water flowed

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Mr. *Pearson*, Q.C., and Mr. *Cookson*, for the Plaintiff:—

The injury to the Plaintiff is clearly proved; but it is not of such a nature that she can obtain adequate damages at law with-

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into it and flowed out of it as the Act of Parliament required it should do; and the Plaintiff does not set up any claim against the Defendants for improper construction of their works. Therefore it is a case in which there is no violation of the parliamentary powers by the Defendants. They have constructed a reservoir, and they continue to use that reservoir. Now what must be the inevitable effect of a river of this size? for it has been stated that the width of the river is forty feet; the depth of it is variable, according to the state of the weather; it is deeper in winter than in summer, but the average width seems to be about forty feet, and the depth from four to six feet. What must be the inevitable consequence of such a river as that flowing into a reservoir and flowing out again? Can any one fail to see that there must be a deposit—call it mud, or whatever it may be—in that reservoir? When it falls to the bottom it becomes mud. It is as certain as that the river flows into the reservoir and then flows out again, that it must and will leave a deposit. That, therefore, is the necessary consequence of the construction of the works. The Plaintiff not finding any fault with the construction of the works, so on the other hand the Defendants do not deny that the consequence of the construction of the works has been to inflict on the tenants of the Plaintiff some injury. The extent of the injury is very much in question. As in other questions of this kind, there is the usual quantity of contradictory evidence. The Plaintiff's witnesses say it has been very serious, particularly Messrs. *Hammersley*, who are not Plaintiffs in this suit, and whose interests, therefore, I cannot regard. They have failed to come forward as Plaintiffs; they must have some very strong reasons for it, because, if there be an injury here it is perfectly plain that the injury to Miss *Clowes*, as the owner of this mill, is utterly insignificant as compared with the injury which Messrs. *Hammersley* must have sustained; but they file no bill. Undoubtedly, they appear as witnesses in favour of the Plaintiff. The Defendants do not deny, as I have said, that they inflict some injury upon Messrs. *Hammersley*, and, it may be, in consequence of the injury Messrs. *Hammersley* have sustained, on the Plaintiff also. Now what is this injury? Assuming the case of the Plaintiff to be thoroughly established, that she does not only sustain, as the Defendants admit she does, some injury, but that she sustains such an extent of injury as is described by her witnesses, what is the result of it? What is the injury, and what is the measure of the damage which she sustains? She is the freeholder of this mill, and Messrs. *Hammersley* are her tenants under a lease dated the 13th of November, 1859, at a rent of £120 a year. Now what is the injury she sustains? If she gets her rent from the mill she is not injured at all. It is not suggested that she has not got her rent, or that in any one year there has been a cessation of payment, or that there is likely to be. It is very true that Messrs. *Hammersley* have always been grumbling against the company and against their landlord; they have been threatening for years to leave, but they never have left, and I am perfectly satisfied they have not the slightest intention of leaving. I am also satisfied that if they were to leave, the

out bringing successive actions, and she is therefore entitled to an injunction in this Court: *Isenberg* v. *East India House Estate Company* (1).

statement in the Defendants' evidence that the works could be relet, is perfectly correct. Sitting here, and having heard all the parties with all the contradictory evidence, with which, in this case, as in every other case, a Judge in equity has to deal, and forming the best conclusion I can, I come, without the slightest doubt in my own mind, to the conclusion that the injury to Miss *Clowes* is almost an imaginary injury. If there be an injury to the *Hammersleys*, the tenants, they do not come forward to seek any remedy for it; and, looking at all the circumstances, I say I am satisfied that the injury to Miss *Clowes* is almost nominal. Now, I do not at present advert to the question whether there is a remedy at law or in equity, or whether the remedy is under the Act of Parliament. I assume on this part of the case that it is a case in which Miss *Clowes* does sustain some injury, and is entitled to some compensation. I am asked to grant an injunction. I pressed Mr. *Pearson* very much to tell me what kind of injunction I ought to grant. First of all let us look at the principle of it. I put the question to Mr. *Pearson* whether he did not admit that if he could sustain a bill in equity he could also maintain an action at law. Of course he was bound to admit that. In the case which he very much relied on, *Broadbent* v. *Imperial Gas Company* (7 D. M. & G. 436), this Court interfered because, as Lord *Campbell* points out, the award of the arbitrator in that case was equivalent to a judgment at law; and because an action had been maintained at law the Court of Equity interfered. If this lady, therefore, is entitled to maintain a suit in this Court, she is certainly entitled to maintain an action at law for the injury she has sustained. Therefore she can only succeed here because she can succeed at law. Mr. *Pearson* says if I send her to law she must bring actions from time to time as often as a flood occurs—a fresh action every year. I do not at all agree with that view of the case. It is perfectly plain, from the admissions on both sides in this case, that the proper remedy here would be the construction of a filter. The tenants of the Plaintiff were offered a filter. They never would say they would be satisfied with it. On the whole evidence I am satisfied that if they had said once for all, "We will take a filter in perfect satisfaction of all demands; make a filter for us, and we will never make another demand against you," a filter would have been constructed. I have before me the evidence. Now the damage which has been sustained in this case is not the damage of the Plaintiff, but of Messrs. *Hammersley*, whose suit I must regard this as virtually being. As regards Miss *Clowes*, if she has sustained damage, there is an adequate remedy for it at law, and by an action at law she can recover all that she can be possibly entitled to, namely, the expense of the construction of a filter, that being, according to my view, the utmost measure of injury that she has sustained. Then, if there be an adequate remedy at law, ought I, by injunction, to interfere? Now, it is not a trifling thing to grant an injunction of this kind against a company who have spent large sums of money in the

(1) 33 L. J. (Ch.) 392; 3 De G. J. & S. 268; 10 Jur. N. S. 221.

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The Defendants contend that the injury the Plaintiff has sustained is the necessary result of the construction of the reservoir, and that as the reservoir has been constructed under the Acts of

construction of such a work as this reservoir. If I were to grant the injunction asked for there would be a motion to commit; but as to any tribunal deciding whether the injunction had been obeyed, or whether there had been a breach of it, I think it would be utterly impossible to do so. Mr. *Pearson* has not pointed out to me any one thing which the company ought to do, except that they are to cleanse out this reservoir. To cleanse a reservoir with an area of forty or fifty acres, and forty feet deep! Why, they must run off the water and make a railway. Every one knows what was done in cleaning out the *Serpentine*, which was a work of the same kind, and which cost at least £20,000. I have no doubt that the clearing out of this reservoir would cost £10,000 or £20,000. It is gravely suggested that for such an injury as this that is what this company ought to do. I understood the Plaintiff to say that it should be done after every heavy shower, after every storm. Such a thing would be utterly absurd. The natural consequence is that there must be a deposit of mud. The Plaintiff was bound to know that after this reservoir was constructed there would be a deposit, and that the water supplied would run over that deposit, and might be less clear than it had theretofore been. Now, therefore, on these grounds, independently of the Act of Parliament, I come to the conclusion that, although I am satisfied that, as the Defendants admit, the Plaintiff has sustained some injury, that is, her tenants have, and she through them, yet as far as the injury to the Plaintiff is concerned, I am very much inclined to think that a very small amount would fully compensate her for the injury. With regard to the Plaintiff's tenants, I am satisfied that the expense of constructing a filter would be the measure of the damage; and under all those circumstances, independently of other considerations applicable to the case, I should come to the conclusion, from my own decision in the case of *Attorney-General* v. *Gee* (Law Rep. 10 Eq. 131), with regard to the drainage of the town of *Bishop Stortford*, that the same principles upon which I acted in that case I am bound to act upon here. It is not a case for an injunction in this Court, and I am bound to leave the Plaintiff to her remedy at law to recover such damages as she has sustained. To grant an injunction, the working of which it is impossible to foresee, obedience to which I am unable to see the way to, would, I think, be doing an act of the grossest injustice; and on that account I come to the conclusion that the Plaintiff has failed to support the case she has brought forward.

Then the Defendants take another objection, and, to my mind, an insuperable objection. They say the Plaintiff admits, as I have already pointed out, that the reservoir was duly constructed in pursuance of the Act of Parliament. They refer for that purpose to the company's Amendment Act of 1861, by which they were empowered to enlarge the *Tittesworth* reservoir. Mr. *Pearson* says they are not entitled to refer to that Act, because it is not mentioned in the answer, and for that purpose he appeals to a decision in a case in which he and I were counsel some years ago, namely, *Phillips* v. *Phillips*, in which

Parliament, she either has no remedy at all, or her remedy is under the compensation clauses of the Acts. But, in the first place, the fouling of the water does not necessarily arise from the

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the purchase for a valuable consideration was not mentioned in the answer, but was set up by affidavit, and it was there decided that it being set up by affidavit was not sufficient, and that the plea was unavailable. He says it is not mentioned here in the answer, and therefore cannot be set up by affidavit. Fortunately for the Defendants, it is totally unnecessary for them to have recourse to the Act at all, because the Plaintiff's admission is, that in 1857 the reservoir was properly constructed in compliance with the Act of Parliament; therefore they do not want the help of the Act of 1861 at all. Then, if the reservoir was constructed in pursuance of the Act of Parliament, what are the principles of law applicable to the case? I take it that the law is now thoroughly settled, that whenever an act is a consequence of what is done in pursuance of Parliamentary authority, the remedy is not by action at law or by injunction in equity, but is under the provisions given by the Act of Parliament. Now this cannot be better expressed, I think, than it is expressed in the two authorities to which I have referred. First, I will take the rule laid down by Lord *Cairns* in *Hammersmith and City Railway Company* v. *Brand* (Law Rep. 4 H. L. 171) before the House of Lords. The question—on which there was much difference of judicial opinion—there was, whether, when a railway had been constructed, and the working of the railway caused vibration in an adjoining house, the owner was entitled to damages for the destruction of his property by the vibration which rendered it uninhabitable? The majority of the noble Lords, as the Court below had decided, were of opinion that he was not entitled to any compensation. Lord *Cairns* took a different view, and thought that he was entitled to compensation; therefore there was a difference of opinion as to whether he was entitled to compensation or not. But there was no difference of opinion upon one point. They all agreed upon this, that if he was entitled to compensation, his remedy was not by action at law, or by bill in equity, but under the particular powers given by the Act of Parliament. Lord *Cairns* said: "On one part of the case I do entirely concur with them. It appears to me that the effect of the legislation on this subject is to take away any right of action on the part of the landlord against the railway company for damage that the landlord has sustained. It must be taken, I think, from the statements in the case, that the railway could not be used for the purposes for which it was intended without vibration. It is clear to demonstration that the intention of Parliament was that the railway should be used. If, therefore, it could not be used without vibration, and if vibration necessarily caused damage to the adjacent landowner, and if it was intended to preserve to the adjacent landowner his right of action, the consequence would be that action after action would be maintainable against the railway company for the damage which the landowner sustained; and after some actions had been brought, and had succeeded, the Court of Chancery would interfere by injunction, and would prevent the railway being

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maintenance of the reservoir. The evil might be remedied either by cleansing the reservoir, for which the company have special powers under the 34th section of the Act of 1861, or by

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worked, which is, of course, a *reductio ad absurdum*, and would defeat the intention of the Legislature. I have therefore no hesitation in arriving at the conclusion that no action would be maintainable against the railway company." Now this is peculiarly applicable to the present case, because Lord *Cairns* there says, "If therefore it could not be used without vibration, and vibration necessarily caused damage to the adjacent landowner." So I say here. The reservoir never could be used without causing to a certain extent a thickening of the water. The water becoming more muddy is a necessary consequence of the construction of the works, and the remedy must be found therefore not by action at law, but under the Act of Parliament. The same rule is in very distinct terms stated by Mr. Justice *Blackburn*, who gave the unanimous opinion of the Judges, in advising the House of Lords in the case of the *Mersey Docks and Harbour Board Trustees* v. *Gibbs* (Law Rep. 1 H. L. 93), in the following passage: "Another class of cases also cited depends upon the following principle: If the Legislature directs or authorizes the doing of a particular thing, the doing of it cannot be wrongful; if damage results from the doing of that thing, it is just and proper that compensation should be made for it, and that is generally provided for in the statutes authorizing the doing of such things. But no action lies for what is *damnum sine injuriâ*; the remedy is to apply for compensation under the provision of the statutes legalising what would otherwise be a wrong. This, however, is the case whether the thing is authorized for a public purpose or a private profit. No action will lie against a railway company for erecting a line of railway authorized by its Acts, so long as the directors pursue the authority given them, any more than it would lie against the trustees of a turnpike road for making their road under their Acts; though the one road is made for the profit of the shareholders in the company, and the other is not. The principle is, that the act is not wrongful, not because it is for a public purpose, but because it is authorized by the Legislature." That applies to the present case. This act is not wrongful, because it is authorized by the Legislature; therefore you seek a remedy in the manner in which the Legislature has given it to you. Now then, how has the Legislature in this case given the remedy? I have been referred to the *Waterworks Clauses Act* (10 & 11 Vict. c. 17), s. 6, which I need not read, but the general effect of it is to make the company liable for any damage occasioned to other persons by the construction or maintenance of the works. Here the damage is caused by the maintenance of the works; day by day, as the company maintain the works, this injury, such as it is, is produced. Then they are bound to make compensation to all persons whose property is injuriously affected by the construction or maintenance of the works. How is that remedy to be enforced? The Act says it shall be enforced under the *Lands Clauses Act*. Sect. 68 provides for all these cases; therefore the remedy is given under the Act of Parliament. You are to proceed

constructing filters, or by a different system of pipes by which the water might be drawn from the reservoir at a higher level. But it is no concern of the Plaintiff's to suggest a remedy; it is for

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under the 68th section of the *Lands Clauses Act*, to which this section expressly refers. And how is that to be done? Why, the person who considers himself injuriously affected can make a claim upon the company. He can require it to be referred to arbitration, because the option of arbitration or action is with him, not with the company. He can oblige them to go to arbitration; or, if he does not require arbitration, he can fix an amount of damages, which throws upon the company the obligation to summon a jury within twenty-one days, or, in default of doing so, they are liable to pay the full amount claimed. Applying that to the present case, this lady says she has sustained damage. What is the amount of it? Her life estate in the property is capable of valuation. Suppose it rendered her property untenantable, the amount of the damage would be the value of her life estate in this property, £120 a year. She would say, "I have lost my tenants; they have gone, and I cannot find another; my life interest produces me £120 a year, and £120 a year for my life is worth so much money, and that is the extent of my damage." She could oblige the company to go to arbitration upon that, or she could assess the amount, and require them to summon a jury, or they would be liable to pay the whole amount. Or she might put it in another way: "I have sustained so much injury, my tenants will not remain unless a filter is constructed; they will not construct it for themselves; I must either lose my tenants or construct a filter; to construct a filter would cost £400 or £500; I am about to construct it; my tenants will not pay for it; I require you to pay for it; that is the measure of my damage." I can see no reason whatever why that course should not have been adopted. Now, in opposition to these views, two cases were mainly relied upon, on one of which Mr. *Cotton* replied, but, with the exception of those two cases, I think I may say the cases on the subject are not only apparently but actually in conformity. I need not refer to the case which was cited in argument by Mr. *Cotton*, namely, *Hutton* v. *London and South-Western Railway Company* (7 Hare, 259), because all that that decides is that where consequential damages are to be paid for injuriously affecting the property, it is not necessary for the landowner to be paid for them before the construction of the works. That was the contention of Mr. *Pearson*, that the extent of the injury could not be ascertained until the works were actually constructed; but there are two authorities which are apparently in favour of Mr. *Pearson's* views; first, the case of *Lawrence* v. *Great Northern Railway Company* (16 Q. B. 643), until you examine the principle, does appear to militate against the other authorities I have cited; but, upon looking closely into the case, you find that the action was there maintainable because the company had not properly exercised their Parliamentary powers. If they had properly exercised their Parliamentary powers, the result must have been the same. The remedy was not at law, but under the *Lands Clauses Act* for the consequential damages. It proceeded, therefore, entirely on the

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the Defendants to find the best way of obeying the injunction: *Attorney-General* v. *Colney Hatch Lunatic Asylum* (1). In the second place, the lands for the reservoir were not authorized to be taken under compulsory powers, and, therefore, the compensation clause (sect. 6) of the *Waterworks Act*, 1847 (2), to which we are re-

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ground which is taken away in this case, where it is admitted that the works are properly constructed—viz. that the works there were improperly constructed. So in the other case of *Broadbent* v. *Imperial Gas Company*, the decision was based on the ground that there was no authority by the Act of Parliament to make gas in a particular manner; the company were authorized to construct gas works, but the mode of making gas was at their own peril, and as they adopted a deleterious mode of making gas, when they could make it without such a process, the Court very properly interfered, and an action being maintained, an injunction was also granted, because that was an injunction capable of being obeyed. Therefore I come to the conclusion, first, on the ground that the Plaintiff has not sustained such an amount of damage as will entitle her to the interference of the Court, that the bill must be dismissed. I come to that conclusion also on the ground that, if she has sustained any damage, it is capable of compensation by an action at law, if it had not been for the other objection which applies to her case. I further come to the conclusion that whatever damage she or her tenants sustain in this case, is in consequence of the property being injuriously affected under the Act of Parliament. It arises purely in consequence of the construction of the works in accordance with the Act of Parliament, and, being in consequence of the exercise of Parliamentary powers by the erection of Parliamentary works, the remedy must be sought, not by an action at law, or by a bill in this Court, but by that mode of proceeding under the 68th section of the *Lands Clauses Act*, which is applicable to all such cases. On all these grounds, therefore, I am of opinion that this bill must be dismissed with costs.

(1) Law Rep. 4 Ch. 146.

(2) 10 & 11 Vict. c. 17, s. 6: "Where by the special Act the undertakers shall be empowered, for the purpose of constructing or supplying waterworks, to take or use any lands or streams otherwise than with the consent of the owners and occupiers thereof, they shall, in exercising the power so given to them, be subject to the provisions and restrictions contained in this Act; and if the waterworks be situated in *England* or *Ireland*, to the provisions and restrictions contained in the *Lands Clauses Consolidation Act*, 1845; and if the waterworks be situated in *Scotland*, to the provisions and restrictions contained in the *Lands Clauses Consolidation (Scotland) Act*, 1845, and shall make to the owners and occupiers of and all other parties interested in any lands or streams taken or used for the purposes of the special Act, or injuriously affected by the construction or maintenance of the works thereby authorized, or otherwise by the execution of the powers thereby conferred, full compensation for the value of the lands and streams so taken or used, and for all damage sustained by such owners, occupiers, and other persons, by reason of the exercise

ferred, has no application. The compulsory powers only extended to taking water from the springs and streams, and the works necessary for that purpose; they had power to diminish the flow of water, but they had no power to foul the stream, and, so far as they are doing so, they were acting *ultrà vires*, and are liable to an injunction: *Broadbent* v. *Imperial Gas Company* (1).

[They also referred to *Attorney-General* v. *Gee* (2) and *Crossley* v. *Lightowler* (3).]

Mr. *Cotton*, Q.C., and Mr. *Speed*, for the Defendants:—

The damage complained of is no injury to the Plaintiff. The works are let to a tenant who pays his rent regularly, and there is no proof that if he leaves the property it might not be let to another tenant. If any real injury is done by the reservoir, the Plaintiff can recover adequate damages at law. The fouling of the water is a necessary consequence of the construction of the reservoir. The plans suggested by the Plaintiff for drawing off the water would make the deposit of mud greater, and the reservoir would soon become filled up; and if it were repeatedly cleansed the benefit of storing the water would be lost, and, besides, the expense to the company would be ruinous.

If the Plaintiff is entitled to any relief, it must be obtained as compensation under the 6th section of the *Waterworks Act*, 1847; that section is not confined to the injury to persons whose land is taken under the compulsory powers of the special Act, but extends to all injury done under the powers of the Act: *East and West India Docks Company* v. *Gattke* (4), which must be taken to have overruled *London and North Western Railway Com-*

as to such lands and streams of the powers vested in the undertakers by this or the special Act, or any Act incorporated therewith, and except where otherwise provided by this or the special Act, the amount of such compensation shall be determined in the manner provided by the said Lands Clauses Consolidation Acts respectively, for determining questions of compensation with regard to lands purchased or taken under the provisions thereof, and all the provisions of the said last-mentioned Acts respectively shall be applicable to determine the amount of any such compensation, and to enforce payment, or other satisfaction thereof.

(1) 7 D. M. & G. 436.

(2) Law Rep. 10 Eq. 181.

(3) Ibid. 2 Ch. 478.

(4) 3 Mac. & G. 155.

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pany v. *Smith* (1). Although the *Tittesworth* reservoir was not originally constructed under the compulsory powers of the Act of 1853, it has been recognised as a complete reservoir by the Act of 1861, and the Plaintiffs cannot now complain of its construction or maintenance being *ultrà vires.*

SIR G. MELLISH, L.J.:—

The Plaintiff in this case is the tenant for life of certain dyeing mills situate on the River *Churnet,* and the suit is brought to restrain the Defendants, the *Staffordshire Potteries Waterworks Company,* from fouling the stream, which fouling is said to be injurious to the Plaintiff in respect of the dye works.

The general case made by the bill is this: It is admitted that before the Defendants' reservoir was made the River *Churnet* did not always send down water sufficiently pure for the dye works, and that from time to time there were floods in the stream, and that when a flood occurred it usually took two or three days before the water became pure, but the complaint is, and it appears to me to be proved by a considerable body of evidence, that the result and effect of making the reservoir in the way in which it has been made, and the user of it in the way in which it has been used, is that the water, which used only to be disturbed for two or three days, is now, in the case of a flood, disturbed for a very much longer time, and also that at other times when there has been no rain or flood at all, if the reservoir is low, the water comes down in a muddy condition, so as seriously to affect the Plaintiff's works. The Vice-Chancellor has dismissed the bill upon two grounds. First, he has come to the conclusion that the complaint is a frivolous one, and that the damage is not sufficient to entitle the Plaintiff to maintain a suit in this Court; secondly, he is of opinion that the remedy, if any, is not by action or by suit, but under the compensation clauses of the *Waterworks Clauses Act,* 1847.

I think it would be better that I should take what the Vice-Chancellor treated in his judgment as the second point first, and consider whether the remedy in this case is by action at law, or whether it is under the compensation clauses.

(1) 1 Mac. & G. 216.

In the first place, if this reservoir had been made without the authority of an Act of Parliament, and the effect of it had been such as it is proved in this case to be, there can of course be no doubt at all that the occupier, at any rate, of the mill, would have been entitled to maintain an action at law on account of the fouling of the stream. Nor, as I understand, is that disputed by the Defendants. That being so, of course the right to maintain that action at law must still continue, unless it has been taken away by the Acts of Parliament, and the burden of shewing that it has been taken away by the Acts of Parliament, beyond all question, is upon the Defendants; because, if a public company or any individuals obtain an Act of Parliament which they say enables them to take away the common law rights of any person, they are bound to shew that it does it with sufficient clearness.

The question, therefore, is whether, according to the true construction of the two Acts of Parliament of 1853 and 1861, taken together, the right to foul the water is given to the Defendants. By the 26th section of the Act of 1853 there is a general power given to make a compensation reservoir. [His Lordship read the section, and continued:—] Now it is to be observed that under that section this reservoir is not made for the purpose of supplying water to be used in the town, but it is a condition precedent to the company being entitled to take the waters of the different streams. If they do not or cannot make the reservoir, the simple consequence is that then they cannot take the water beyond the limited quantity which is mentioned in this section. It is also to be observed that, although to a certain extent compulsory powers are given and lands are delineated on the plans which they are entitled compulsorily to affect, yet they are not given any compulsory power for the purchasing of land for this reservoir. If it had so happened that no owner of lands on the stream was willing to sell them the land, they could not have made the reservoir at all, and the simple consequence then would have been that they would not have been entitled to take the additional quantity of water. If the question had depended solely on that section, it would have been extremely doubtful indeed whether any compulsory powers with reference to the reservoir were given at all. If no compulsory powers were given for the purpose of purchasing lands upon

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which the works were to be built, it certainly seems extraordinary that compulsory powers should be given to take away the rights of other persons who have rights in the nature of easements over that land which they so purchased.

But the case does not end simply with that section. The next section which is material is the 54th, which is little more than a repetition of what is said in the 26th, as to the making of the reservoir, and simply carries out the provisions of that section.

But the 72nd section appears to me very material in the determination of this question. [His Lordship read the section.]

Now the Plaintiff, and the other owners of these mills, and the occupiers of these mills, beyond all question, did enjoy, before the passing of this Act, the right of using the water of the *Churnet* in its natural purity for the purpose of dyeing. Then does not this section preserve it? It appears to me that, beyond all question, it does. What is the object of inserting such a section as this? It was said that it means nothing, that it simply reserves what would have been implied even if it had not been there, and possibly to a great extent that may be true. I am not at all certain that even if this section had not been there the construction would not have been the same. But the section is put in to obviate all doubt. If it had not been inserted, the question might possibly have been raised whether the rights of persons were not incidentally affected, and to save that doubt, and prevent any persons who might be afraid that their rights might incidentally be affected endeavouring to obtain express clauses for their protection, this general clause is inserted.

The scheme of the Act appears to me to be simply this: the waters of the streams are to be taken, and, therefore, it necessarily follows that they will be greatly diminished in quantity. Therefore, the millowners who use the stream for power, and are interested in the quantity of water which comes down the stream, are to be compensated in kind. But as respects any other person who may have an interest in the stream, any riparian proprietor or other person who may use the water, who may be interested in its purity, because he uses it for manufacturing purposes, the promoters of this scheme undertake that they will not affect their rights at all. That appears to me to be the bargain upon

which this Act of Parliament was obtained, and, in my opinion, the Courts ought to hold persons to these bargains, because otherwise a clause of this kind would deceive those who were interested. Suppose that in this Act they had expressly inserted a clause to the effect that the company should be at liberty to foul the water as much as they might find it convenient for the purpose of making and working their reservoir, would not the Plaintiff and the owners of the mills, if they had heard that such a clause was to be inserted in the Act of Parliament, have applied directly to Parliament, and would not, as a matter of course, a clause have been inserted for their protection? For it is not the ordinary practice of Parliament to take away water rights, except in cases of extreme necessity. The ordinary practice when such Acts are obtained is to compensate those who are injured in kind. It is very difficult to compensate them in money, and Parliament does not intend to destroy the manufacturing value of streams. Therefore clauses are introduced to preserve general rights of this character, which engineers seem to have, generally speaking, not much difficulty in enabling them to do. That appears, therefore, to me to be the scheme of this Act of Parliament.

Then with respect to the Act of 1861: It was contended that, whatever might be the effect of the Act of 1853, the Act of 1861 recognised the reservoir as a complete reservoir, which had been properly made, and therefore no person after that Act can legally assert that there is any imperfection in the making, or indeed, as it is contended, in the working of the reservoir. I am of opinion that the Act of 1861 had not that effect. The object of it was simply to regulate the rights between the millowners and the company, and the effect of the clause, as it appears to me, simply is, that it is a legislative recognition that the reservoir is a sufficient compliance with the obligations which the previous Act had put upon the company, as between them and the millowners, for the purpose of furnishing the quantity of water which was necessary for their purposes. [His Lordship then referred to the sections of the Act before stated, and continued:—] The Act contemplates that the reservoir will from time to time require to be emptied and cleansed. There are two reservoirs, and they are not to empty both at the same time; and there are powers given

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to them which appear to me to be to a considerable extent a recognition that they never contemplated that the water was to be as dirty as they chose to make it. Therefore I am of opinion that it would be wrong to construe this Act of 1861 as effecting what certainly the committee, when they passed it, never supposed it would do, namely, to take away the rights of persons which had been preserved by the previous Act.

The result is that these Acts of Parliament did not give the Defendants any right to foul the water so as to be injurious to the Plaintiff; and, consequently, an action at law would have been maintainable.

Then comes the only other question, which I will deal with shortly. I cannot conceive that, an action at law being maintainable, relief is not to be had in this Court. If this case had happened before *Sir John Rolt's Act* or *Lord Cairns' Act*, I presume the ordinary course would be that a bill having been filed, an action would have been sent to be tried at law. The action having been tried, nominal damages would have been obtained, and the Plaintiff would have come back to this Court for an injunction. Would this Court have sent her away, and said that she should bring action after action, instead of having her remedy by injunction? I cannot think that would have been so. The Vice-Chancellor said, "If you can recover at law at all I think you will get no greater damages than would be sufficient to pay for a filter, and that would be a sufficient compensation." But, with submission to the Vice-Chancellor, I do not think the Plaintiff would get at law a sum sufficient to put up a filter. She would only get, in the first instance, nominal damages, because in a case of this sort you cannot prove specific damage, and there is no evidence here of specific damage, and upon that evidence you would only get, in the first instance, 40*s.* damages. Then you must bring a second action, and what you would get in the second action would be the actual damage which you had proved you sustained between the time you brought the first and the second actions. Then you would bring a third action, and you would get as damages the actual damage which you could prove you had sustained between the time of bringing the second and third actions. It is because it is most inconvenient to leave the rights of parties to be de-

termined in that way, and in fact impossible to leave it in that way, that this Court has always in such cases given relief. In my opinion, therefore, the Plaintiff is entitled to maintain this suit, and is entitled to have a declaration that the Acts of Parliament have not given the Defendants any legal right to foul the water, to her damage, and ought to have an injunction to prevent any such damage in future.

SIR W. M. JAMES, L.J. :—

I entirely concur in the view which has been expressed by the Lord Justice as to the legal construction of the Acts of Parliament, and as to the legal right of the Plaintiff and the legal liability of the Defendant. That being so, and the legal right being, as it seems to me, quite clear, the only question is, whether it is of such a character as to induce this Court to grant an injunction. I am of opinion that this is a case pre-eminently for an application to this Court for an injunction, upon two grounds. To one of these the Lord Justice referred—the absolute necessity of preventing a continued series of actions, which would be the sole result if we remitted the party to what used to be called the other side of *Westminster Hall.* Beyond that, it has always been the practice of this Court, and one of the main duties of this Court, to take care that public bodies who obtain authorities under Acts of Parliament do not abuse their powers. The Vice-Chancellor, indeed, expressed an opinion that this was a trivial damage, and that the Courts ought not to encourage such cases to be brought before them. I myself should be very loth indeed to encourage parties to come here upon a mere technical legal right, but it is impossible, as it seems to me, to read what has taken place between these parties without seeing that there has been a very substantial ground of complaint in fact; and that the Defendants and their agents (of course not admitting their legal liability) have admitted this by the very proper and laudable efforts made by them in past years to mitigate or avoid the damage complained of. After that, it seems to me, with all deference to the Vice-Chancellor, impossible to hold that this is a case of a person who merely comes into this Court for the purpose of vexation and oppression, availing himself of some technical right which he has under an Act of Parliament. That

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being so, I am of opinion that the injunction is really a matter of course, and I propose, if the Lord Justice agrees with me, to declare (following out the judgment he has been good enough to pronounce as to the legal construction) that the provisions of the Act of Parliament mentioned in the pleadings for storing and discharging the water in and from the reservoir of the Defendants, did not legalise the fouling of the stream below the reservoir. Then an injunction restraining the Defendants from so storing and discharging the water as to foul the water to the damage and injury of the owners and occupiers of the Plaintiff's dye works in the bill mentioned.

Solicitors for the Plaintiff: Messrs. *Milne, Riddle, & Mellor*, agents for Messrs. *Hacker & Allen, Leek.*

Solicitor for the Defendants: Mr. *J. Raw*, agent for Mr. *Llewellyn, Tunstall.*

L. JJ. 1872 *Nov.* 21.

Ex parte WARD. *In re* COUSTON.

Bankruptcy — Order and Disposition — Consent of True Owner — Bonded Warehouse.

In December, 1870, *W.* bought from *C.* whisky in bond, to remain in bond to *C.'s* order rent free for twelve months, after which warehouse rent to be paid. In March, 1871, the price was paid. On the 19th of February, 1872, *W.* wrote to *C.* directing him to forward a specified hogshead of the whisky, and inclosing a cheque of sufficient amount to pay duty and clear the whisky. On the 26th *C.* filed a Petition for liquidation, having retained the cheque, but not paid the duty nor in any way complied with *W.'s* directions. At the time of sale the whisky had been all carried to *W.'s* credit in *C.'s* books, but had throughout been lying to *C.'s* order at a dock warehouse :—

Held (reversing the decision of the Chief Judge and affirming that of the County Court Judge), that this hogshead did not pass to the trustee in liquidation as being within *C.'s* order and disposition, as the consent of the true owner had been determined by the demand of possession, though no notice had been given to the warehouseman.

THIS was an appeal from a decision of the Chief Judge, reversing part of an order of the Judge of the County Court of *Lancashire.*

In December, 1870, *Couston, Thomson, & Co.*, spirit merchants, carrying on business at *Leith* and *Liverpool*, sold to *Robert Ward*, an innkeeper at *Manchester*, ten hogsheads of *Isla* whisky,

numbered 4098 to 4107, which were then in bond at the *Leith* dock warehouse to the order of *Couston, Thomson, & Co.* At the time of the sale it was agreed that the hogsheads should remain in bond under *Couston & Thomson's* control rent free for twelve months, after which warehouse rent should be payable by the purchaser. In March, 1871, *Ward* paid £77 2*s.* 9*d.*, the price of the whisky. In November, 1871, *Ward* died, and his business was continued by *John* and *James Ward*, his executors. On the 19th of February, 1872, *Couston & Co.* received from the *Wards* a cheque for £30, accompanied by the following letter :—"Inclosed you have cheque for £30 on account of one hogshead of whisky, number 4100. Direct and permit for the executors of *Robert Ward, Town Hall Tavern, Salford.*" The £30 was to pay duty, warehouse rent, and clearing charges in respect of the one hogshead, and was more than sufficient for the purpose. On the 26th of February, 1872, *Couston, Thomson, & Co.* filed a Petition for liquidation by arrangement, and on the 25th of March a meeting of creditors was held, at which resolutions for liquidation by arrangement were passed, which were afterwards duly registered. Two of the ten hogsheads had been delivered before February, 1872, but the above-mentioned hogshead and the remaining seven, at the time of the filing the Petition, were still lying at the *Leith* dock warehouse to the order of *Couston, Thomson, & Co.*, though in the books of that firm they had been transferred to the credit of *Ward* at the time of the sale.

At the time of the filing the Petition large quantities of bonded goods, which *Couston, Thomson, & Co.* had sold, remained, as to some, in bonded warehouses belonging to the firm, and as to others, in neutral warehouses. Representative cases were chosen for obtaining the opinion of the Court as to the title to goods so circumstanced, and *Ward's* case was selected to try the question as to goods in neutral warehouses.

Thomson stated by affidavit as follows :—"It is the custom and usual practice in the wine and spirit trade in *Liverpool* for goods sold in bond (that is, upon which the Government duty has not been paid) to remain in the bonded warehouse in which they are stored at the time of sale, in the possession or under the control of the vendor after they have been paid for by the purchaser, the vendor giving to the purchaser when required by him an authority to

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receive the goods from him or the warehouse keeper, called a delivery order. These delivery orders, if they are not applied for by the purchaser, are rarely, if ever, given to him at all, but the goods sold remain in the possession or under the control of the vendor, who charges warehouse rent for them to the purchaser, and when the goods are required by the purchaser for use, he generally sends to the vendor the amount of duty payable, and the vendor pays the duty to the Government, and forwards the goods to the purchaser or his order, making a small charge for so doing. In all cases on the sale of goods the same are transferred in what is called the bond-book of the vendor into the name of the purchaser, and are so transferred in transactions of a similar nature in the books of the late firm of *Couston, Thomson, & Co.*"

Another witness, who was a wine and spirit broker, deposed:—"I have been engaged in the wine and spirit business at *Liverpool* for fifteen years. I have considerable knowledge of the custom of the trade at *Liverpool*. It is the custom for the merchant, upon the sale of any goods, simply to enter the purchaser's name against the goods in his stock-book, and thus write all such goods out of his stock, holding them to the order of the vendee. The vendor then becomes the agent or trustee (and, as a rule, the warehouse keeper) for such goods, making a certain charge for warehouse rent. It is not the custom in *Liverpool* to give the vendee any delivery order or warrant for such goods, but such delivery order or warrant would be given if specially asked for, as it would be used in case of a transfer or re-sale to a sub-vendee."

The case was brought before the Court by an application on the part of the *Wards*, for an order upon the trustee to deliver up to them the eight hogsheads. The County Court Judge decided in favour of the trustee as to seven of the hogsheads, but held that the application for No. 4100 on the 19th of February had determined the consent of the true owner as to that hogshead, and that the *Wards* were entitled to it. The trustee appealed, and the Chief Judge decided that this also passed to the trustee (1). The *Wards* appealed.

(1) 1872. July 29.

SIR JAMES BACON, C.J.:—

In this case the Respondents have clearly admitted themselves and are made out to be the true owners of these goods; and it is precisely for their case

Mr. *Herschell*, Q.C., and Mr. *Wheeler*, for the Appellants:—

The consent of the true owner was determined by a *bonâ fide* demand of possession: *Belcher* v. *Bellamy* (1); *Ex parte Dover* (2); *Ex parte Moldaut* (3); *Brewin* v. *Short* (4); *Smith* v. *Topping* (5); *Ex parte Cohen* (6).

Mr. *Benjamin*, Q.C., and Mr. *McConnell*, *contrà*:—

There was no demand of possession. The true owners only wrote to the bankrupts as their agents, directing them to get the goods out of the custody of the wharfinger, from whom possession was never demanded. The case is governed by *Knowles* v. *Horsfall* (7).

SIR G. MELLISH, L.J.:—

This is an appeal from an order of the Chief Judge reversing part of an order of the County Court Judge, who held that one keg of whisky out of several was not within the order and disposition of the bankrupt with the consent of the true owner. The bankrupts had sold whisky to *Ward*, the testator of the Appellants. The whisky was left on commission in a warehouse not

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that the *Bankruptcy Act* has made provision, enacting that the property of the bankrupt divisible amongst his creditors shall comprise, among other things, all goods and chattels being at the commencement of the bankruptcy in the possession, order, or disposition of the bankrupt, being a trader, by the consent and permission of the true owner. The case of *Knowles* v. *Horsfall* (5 B. & A. 134) which has been quoted is still law; the case of *Hamilton* v. *Bell* (10 Ex. 545) is a totally different case, the question of reputed ownership was never raised in it. Then as to the alleged and constructive demand, that does not vary the case, for notwithstanding that the goods remained in the possession of a person other than the true owner. The bankrupts might have dealt with the goods up to the time of the bankruptcy. The letter and cheque which were sent to the bankrupts by the Respondents with the request to pay the duty on the whisky not having been acted upon before the bankruptcy, gave rise to a difference of the transaction as between the parties themselves, but not so as to alter the rights of third persons. *Knowles* v. *Horsfall* is not in the slightest degree affected as an authority by the circumstance that it was a special case. The order of the County Court Judge must therefore be discharged. The deposit will be returned. The trustee will have his costs out of the estate.

(1) 2 Ex. 303.
(2) 2 M. D. & D. 259.
(3) 3 D. & Ch. 351.
(4) 5 E. & B. 227.
(5) 5 B. & Ad. 674.
(6) Law Rep. 7 Ch. 20.
(7) 5 B. & A. 134.

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belonging to the vendors, but a bonded warehouse. Some of it had been delivered to the purchaser, but the rest remained. The County Court Judge held that it was within the order and disposition of the bankrupt, except one keg, as to which the Appellants on the 19th of February sent a letter to the bankrupts at their office in *Liverpool*, directing them to forward it, and inclosing a cheque for a sum sufficient to pay the duty on it, clear it, and enable it to be sent to them. This was the way in which delivery had been obtained on former occasions. The filing a Petition for liquidation, which is equivalent to bankruptcy, took place on the 26th. The bankrupts did not return the cheque, so they had ample time to pay the duty, clear the whisky, and send it away before the bankruptcy. The question then is, was it at the time of the bankruptcy within the order and disposition of the bankrupts with the consent of the true owner? It is clear law, as laid down in *Smith* v. *Topping* (1) and other cases, that if the true owner *bonâ fide* demands possession with a view of taking possession before the bankruptcy, though from no fault of his own he fails to get it, the goods are not within the possession of the bankrupt with his consent. This case is within that rule. There was a demand of possession, and nothing to shew that it was not a *bonâ fide* demand. The only difference between this and the ordinary case is, that here the property was not in the actual possession of the bankrupts, but of another warehouseman, and the Chief Judge appears to have gone upon this. But it appears to me to make no difference, for though, in order to take the goods out of the possession of the bankrupts, notice must have been given to the warehouseman, still, for the purpose of determining the consent of the true owner, the bankrupts were the proper persons to receive the notice. The purchaser cannot be in any worse position because the bankrupts did not keep the goods in their own warehouse. I am of opinion, therefore, that the order of the Chief Judge must be reversed.

SIR W. M. JAMES, L.J.:—

I entirely agree.

Solicitors: Messrs. *Chester & Co.*; Mr. *Wynne*.

(1) 5 B. & Ad. 674.

GREAT EASTERN RAILWAY COMPANY *v.* TURNER.

L. C. 1872 Nov. 19.

[1871 G. 67.]

Trustee—Illegal Trust—Bankrupt—Order and Disposition.

The chairman of a company, with the assent of the company, held in his name shares in another company, which had been purchased with the money of the first-named company. The chairman became bankrupt:—

Held (reversing the decree of the Master of the Rolls), that, though the purchase by one company of shares in another company was illegal, the shares were not within the order and disposition of the bankrupt so as to pass to his assignees, and that he must transfer them as the company should direct.

Ex parte Watkins (1) distinguished.

IN the month of June, 1863, *Horatio Love*, then chairman of the board of directors of the *Great Eastern Railway Company*, on behalf of the company, and by their direction (as alleged by the bill), and with their money, purchased 102 shares in the *Lynn and Hunstanton Railway Company*, which shares were duly transferred to *Horatio Love* as a trustee for the company; the *Lynn and Hunstanton Railway Company* having notice of the facts. In August, 1863, *Horatio Love* ceased to be chairman, and *J. Goodson* succeeded him, whereupon the above-mentioned shares were transferred to *J. Goodson*. The shares were afterwards converted into £1020 stock, which was registered in the name of *J. Goodson*. In February, 1866, *J. Goodson* ceased to be chairman, and *C. H. Turner* succeeded him, whereupon the £1020 stock was transferred to *C. H. Turner* as a trustee for the *Great Eastern Railway Company*. The stock certificate was sent to the *Great Eastern Railway Company*, and remained in their possession. In September, 1869, *C. H. Turner* was duly adjudicated a bankrupt, and *J. Field* and *E. C. Foreman* were appointed assignees under the bankruptcy.

Field and *Foreman* refused to transfer the shares to new trustees for the *Great Eastern Railway Company*, and the company thereupon filed the bill in this suit containing the statements above mentioned, and praying that the assignees might be ordered to transfer the shares as the *Great Eastern Railway Company* should direct.

(1) 2 Mont. & A. 348.

L. C. 1872 GREAT EASTERN RAILWAY CO. v. TURNER.

C. H. Turner, who was made a Defendant, stated that he was willing to make the transfer, but was advised that he could not safely do so, as *Field* and *Foreman*, his assignees in bankruptcy, objected.

Field and *Foreman* alleged that the purchase of the shares out of the money of the company and the transfer of the stock were illegal transactions, and that the vesting the same in the successive chairmen was a mere device for giving additional credit to the chairmen; that the trust of the stock was not effectual, and that it remained in the order and disposition of *C. H. Turner* at his bankruptcy, and as such passed to his assignees, who claimed the same accordingly.

The Master of the Rolls dismissed the bill with costs as against all the Defendants (1).

The Plaintiffs appealed.

Sir *R. Baggallay*, Q.C., and Mr. *Smart*, for the Plaintiffs:—

The decision of the Master of the Rolls proceeded on the simple principle that the whole transaction was illegal. No doubt the

(1) 1872. May 12. WM (1872) W

LORD ROMILLY, M.R.:—

The question in this case is very short. The Plaintiffs are a company incorporated by Act of Parliament. The company are not by their Act of incorporation enabled to purchase or hold shares in any other company. [His Lordship then stated the facts of the case.] I think that the assignees are right, and I am of opinion that this stock, which the Plaintiffs could not legally acquire or hold, cannot be said to be of that description of trust property which upon bankruptcy does not pass to the assignees. All that Mr. *Turner* did was to enter into an agreement to deal with the shares as the Plaintiffs should require. This engagement his bankruptcy disqualified him from executing. The notice to the *Lynn and Hunstanton Railway Company* could not have prevented Mr. *Turner* from transferring the shares or the stock as he chose, nor would this have made the *Lynn and Hunstanton Railway Company* liable if they had adopted such transfer. Even assuming that the Plaintiffs were the true owners, yet the shares were still with their consent in the ostensible ownership, that is in the order and disposition, of the bankrupt. I am disposed to think that the stock vested in the assignees in bankruptcy without the necessity of resorting to the order and disposition clause in the bankruptcy Acts; but it is unnecessary to determine that question. I think also that the same question of principle arose in the case which was cited to me, *Ex parte Watkins* (2 Mont. & A. 348), and that by the decision in that case the question is concluded in favour of the assignees. The bill will be dismissed with costs.

shareholders could complain of the illegality, just as a *cestui que trust* could complain of an unauthorized investment; but neither the trustee nor his assignees could claim the fund.

Mr. *Speed*, for Mr. *Turner*.

Mr. *Fry*, Q.C., and Mr. *Bagshawe*, for Mr. *Turner's* assignees:—

The assignees have been directed by the Court of Bankruptcy to defend this suit. The *Great Eastern Railway Company* can never have been the owners of these shares, as such ownership was beyond their powers. The public, by the Attorney-General, could interpose and prevent it. The company could not have compelled *Turner* to transfer: *Attorney-General* v. *Great Northern Railway Company* (1). If the company choose to create an illegal trust, they cannot enforce it against the creditors of *Turner*. *Ex parte Watkins* (2) and *Ex parte Ord* (3) are clear authorities. If the directors negligently and improperly place a chattel of the company in the hands of a trader who becomes bankrupt, they cannot recover the chattel from the assignees: *Copeman* v. *Gallant* (4); *Joy* v. *Campbell* (5): *Ex parte Castle* (6). The *Lynn and Hunstanton Railway Company* cannot recognise this trust: *Companies Clauses Act*, 1845, s. 20.

The only thing which the *Great Eastern Railway Company* can do would be to force the directors, who had acted illegally, to take the shares, and replace the money, and then the shares would certainly go to the assignee.

LORD SELBORNE, L.C.:—

I am sorry that I am unable, in this case, to follow the view of His Lordship the Master of the Rolls.

As I see the facts, the legal conclusion to be drawn from them is not difficult. Supposing that there had been an authority by law to invest the funds of the company in the purchase of shares in the *Lynn and Hunstanton Railway Company* in the name of the chairman for the time being, then I take it to be clear, beyond

(1) 1 Dr. & Sm. 154.
(2) 2 Mont. & A. 348.
(3) Ibid. 724.
(4) 1 P. Wms. 314.
(5) 1 Sch. & Lef. 328.
(6) 3 M. D. & D. 117; 7 Jur. 47.

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controversy, that, even without any notice to the company, the principle of *Joy* v. *Campbell* (1), and the other cases of that class, would have prevented the application of the order and disposition clause of the *Bankruptcy Act*, and that the shares would not have passed to the assignees of the chairman.

The difference between the case which I have supposed and the present case is just this: that there was no authority to purchase either in the name of the company or in the name of the chairman, or in any other name. The company is a mere abstraction of law. All that it does, all that the law imputes to it as its act, must be that which can be legally done within the powers vested in it by law. Consequently a thing which is *ultrà vires* and unauthorized is not an act of the company in such a sense as that the consent of the company to that act can be pleaded.

The directors are the mere trustees or agents of the company—trustees of the company's money and property—agents in the transactions which they enter into on behalf of the company. In this case, without legal authority, and therefore without the consent of the corporation, whose trustees and agents they were, the directors took a part of the company's money, and therewith purchased a property which this contest proves to be of some value—shares in the *Lynn and Hunstanton Railway Company*. Those shares so bought—not a farthing of any other person's money having contributed to the purchase—were placed in the names of three successive chairmen of the company, and were uniformly dealt with as that which they were, the property of the company. True it is that the investment was an unauthorized investment; but I entirely assent to what was said by Sir *Richard Baggallay*, that there is no difference between an unauthorized investment of the money of a public company by its trustees, and an unauthorized investment of the moneys belonging to any other trust by the trustees of that trust. It would be monstrous—it would be extravagant to the very last degree—to say, that because the money of *cestuis que trust* has been laid out in an unauthorized manner, that therefore they are not to have the benefit of whatever value there is in the property bought with their money.

It is clear that the chairman, although this was an unauthorized

(1) 1 Sch. & Lef. 328.

investment, was a trustee of the shares bought with the money of the company; but if the shares had become burthensome, the burthen could not have been thrown upon the company. That is a proposition quite consistent with the other.

Then how can it possibly be said, there being this trust created by the company's trustees in their own wrong—binding on them, although not binding on the company—created by them, but not assented to by the company—that the company, as the true owners, have consented to allow their property to be placed in jeopardy by creating a reputed ownership in the name of its chairman? I cannot follow the proposition. While in the ordinary case of an authorized trust that order and disposition and reputed ownership which the statute contemplates are wanting, in this case of unauthorized trust the consent of the true owner, that equally essential ingredient to the creation of a reputed ownership, is much more wanting.

The case, therefore, seems to me to resolve itself into the ordinary one of trust money in the hands of trustees, which the Court follows and traces into every investment which they have made. In the case of *Pennell* v. *Deffell* (1), where an official assignee had carried moneys, which he had received for the purposes of his assigneeship, into an account which he kept in his own name with his bankers, and afterwards died insolvent, it was held that the balances of that account, which could be ear-marked as having arisen from the trust moneys, passed to his successor in office. Whatever be the nature of the investment into which the trust money invested by a trustee can be traced, unless the *cestuis que trust* are affected by the consent which the statute contemplates for the creation of reputed ownership, I apprehend it to be clear law that the money so invested does not pass on bankruptcy to the assignees, but remains the property of the person for whom it was originally held.

I will only add one sentence upon that class of cases which have been cited, and which appear to have been considered by the Master of the Rolls to be authorities for the decision at which His Lordship arrived. They are undoubtedly cases in which an apparent exception is made to the general rule, that where there is a *bonâ*

(1) 4 D. M. & G. 372; 18 Jur. 273.

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fide trust the trustee does not hold the property in his order and disposition with the consent of the true owner, or with such a reputation of ownership as to cause the property to be treated as his own in case of bankruptcy. But the principle of the exceptions in those instances, which I will assume for the present purpose to have been correctly made upon the facts of those particular cases, is this, that there being no *bonâ fide* reason for the creation of any trust, the forms of a trust were gone through in order to conceal the true ownership of the property. That has been held to be in truth an abuse of the forms of a trust for the purpose of creating a reputation of ownership, and placing the property within the order and disposition of another with the consent of the true owner of the property.

For the reasons which I have already given, that principle cannot apply where a joint stock company is the true owner, and can have given no consent, and where the investment is an unauthorized investment of the money of the company as against the company, by the act of its trustees.

MINUTES:—Declare that *Henry Turner*, at the date of his bankruptcy, was trustee for the Plaintiffs of the £1020 stock of the *Lynn and Hunstanton Railway Company*. Decree that he be directed to transfer the stock to the Plaintiffs, or as they shall direct. The costs of the suit up to the hearing in the Court below to be paid by the assignees. No costs given to *Turner*. No costs of the appeal.

Solicitor for the Company: Mr. *W. H. Shaw.*

Solicitors for the Assignees of *Turner:* Messrs. *Wilde, Berger, & Moore.*

DIXON *v.* MUCKLESTON.

[1870 D. 54.]

L.C.
1872
Nov. 18, 19.

Equitable Mortgage—Deposit of Old Deed—Priority.

The owner in fee of a farm deposited deeds of conveyance of the farm dated 1774, by way of security for money then due, writing at the same time a letter which stated that the deeds were the title-deeds of the farm, and were to be a security. He afterwards deposited the subsequent title deeds of the farm, the earliest being dated 1787, with bankers, by way of security for money due to them; the title was investigated by the bankers, and they had no notice of the prior charge:—

Held (affirming the decision of the Master of the Rolls), that the letter created an equitable charge on the farm, and that under the circumstances credit must be taken to have been given by the owner of the prior charge to the statement made by the mortgagor, that the deposited deeds were the whole of the title-deeds; and that the owner of the prior charge had therefore not been guilty of negligence so as to deprive herself of her priority.

By indentures of lease and release bearing date the 11th and 12th of May, 1774, a certain farm called *Pen-y-bank* was conveyed to one *Henry Bowdler*, through whom it appeared to have come to his step-son *Charles Muckleston*.

By indentures of lease and release bearing date the 2nd and 3rd of August, 1787, *Charles Muckleston* settled the *Pen-y-bank Farm* and certain lands at *Cotton Hill* on himself for life, with remainder to his children as tenants in common. He had four children, of whom two died infants, so that the settled lands vested as to three-fourths in the surviving son, *Edward Muckleston* the elder, and as to one-fourth in a daughter, *Mary*, who by a settlement made on her marriage with *Edward Shaw*, and dated the 28th of June, 1814, conveyed her one-fourth to *Edward Shaw*, her husband.

Edward Muckleston the elder, by deeds dated the 21st and 22nd of August, 1818, conveyed his three-fourths to trustees on trust for himself for life, with remainder to his child or children as he should appoint, subject to a jointure to his wife.

By deeds of the 21st and 22nd of February, 1822, *Edward Shaw* conveyed his one-fourth to *Edward Muckleston* the elder.

By an indenture dated the 1st of February, 1848, *Edward*

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Muckleston the elder appointed and conveyed the whole of the settled lands (subject to the jointure) to his son *Edward Muckleston* the younger in fee.

Edward Muckleston the younger, being indebted to his aunt *Mary Shaw* in the sums of £400 and £1100, on the 25th of October, 1864, wrote to her as follows:—"When I last had the conversation with you about your interest, it was agreed between us that if I gave you 5 per cent. for the use of your £1100, you would be satisfied. I gave you the title-deeds of *Pen-y-bank Farm* on your £400 as a double security. I trust, therefore, as I pay you so regularly, you will not put me to the great expense of mortgaging my *Bromlow* property. . . . Besides, the deeds now in your possession are of more value than all the money I have now from you."

There was no statement how any of these deeds were deposited: but it was apparently assumed that the deeds relating to the *Pen-y-bank Farm* were deposited with *Mary Shaw* by *Edward Muckleston*, and that both sets of deeds came into the possession of *Mary Louisa Muckleston* as executrix of Mrs. *Shaw*.

Mary Shaw died in 1865, having by her will appointed and bequeathed her residuary estate to *Mary Louisa Muckleston*, who was also appointed executrix. There were some dealings between *Mary Louisa Muckleston* and *Edward Muckleston* the younger which are not material to the decision of the case.

In February, 1868, *Edward Muckleston* the younger, being indebted to the Plaintiffs, who were bankers, in the sum of £4591, deposited with them the deeds of 1787, 1818, 1822, and 1848, and other deeds relating to the *Pen-y-bank Farm* and the *Cotton Hill* lands; and on the 24th of April, 1868, he gave a memorandum of deposit, with an agreement to execute a mortgage to the Plaintiffs. The title appeared to have been advised upon by the solicitors of the Plaintiffs, and the Plaintiffs had no notice of the dealings with *Mary Shaw*.

Edward Muckleston, in 1869, became bankrupt, and the Plaintiffs then filed the bill in this suit, claiming (amongst other things) priority for their charge on the *Pen-y-bank Farm* and the *Cotton Hill* estate over the charge of *Mary Louisa Muckleston*.

She, by her answer, said that she held the deeds of 1774, re-

lating to *Pen-y-bank Farm*, and those of 1814, relating to one-fourth of both estates, and set forth the letter of the 25th of October, 1864, and contended that the claim of the Plaintiffs was unfounded.

The Master of the Rolls made a decree in the suit that the charges of *Mary Louisa Muckleston* on the *Pen-y-bank Farm* and the *Cotton Hill* estate had priority over that of the Plaintiffs.

The Plaintiffs appealed.

Sir *R. Baggallay*, Q.C., and Mr. *Cookson*, for the Appellants:—

No doubt, as between persons having equitable rights, priority in time gives the better title, but that is only when their equities are really equal: *Rice* v. *Rice*. (1) The Defendant here founds her equity on the possession of title-deeds relating to the estates in question, but in order that such an equity may prevail, those deeds must be material: *Lacon* v. *Allen* (2); *Roberts* v. *Croft* (3). The deed of 1774 formed no part of the present title, but the deeds delivered to us shewed a complete title from 1787; and no mortgagee could expect, or purchaser demand, any earlier title. The deposit of an old and useless deed which happens to be in the hands of any one else cannot give a title or an equitable estate: *Rooper* v. *Harrison* (4). To call such a doctrine equitable is absurd; nothing can be more inequitable. The deeds were examined on behalf of the Plaintiffs, and a memorandum was carefully prepared. What more could they have done? *Edward Muckleston* professed to be owner in fee, and shewed a complete title; and what could they have required more? Mrs. *Shaw*, on the other hand, was guilty of negligence in not seeing that she had the real title deeds, and the Defendant must take the consequences. *Hewitt* v. *Loosemore* (5) and *Colyer* v. *Finch* (6) shew the rule where the contest is between two mortgagees; *Lacon* v. *Allen* when it is between a mortgagor and an assignee in bankruptcy. *Roberts* v. *Croft* is distinguishable, because there the mortgagee was assured that he had all the deeds. In *Hunt* v. *Elmes* (7) and in *Ratcliffe* v. *Barnard* (8) there were merely bundles of deeds deposited. In

(1) 2 Drew. 73.
(2) 3 Ibid. 579.
(3) 2 De G. & J. 1.
(4) 2 K. & J. 86.
(5) 9 Hare, 449.
(6) 5 H. L. C. 905.
(7) 2 D. F. & J. 578.
(8) Law Rep. 6 Ch. 652.

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Dowle v. *Saunders* (1) a prior equitable mortgage was displaced on the ground of laches; so in *Perry-Herrick* v. *Attwood* (2). *Jones* v. *Williams* (3) is very like this case. If Mrs. *Shaw* employed no solicitor, she must be considered as her own solicitor, and must take the consequences of her own negligence. The bankers took every precaution short of getting in the legal estate. The allegations and evidence as to the deeds of 1774 are very scanty, and it does not clearly appear how Mrs. *Shaw* got those deeds. As to the *Cotton Hill* property, that is not mentioned in the memorandum; and if Mrs *Shaw* had the deeds of 1814 relating to it, she very probably got them as having belonged to her husband.

Mr. *Southgate*, Q.C., and Mr. *Dryden*, for Miss *Muckleston*, were not called upon.

LORD SELBORNE, L.C.:—

With regard to the principal question which has been argued, it will be right for me to make one or two observations upon the nature of these equitable securities.

I think there is no better statement of the matter, in the light in which I see it, than that made by the Lord Justice *Turner* in his judgment in the case of *Cory* v. *Eyre* (4). [His Lordship then read from pages 167 and 168.] No doubt, in cases of this class, injustice is sometimes done, and, but for the honour and integrity generally shewn by the persons engaged in these transactions, much more might frequently be done. It is impossible to reflect on this injustice without finding very cogent arguments in favour of some attempt to improve the state of the law as to title of real estate, and to get rid of the difficulty which arises from the distinction between a legal and an equitable estate, and to avoid the necessity of deducing title by long and complicated abstracts, travelling through a great number of deeds. But in the meantime, until the Legislature sees its way to apply a remedy to that state of things, we must deal with the law as we find it.

The first question in every case of this kind must be: Did that take place between the owner of the estate and the person

(1) 2 H. & M. 242. (3) 24 Beav. 47.
(2) 2 De G. & J. 21. (4) 1 D. J. & S. 149.

claiming to be the prior incumbrancer, which vested in that prior incumbrancer an estate or interest in the land? In this case I can entertain no doubt whatever that it did. The case does not rest, I may observe in passing, upon a mere deposit of deeds, but it rests upon that which is, in the view of this Court, equivalent to an express declaration of trust by the owner of the legal estate in *Pen-y-bank* in favour of his aunt originally, and now of his sister, Miss *Muckleston*. In the letter written by *Edward Muckleston*, who was at that time legal and equitable owner in fee simple of the *Pen-y-bank* estate, subject to charges which are not material, he says with reference to a debt due from him to his aunt, Mrs. *Shaw*, whom his sister now represents:—[His Lordship then read the important passages.] As between *Edward Muckleston*, who signed that letter, and the representatives of Mrs. *Shaw* to whom it was addressed, I have no hesitation whatever in holding that, whatever were the deeds which were then in Mrs. *Shaw's* hands, a good equitable security on the *Pen-y-bank* estate was created as between those two persons, which *Edward Muckleston* and those claiming under him would be estopped from at any time whatever disputing. I will even go the length of saying that, if the deeds had not been truly deeds relating to the *Pen-y-bank* estate at all, but stated by him in writing to be so, still the same security would have been effected. It is a security created by an express writing under the hand of the owner in fee sufficient to satisfy the *Statute of Frauds*, and raising none of the questions which a security by mere deposit might have raised. The writing interprets the intent and purpose of the deposit, and does not leave that intent and purpose to be ascertained merely from an examination into the nature and character of the deeds themselves.

Now that being so, we have a case in which the legal owner of the property, by that which operates in equity as a declaration of trust, has vested an estate and interest in the subject-matter of the trust, in the person in whose favour the trust is created or declared.

Then come in the authorities which guide the Court in deciding the question whether the person in whose favour the charge is created has, by act or by omission, done that which entitles and requires the Court to postpone the interest already vested in him to some interest vested in another by a later transaction.

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Now, independently of authority, it is to be observed that in such a case, acts are much stronger in raising an equity than omissions can be. There may be omission or negligence equivalent in practical effect to acts; because when there is something which a person ought to do, and must be presumed to know that he ought to do, but does not do, the consequence is that the omission may be regarded as due to what is called gross or wilful negligence, which is equivalent to an act. But it must be something which raises a positive equity against him, upon the principle which in equity, as distinct from law, is conveniently designated by the term "estoppel." In other words, the man who has conducted himself in such a manner is not entitled to deny the truth of his own representations if it be a case of express representation —he is not entitled to deny being bound by the natural consequences of his own acts, if it be a case of positive acts—he is not entitled to refuse to abide by the consequences of his own wilful and unjustifiable neglect, if that is the nature of the case. By one or other of those means he may have armed another person with the power of going into the world under false colours; and if it be really and truly the case that by his act, or his improper omissions, such an apparent authority and power has been vested in that other person, he is bound upon equitable principles by the use made of that apparent authority and power. But as that is a doctrine resting upon the highest principles of justice, the Courts of Equity have been very careful that it should not be extended beyond the point at which it is consonant with practical justice; and this particular class of cases has presented very difficult questions for determination on that point.

I really do not feel myself bound to say how I should have looked at such a case as the present, if it were free from and unaffected by authority. I am very much impressed by the force of many of the arguments adduced by Sir *Richard Baggallay* and Mr. *Cookson*, as to the question viewed in the light of principle merely. It may certainly be said, with great truth, that a man taking an equitable security with a deposit of deeds ought to look into the deeds, ought to make some examination of them, and ought to satisfy himself that they are not such as to leave in the hands of the person with whom he is dealing the power of

going afterwards to somebody else, and dealing with him in like manner under the appearance of a perfect title. But here I am bound by the series of authorities which have decided—for I take it to be clear that they have gone to this length—that when the Court is satisfied of the good faith of the person who has got a prior equitable charge, and is satisfied that there has been a positive statement, honestly believed, that he has got the necessary deeds—then he is not bound to examine the deeds, and is not bound by constructive notice of their actual contents, or of any deficiencies which by examination he might have discovered in them. This I take to be the law, even in cases where the depositor of the deeds is himself acting in the double character of borrower of the depositee's money and of solicitor for the depositee. In the cases which have been mentioned of *Hunt* v. *Elmes* (1) and *Hewitt* v. *Loosemore* (2), and I think in some others also, the facts were of that character. In *Hunt* v. *Elmes* and *Colyer* v. *Finch* (3) the deeds had never been looked at, but credit had simply been given to a statement made, either upon the parcel containing the deeds or otherwise, that they were the proper deeds relating to the estate. In some of these cases the lender was not otherwise advised than by the solicitor of the borrower or by a solicitor having, as mortgagor, a personal contrary interest, and yet the lender was held not to be guilty of such neglect or laches as amounted to what is described by the Vice-Chancellor *Turner*, in *Hewitt* v. *Loosemore*, as "gross and wilful negligence, which in the eye of this Court amounts to fraud," merely because he believed the statements made to him, and abstained from examining the deeds, and did not employ an independent solicitor.

I am unable to distinguish this case in principle from the cases so decided; for what have we more than this? A lady, Mrs. *Shaw* —whom I must presume to have been unlearned in the law, and very unlikely, even if she had read the deeds, to be able to tell their precise bearing upon any question of title—gave credit to the representation made by her nephew under circumstances which would not suggest any reason for suspicion. The deeds were given to her, and, from what appears upon the very scanty evidence, I

(1) 2 D. F. & J. 578. (2) 9 Hare, 449.
(3) 5 H. L. C. 905.

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assume that they were not examined, but were believed, upon the statement of the mortgagor, which was sufficient as against him to preclude any necessity for further inquiry, to be the title-deeds of the *Pen-y-bank Farm.* When examined, they appear to be insufficient title-deeds, though relating to the *Pen-y-bank Farm.* If it had been suggested and proved that the deeds had been examined, and, being examined, had been found to be ancient and not essential to the title, that would have raised a different kind of case, upon which I express no opinion. But we have to deal with the simple fact of a security created in favour of a member of the family, stated in writing to be a security upon all the title-deeds (for so I read the letter) of the *Pen-y-bank Farm,* and nothing whatever to shew that in honest good faith credit was not given to that statement.

That being so, my opinion is, that, according to the principles of the authorities, it is impossible to say that Mrs. *Shaw* or her niece has been guilty of such wilful negligence as to raise an equity against the priority which they originally possessed. I think, therefore, that the decision of the Master of the Rolls is correct.

With regard to the *Cotton Hill* estate, the Respondent has scarcely raised a contest, and I am inclined to think that, if the matter had been as carefully examined before the Master of the Rolls as it has been here, His Lordship would not have fallen into the error into which, I think, he has certainly fallen in respect of that security. There is nothing to shew in what manner those title-deeds which relate to the *Cotton Hill* estate came into the possession of Miss *Muckleston* or of Mrs. *Shaw,* and that possession might be accounted for in a manner more consistent with the real title by supposing that they were in Mrs. *Shaw's* possession in her own original right, than by supposing that they came to her from *Edward Muckleston.* They are not mentioned in the letter, and the mere possession of deeds without evidence of the contract upon which the possession originated, or at least of the manner in which that possession originated, so that a contract may be inferred, will not be enough to create an equitable security. That this is so, appears, amongst other authorities, by the case of *Chapman* v. *Chapman* (1).

(1) 13 Beav. 308.

L. C. 1872 DIXON v. MUCKLESTON.

I am clearly of opinion, therefore, that, so far as the decree of the Master of the Rolls extends the security in this case to the *Cotton Hill* estate, it is erroneous, although I believe the error to be one which His Lordship would not have fallen into if his attention had been called as distinctly to the matter as mine has been.

The conclusion at which I arrive upon the whole of this case is, that the judgment of the Master of the Rolls should be affirmed with the variation which I have mentioned, excluding the *Cotton Hill* estate; that the Respondents should add their costs of this appeal to their security, because I do not think the costs have been increased by the question about the *Cotton Hill* estate; and that in other respects no costs of the appeal should be given, but the deposit to be returned.

Solicitors: Messrs. *Milne, Riddle, & Mellor*; Mr. *W. H. Reece.*

Ex parte SOCIETY OF ATTORNEYS, &c.

L. C. 1872 *Nov.* 20.

Supplemental Charter—Objections—Great Seal.

In order to stop the sealing of a supplemental charter granted to an existing corporation, it must in general be shewn that the proposed charter is contrary to law, or that no proper authority for the application had been given, or that some personal right of a member of the Society would be wrongly interfered with.

BY letters patent, under the Great Seal, dated the 22nd of February, 1844 (being a charter granted on the surrender of a former charter), the then members of the Society, and such persons as should thereafter be elected members of the Society, were constituted a corporation by the name of "*The Society of Attorneys, Solicitors, Proctors, and others, not being Barristers, practising in the Courts of Law and Equity of the United Kingdom.*" And it was directed that there should be a council of the Society, to be elected from among the members of the Society, consisting of not more than thirty nor less than twenty members. And it was declared that at any general meeting it should be lawful for the members, or such of them as should be then present, to ordain and

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make bye-laws, rules, orders, and ordinances for (amongst other things) fixing and determining the number of which the council should consist, and the manner of electing them, and also the period of their continuance in office.

Several bye-laws for the regulation of the elections, the buildings, and other matters were made under these powers.

On the 24th of June, 1872, the Society presented a Petition to the Queen in Council, praying for a supplemental charter. The proposed supplemental charter directed that the council should consist of not more than fifty nor less than twenty members, exclusive of extraordinary members; any member of the Society holding at the time of his appointment the office of President of any other Law Society in any place except *London* should be eligible by the council as an extraordinary member; the number of extraordinary members not to exceed ten; and that the powers given to a general meeting by the last charter of making and ordaining bye-laws, rules, orders, and ordinances for fixing and determining the number of members of which the council should consist, and the manner of electing members of the council, and also the period and time of their continuing in office, and the manner and time of supplying vacancies, should continue applicable to the ordinary members of the council, regard being had to the enlargement in the number of ordinary members of council now authorized.

The application for the charter had been authorized at a general meeting of the Society held in January, 1872, and the proposed charter had been unanimously approved of at a general meeting held on the 19th of July.

On the 3rd of August, Mr. *W. R. Ripley*, a member of the Society, lodged with the Clerk of the Privy Council a caveat against the grant of the supplemental charter.

On the 9th of August an Order in Council was passed directing the grant of the proposed supplemental charter; and the Clerk of the Council informed Mr. *Ripley* that the Council failed to discover in the papers transmitted to the office any reason which would justify them in advising Her Majesty not to grant the proposed charter.

On the 15th of August Mr. *Ripley* lodged a caveat at the *Great Seal Patent Office*.

The Society thereupon presented a Petition to have the supplemental charter sealed, stating as above mentioned, and that Mr. *Ripley* wished to have several alterations in the bye-laws of the Society, one of which alterations was that five members of the council should retire annually, and not be eligible for re-election.

The Petition now came on for hearing.

Sir *R. Baggallay*, Q.C., and Mr. *Haynes*, in support of the Petition.

Mr. *Dickinson*, Q.C., and Mr. *Cookson*, for Mr. *Ripley*:—

This Petition ought to have been approved of at a general meeting; and even if there are no objections to the proposed charter, the hearing ought to stand over for a general meeting to be held. These changes are organic changes in the constitution of the Society, and ought not to be made without an opportunity of their being opposed at another meeting. It is no objection that Mr. *Ripley* did not oppose the charter at the previous meeting. He objects to the power of making bye-laws, and considers that several which have already been made are improper.

LORD SELBORNE, L.C.:—

It appears to me clear that no legal objection to the affixing the seal to this supplemental charter has been stated.

I will not undertake to foresee all possible objections, because there may be some that do not occur to me at the moment; but, generally speaking, I conceive that, in order to warrant the stopping a royal charter at this stage—a supplemental charter to a corporation already existing—the objection must be in one of three forms: either that in the proposed supplemental charter there is something opposed to the general law of the land; or that no proper authority to apply for the charter has been given; or lastly, that some personal or individual right of the objector is interfered with in a manner which is either wrong in itself, or wrong unless specially brought to the notice of the Crown. No objection of either the first two kinds has been here offered. It seems to be clear that there is no illegality in the charter unless some right of the individual members is interfered with; equally

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clear that the charter follows in substance the authority given to the governing body of the Society to solicit it, at a general meeting held some time since.

Then the only question is, whether that which is asked by the charter interferes with the personal rights of individual members of the Society in a manner wrong in itself, or wrong unless specially brought to the notice of the Crown. Mr. *Cookson* has suggested that it may do so indirectly in this way, by altering the constitution of the body who are to make bye-laws. This, however, I think is not the case. If I rightly apprehend, under the new charter as well as the old, the power to make general bye-laws will rest with the general meeting and not with the council. Mr. *Cookson* further says that by altering the constitution of the governing body of the Society there may be a possible change of power under bye-laws which affect individual members. The first observation I make as to that is, that the indirect and remote suspicion of a possibility is not a legal objection in my view of the matter; secondly, that I do not follow the suggestion itself. Mr. *Cookson* has referred to certain bye-laws under the existing charter as to the appropriation of particular parts of the building for purposes beneficial to individual members, and as to powers of discipline capable of being exercised as against members offending against the Society. The very fact that those powers are given by bye-laws, if the bye-laws are valid, proves that they do not interfere with the rights of individual members under the existing charter; therefore the continuance of such powers under any variation of the governing body will be still subordinate to all the rights vested in the individual members by the original charter, none of which by this supplemental charter are proposed to be interfered with. It seems to me that this ground of objection fails, and that being so, my duty is to seal this charter.

Solicitors: Mr. *E. W. Williamson;* Mr. *W. R. Ripley.*

Ex parte HENRY.

L. C.
1872
Dec. 20, 21.

Patent—Lodging Complete Specification—15 & 16 Vict. c. 83, s. 9—Law Officer —Rival Inventor.

It is the duty of the law officer to hear and determine which of two rival applicants for patents is entitled to a patent, and the question ought not to be remitted to the Lord Chancellor by directing warrants for both patents.

An applicant for a patent does not, by lodging a complete specification and obtaining protection, acquire the rights of a patentee so as, during the six months' protection, to prevent any other person who had previously applied for a patent for a similar invention from obtaining a patent.

It is no objection to the grant of a patent that another person has been making experiments and working towards a similar invention.

ON the 25th of May, 1872, *John Farquharson* applied in the usual manner for a patent for an improvement in breech-loading firearms, and left a provisional specification of his invention. On the 7th of June he gave notice of his intention to proceed; and on the 2nd of July *Alexander Henry* lodged objections.

On the 26th of August, *Henry* applied for letters patent for an improvement in breech-loading firearms, and left a complete specification of his invention. He then gave notice of his intention to proceed, and *Farquharson* lodged objections.

Both of the applications were on the 7th of November heard before the Solicitor-General, who expressed his opinion that the evidence was very contradictory, and said that he did not like to take upon himself the onus of deciding between the applicants. He should put the matter in a train for the decision of the highest authority, by causing warrants to be made for the sealing of both patents, and leaving the applicants to apply to the Lord Chancellor.

Warrants were accordingly made for sealing both patents, and each of the applicants presented a Petition to have the Great Seal affixed to letters patent for his invention. *Farquharson* lodged objections that *Henry* was not the first and true inventor, and had obtained knowledge of *Farquharson's* invention from a workman to whom *Farquharson* had explained it, and from having seen a rifle made according to *Farquharson's* invention. *Henry* lodged

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objections that *Farquharson* was not the first and true inventor; that the invention was the same as one for which *Henry* held a patent, or if there was any improvement it was an invention of *Henry's*, of which *Farquharson* had obtained knowledge from *Henry's* descriptions or drawings or from seeing *Henry's* workshops; and that as *Henry* had applied for a patent, and lodged a complete specification, and received protection for six months, which had not then expired, he had the same privileges as if he had letters patent; and letters patent for a similar invention could not be granted to any other applicant.

Both of the Petitions now came on for hearing.

The Lord Chancellor, when the Petitions were opened, objected to their coming before him, and said that he understood it to be the proper duty of the law officer to determine these questions and to discharge the functions of a jury in deciding the matters in dispute. As, however, the applicants had obtained warrants, his Lordship would hear the Petitions, but the case must not be drawn into a precedent.

Mr. *Aston*, Q.C., and Mr. *Lawson*, for *Henry*:—

In the first place, the filing a complete specification has the effect of preventing any one else from obtaining a patent during the six months of protection: 15 & 16 Vict. c. 83, ss. 9, 16, 24. The question arose in a case of *Tanner and Way*, in which the Attorney-General consulted the Lord Chancellor, who was understood to have decided to that effect. That was also held in *Ex parte Bates & Redgate* (1), and the reason is that the applicant has performed his part of the bargain, and given his invention to the world, whereupon he has a right to his patent. The words of sections 6 and 9 of the Act of 1852 are conclusive.

The Lord Chancellor said that it was impossible to maintain that by filing a complete specification an applicant could for six months prevent any one else from obtaining a patent for a similar invention. His Lordship could not hold the deposit of a complete specification to be equivalent to an actual grant of letters patent under the Great Seal.

(1) Law Rep. 4 Ch. 577.

Mr. *Aston* and Mr. *Lawson* then proceeded to argue that on the evidence the objections of *Henry* as to the means by which *Farquharson* obtained his invention were supported, and those of *Farquharson* failed.

Mr. *Kay*, Q.C., and Mr. *Macrory*, for *Farquharson*, were not called upon.

LORD SELBORNE, L.C.:—

I have come to the conclusion that Mr. *Farquharson's* patent must be sealed, and that the application for the other patent must be entirely refused.

There are some questions of law and some questions of fact which have to be considered in this case. One question of law I disposed of during the course of the argument; but as it is desirable that the grounds upon which I did so should be well understood, I propose to say a few words upon that subject. Mr. *Henry* applied for a patent upon the 26th of August, 1872, and at the same time filed a complete specification; and the question was whether, under the statute, the effect of that complete specification was to make it an answer to any claim by any one else who had previously applied for a patent for the same thing, alleging himself to be the first inventor. The argument was founded upon the case of *Ex parte Bates & Redgate* (1), which decided that, where a patent has actually been sealed, the Crown will not afterwards enter into the question whether or not some one else, who had previously applied, was a prior inventor, and would in no case give a subsequent grant for the same thing for which a patent had already been granted before.

The principle of that decision plainly is, that what the Crown has actually granted cannot, if vested in the grantee, be taken away from him and given to somebody else; and that the grant cannot be assumed to be void in this jurisdiction, but must be repealed by *scire facias* before the Crown, consistently with the principles applicable to all Crown grants, can properly grant a second patent for the same matter.

Then it was attempted to transfer the principle of that decision

(1) Law Rep. 4 Ch. 577.

L.C. 1872 *Ex parte* HENRY.

to a case like the present, because there is a clause in one of the Acts of Parliament (15 & 16 Vict. c. 83, s. 9) which says that for a period of six months every person who has applied for a patent, and has filed a complete specification, shall, during the term of six months, have the like powers, rights, and privileges as might have been conferred upon him by letters patent duly sealed as of the day of the date of his application. That proviso of the Act of Parliament gives to the act, not of the Crown, but of the party, such an effect as would put him, for a limited period of time, in a situation like that which, on the face of a royal grant, he would, according to the legal import of that grant, be put into. The whole foundation of that proviso is that there has been no sealed patent, and the whole question now is, whether there should be a sealed patent, and to whom it should be given. It is not contended that the mere lodging a complete specification absolutely entitles the party who lodges it to have his patent sealed if he applies for it within six months; no one can contend that. But if the argument is not good for that, it is not good for anything at all. The analogy is false as derived from the case where a grant has actually been made and sealed; and in a case where no grant has been made or sealed, there is no obstacle to the Crown doing what may appear to be right or just. So much for that part of the case with respect to the only point of law which appears to me necessary to be adverted to before I come to the questions of fact.

I apprehend that it would be no answer to a *bonâ fide* applicant for a patent, who has himself, by his own ingenuity, made a useful invention, and has applied for a patent before any one else claiming to have made the same invention—it would, I say, be no answer to him, assuming the absence of fraud or communication, to allege that experiments had been going on, or even drawings made, by another inventor. One person, being a *bonâ fide* inventor, comes first to ask for a patent for his invention, and such allegations are no answer to him. If a patent be granted to him, it would date from the day of his application. If he were the true inventor, the circumstance of something having taken place somewhere else, which was not disclosed to the world, and as to which no prior application was made, would be no answer to him, even if it were shewn that the two inventors were travelling

very much upon the same lines, and that their minds were going very much to the same point at the same time. I think I ought, if that be the state of the present case, to grant Mr. *Farquharson* his patent.

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I now come to the questions of fact which have been raised in the case.

[His Lordship then commented on the evidence, and came to the conclusion that *Farquharson* had made his invention independently; that letters patent for his invention should be sealed; that those for *Henry's* patent should not be sealed; and that *Henry* should pay the costs of the applications.]

Solicitors for Mr. *Farquharson:* Messrs. *Collette & Collette.*
Solicitor for Mr. *Henry:* Mr. *J. H. Johnson.*

BOWEN *v.* BARLOW.

L. C. 1872 *Nov.* 15.

[1867 B. 157]

Will—Construction—Devise—Mortgage-money.

The lessee of a term of years in four houses assigned the term, by way of mortgage, to the owner in fee of the immediate reversion, who afterwards devised the houses by the description of "my freehold houses Nos. 5, 6, 7, and 8, *Stock Street*," and was at the time of his death in possession as mortgagee:—

Held (affirming the decision of the Master of the Rolls), that the mortgage debt did not pass under the devise, but formed part of the testator's personal estate.

JAMES DAVERON, the testator in this case, was owner in fee simple of a piece of land in *Stock Street*. On the 1st of February, 1855, he granted to one *Thursby* a lease of the piece of land for the term of ninety years, at a rent of £16.

By a deed dated on the following day *Thursby* assigned to the testator the term in the piece of land by way of security for advances and interest. The testator made advances to the amount of £500, and *Thursby* built four houses on the land. The testator entered into possession as mortgagee, and was in possession at the

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time of his death, the accounts between him and *Thursby* remaining unsettled. The testator, by his will, dated the 17th of May, 1861, directed the trustees thereof to stand possessed of "my freehold houses, Nos. 5, 6, 7, and 8, *Stock Street*," upon trust for the benefit of his daughters and their issue. The testator died on the 17th of August, 1861.

The Master of the Rolls held that the devise of the houses did not include the mortgage debt due to the testator: as reported (1).

The *cestuis que trust* under the devise of the houses appealed.

The *Solicitor-General* (Sir *G. Jessel*), and Mr. *Everitt*, for the Appellants:—

When a testator gives a house he gives all his interest in it, whatever that may be: *Woodhouse* v. *Meredith* (2); *Emuss* v. *Smith* (3). If he had had a simple charge it would have passed. If a man owns a house subject to a charge which he buys up, the house would pass by the devise free from the charge. If he had the mortgage only, it would have passed by those words, and his having the reversion cannot affect the devise. If there were two moieties of a house, and the testator was owner of one and mortgagee of the other, both would pass by those words. The theory of the *Wills Act* is, that whatever interest a testator has shall pass by his will. If he had said, "all my estate and interest," there would have been no doubt, and that is what he has in fact given. The executors must come into equity to raise this money as the term is gone; but where is their equity? There is none between a devisee and a personal representative: *Compton* v. *Oxenden* (4). *Mathews* v. *Mathews* (5) is a very similar case.

Sir *R. Baggallay*, Q.C., and Mr. *Batten*, for the Respondents, were not called upon.

LORD SELBORNE, L.C.:—

It appears to me perfectly clear that the decision of the Master of the Rolls in this case is quite right.

(1) Law Rep. 11 Eq. 454.
(2) 1 Mer. 450.
(3) 2 De G. & Sm. 722.
(4) 2 Ves. 69, 261.
(5) Law Rep. 4 Eq. 278.

Suppose that a testator had a freehold house held under him by a tenant whose interest would of course be perfectly distinct from that of the testator; then suppose that the tenant was indebted to the testator; the testator would, therefore, have two distinct estates—one an estate in the house, the other an estate in the debt. The estate in the house would pass by a devise of the house, the estate in the debt would go to the executor as personal estate. The fact that the debt was secured by a charge on a term in the house could make no difference, and the fact that at law the term is merged cannot affect the construction of the will.

If matters had stood between the testator and his tenant as they originally were, the construction of the will would be clear. The testator had two distinct subjects for disposition, and by this devise he has, in my opinion, disposed of only one of them. His having taken possession as mortgagee could not make any difference unless the equity of redemption had been barred by lapse of time.

The case appears to me plain, and this appeal must be dismissed with costs.

Solicitors: Messrs. *Lloyd & Lane;* Mr. *E. H. Barlee.*

PHILLIPS *v.* SILVESTER.

[1868 P. 119.]

Vendor and Purchaser—Possession—Rent—Wilful Default—Deterioration.

A dispute arose between the trustees for a deceased vendor and a purchaser, the purchaser claiming to be entitled under his agreement to an additional piece of land. The trustees filed a bill and obtained a decree for specific performance, excluding the additional piece of land. The trustees had not allowed the purchaser to take possession of the rest of the land whilst the purchase-money remained unpaid, and in the meantime the rest of the land was allowed to lie waste:—

Held (affirming the decree of the Master of the Rolls), that the purchaser must be allowed to set off against the interest payable by him the amount of rent which might have been received, and the amount of deterioration.

6 Ch D 473

THE Plaintiffs in this case were the trustees under the will of the Rev. *S. H. W. Nanney*, who had, on the 4th of August, 1865,

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agreed to sell to the Defendant *John Silvester*, for £8500, certain lands at *Towyn*, in *Wales;* the purchase to be completed on the 25th of March then next, when the Defendant was to be let into possession; and if the purchase was not then completed, the Defendant was, until completion, to pay interest at the rate of 5 per cent. on £8075, the balance of the purchase-money.

A dispute arose between the Plaintiffs and the Defendant whether a certain piece of land in the occupation of a railway company was included in the agreement for sale; and after several attempts to arrange the dispute the Plaintiffs filed the bill in this suit for specific performance of the agreement. The Defendant, by his answer, in effect claimed the whole of the land as included in the agreement; but submitted to perform the agreement as the Court should direct.

The cause was heard on the 10th of February, 1872, when the Master of the Rolls made a decree that the agreement for purchase ought to be specifically performed; that the land occupied by the railway company was not included in the agreement; that, the title being accepted by the Defendant, the Plaintiffs should execute a proper conveyance, whereupon the Defendant should pay to the Plaintiffs the sum of £8075, being the balance of the purchase-money; that the Plaintiffs were entitled to interest at 5 per cent. on the said sum of £8075 from the 25th of March, 1866; that an account should be taken of rents and profits received by the Plaintiffs in respect of the premises, or which, but for their wilful neglect and default, might have been received; and an inquiry as to any deterioration in the premises since the 25th of March, 1866, and as to what would be required to restore them; and it was declared that the Defendant would be entitled to set off against the interest the amounts so found; and the Defendant was ordered to pay the costs of the suit other than such as related to the neglect and deterioration.

In pursuance of this decree, the balance of the purchase-money had been paid, and the property had been conveyed; but the Plaintiffs appealed against so much of the decree as related to wilful neglect and default, and to deterioration.

It appeared that the tenant of the land had in 1865 given it up in contemplation of the change of ownership, and that the land, or

a great part of it, had since remained unlet and neglected. The house and buildings were allowed to go to ruin; and it was stated that the land was left wild and open to any one, so that gipsies pitched their tents upon it, and the neighbouring farmers were in the habit of turning in their cattle. At one time the tithe-owners had seized the land in order to recover payment of the tithe rent-charge, which was left unpaid. Negotiations had gone on between the parties, and it seemed that at one stage of the proceedings the purchaser would have been let into possession on payment of a disputed sum of £250 claimed by a former tenant. The tenant, however, when possession was demanded, acting under the orders of the trustees, refused to deliver possession; and the trustees alleged that they should not be justified in putting the purchaser into possession until his purchase-money was paid.

Sir *R. Baggallay*, Q.C., and Mr. *Rowcliffe*, for the Appellants:—

All depends upon the question of who was in default. The Master of the Rolls has decided that the purchaser was in default, and therefore in effect that the purchaser ought to have taken possession at the appointed time. In *Ferguson* v. *Tadman* (1) the purchaser was not in default. In *Binks* v. *Lord Rokeby* (2) and *Minchin* v. *Nance* (3) the purchaser was refused compensation. That is the rule laid down in *Dart's* Vendors and Purchasers (4). In *Leggott* v. *Metropolitan Railway Company* (5) no allowance was given. *Sherwin* v. *Shakspear* (6) shews that a vendor is not liable in an ordinary case. These Plaintiffs were trustees, carrying into effect a contract made by their testator, and they could not prudently let in the purchaser without receiving the money. The Court would not have directed them to admit the purchaser. The Plaintiffs did all they could, and the purchaser refused every offer; he has been decided to be in the wrong, and must take the consequences.

Mr. *Fry*, Q.C., Mr. *W. W. Cooper*, and Mr. *H. Fawcett*, for the purchaser, were not called upon.

(1) 1 Sim. 530.
(2) 2 Sw. 222.
(3) 4 Beav. 332.
(4) 8th Ed. p. 596.
(5) Law Rep. 5 Ch. 716.
(6) 5 D. M. & G. 517.

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LORD SELBORNE, L.C.:—

With respect to the point which has been argued upon this appeal, the Master of the Rolls has come to the conclusion that it was, under the circumstances, at their own risk that the vendors, insisting upon continuing in possession of this property pending the disputes between themselves and the purchaser, left it to fall into that state of dilapidation which the evidence proves, to a greater or less extent, to exist. Supposing that the question is looked at upon principle only, and without reference to authority, I cannot doubt that the Master of the Rolls has proceeded upon sound principles of equity.

By the effect of the contract, assuming there to be no ground on either side for simply setting it aside, according to the principles of equity, the right to the property passes to the purchaser, and the right of the vendor is turned into a money-right to receive the purchase-money, he retaining a lien upon the land which he has sold until the purchase-money is paid. Let us for a moment suppose the case of any other description of security, and that the holder of the security insisted, for his protection, upon entering into possession of the land over which the security extended—then is not such a person so entering into possession answerable, when the account under the security comes to be taken, for keeping the property in the condition in which a person in possession ought to keep it? I apprehend that he is so answerable; and, on principle, I can see no reason why a vendor, who insists upon continuing in possession of the land over which he has security —the contract being one which, in the view of a Court of Equity has changed the title of the land—I see no reason why such a vendor should not be under the same obligations as those under which any other person would be, who, having security on land, insisted on the possession of the land as a further security. He, when the account comes to be taken between himself and the purchaser, will be entitled to credit for all proper expenditure for the purpose of maintaining the purchaser's property in a proper condition, as against the account of rents and profits to which he is necessarily subject. He will receive, on the other hand, the interest which, by the contract, he is entitled to receive. Perfect justice is done in that way; and it is wholly unimportant,

as it appears to me, that he has the right, which undoubtedly he has, to insist upon retaining possession until payment of the purchase-money is made and the conveyance is accepted. He has that right; but the question is, upon what terms that right is to be exercised? It appears to me that it must be upon the terms of his undertaking the duties of possession while he insists upon retaining possession. He is *pro tanto* a trustee in possession for the purchaser, although he holds the purchaser at arm's length, and a trustee, therefore, who is bound to do those things which he would be bound to do if he were a trustee for any other person. In this particular case it so happens that the vendors, after Mr. *Nanney's* death, were his trustees. Supposing this contract had gone off—supposing that the purchaser had been unable to complete—would they have discharged their duty to their *cestuis que trust* by leaving the property in this condition? It is plain that, if they set up their duty to their *cestuis que trust* as a reason (and it may be a very sufficient reason) why they would not give up the property without payment of the money, they undertook towards those *cestuis que trust* the very same duties which, in my judgment, they undertook towards the purchaser if it turned out that the beneficial interest was in him.

So I should have regarded the case, apart from authority. The vendors run no serious risk if they take that course, assuming always that the property is worth being preserved. No doubt there might be special circumstances tending to shew that it was not worth being preserved, if the expenses of the necessary repairs would be greater than those which the property would bear. In that case it is very possible that a purchaser might have no claim if previous notice were given to him that, unless he would supply the vendors with funds in order to make the necessary repairs, the property must be left to take its chance. But no case of that kind is alleged here. There is nothing whatever to shew, or to suggest, that this was not property which would bear the expense of keeping it in a proper state of repair; there is nothing to shew or to suggest that the purchaser was not a person who could be made responsible for anything that might become due from him in pursuance of the contract. I entirely agree that the vendors were acting in their strict right and were doing nothing wrong in

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insisting, as they did, upon retaining possession until the purchase-money was paid, yet, on the other hand, I cannot admit that that is any reason why they should be exonerated from the obligations attaching to persons insisting upon remaining in possession. As far as appears, they would have incurred no risk in allowing possession (the purchase-money remaining unpaid) to be taken by a solvent and responsible purchaser, retaining, as they might have done, their lien for the purchase-money over the estate. They were not bound to do so; but they cannot play fast and loose, and in one breath say, "The time has come when you might have taken, and ought to have taken, possession, and, therefore, you must bear the consequences of all the subsequent deterioration;" and in another breath say, "We have a right to refuse you possession, and we choose to exercise that right."

Now, the authorities appear to me to be entirely consistent with this view. One or two were referred to, but they simply come to this—that from the time when the party might have taken possession, and when it was his duty actually to take possession, if he does not do so he may be answerable for deterioration. I have no doubt whatever, that if in this particular case the Plaintiffs had sent to Mr. *Silvester* and had said, "We are perfectly willing to let you go into possession subject to the question between us," and Mr. *Silvester* had said in reply, "I am willing to take possession, but I am not willing to pay the purchase-money;" or if he had said, "I will not take possession unless you give me a conveyance and the whole thing is cleared up," Mr. *Silvester* would have put himself within the reach of those authorities. In that case, according to the contract, the time for taking possession would have come, possession would have been offered to him, and there would have been no obstacle or impediment to his taking it except one which, in the exercise of his strict rights, he would have himself created.

But although it is true that each party is entitled to refuse to alter the possession until the whole contract is completed, it is not true that when the parties differ upon some subordinate question as to the manner of completing the contract, whether in the form of the conveyance or in the parcels, each party being minded that the contract should go on—it is not true that giving

possession to the vendor would be a departure from the ordinary course of proceeding. Possession may be changed before completion. But payment of the purchase-money before completion is not according to the ordinary course of proceeding, although sometimes the money is paid into Court.

Here there was a very small question between the parties as to this land occupied by the railway—a question as to parcels merely. The purchaser was willing to complete, and the vendor desired to compel him to complete, however that question might be determined. The purchaser was perfectly solvent, and there was no good reason why he should not be let into possession pending the settlement of the question, leaving the question of payment to stand over. At one time it appears to have been contemplated that on the payment of a small sum of money, £250, he might, and would have been, let into possession. But there was some misunderstanding as to the payment, and the delay unfortunately led to different views being taken by some of the parties, so that when the time had elapsed the consent of the vendors, which was necessary for the purchaser taking possession, was absolutely refused; and I cannot perceive that anything which afterwards took place changed the relative position of the parties.

My opinion is, that, in that state of things, there being proof of careless, and I must say wantonly negligent, conduct on the part of the Plaintiffs, which has caused serious dilapidations, I cannot differ from the conclusion of the Master of the Rolls, or see any reason to alter His Lordship's order in this respect.

Appeal dismissed with costs.

Solicitors: Messrs. *Gregory, Rowcliffes, & Rawle;* Mr. *J. Needham.*

L. C.
and L. JJ.
1872
Dec. 2, 3.

ANDERSON *v.* PIGNET.

[1870 A. 70.]

Satisfied Term—8 & 9 *Vict. c.* 112—*Dower.*

A., being lessee of land for ninety-nine years, created a mortgage term which ultimately became vested in a trustee for a mortgagee, and subsequently acquired the fee. He afterwards became bankrupt. In pursuance of an agreement between his assignees, himself, and the mortgagee, a deed was executed by which the mortgagee released the mortgage debt, and the fee simple was conveyed to the mortgagee freed and discharged from all equity of redemption. It was intended that the wife of *A.*, who was married in 1832, should join in the deed for the purpose of releasing her dower, but she refused to execute it, and after the death of *A.* she filed her bill to enforce her right to dower :—

Held (reversing the decision of *Bacon*, V.C.), that the mortgage debt was not extinguished, and that the term was not satisfied within the 2nd section of the *Satisfied Terms Act*, 8 & 9 Vict. c. 112, and that the term afforded the purchaser protection against the Plaintiff's right of dower.

Toulmin v. *Steere* (1) commented on.

Doe v. *Jones* (2) followed.

THIS was an appeal from a decision of Vice-Chancellor *Bacon*, overruling a demurrer (3).

The bill, which was filed for the purpose of enforcing the Plaintiff's right to dower out of land of which her late husband, *Richard Anderson*, was seised in fee simple in possession during the coverture, contained the following statements :—

The Plaintiff was married on the 4th of September, 1832. No settlement, or agreement for a settlement, was made either before or after the marriage.

On the 10th of November, 1851, the land in question was demised by *James Rhodes* to *Richard Anderson* for the term of ninety-nine years from the 25th of March, 1851; and shortly after this demise two cottages were built by *Anderson* on the land.

On the 14th of November, 1851, the land and the cottages, then in course of erection, were demised by *Anderson* to *Mary Marshall* for the then residue of the term of ninety-nine years, less ten days, by way of mortgage.

(1) 3 Mer. 210. (2) 13 Q. B. 774.

(3) Law Rep. 11 Eq. 329.

On the 12th of January, 1852, *Anderson* demised the land and the cottages thereon to *F. W. Dolman* for the then residue of the term of ninety-nine years, less ten days, by way of mortgage.

On the 19th of May, 1852, *Anderson* demised the premises to *James Buckell* for the then residue of the term of ninety-nine years, less five days, by way of mortgage.

On the 29th of July, 1852, *Anderson* demised the premises, by way of mortgage, to *J. E. Green* and *E. Randall* for the then residue of the term of ninety-nine years, less three days. This mortgage also included other hereditamants belonging to *Anderson*.

On the 4th of April, 1853, *Anderson*, *J. E. Green*, and *E. Randall*, according to their estate in the premises, and with the consent of *Buckell*, demised and confirmed the premises to *A. M. Mathews*, as a trustee for *Green* and *Randall*, for the residue of the term of ninety-nine years, less ten days.

On the 1st of August, 1853, the reversion of the property in fee simple was conveyed by *Rhodes* to *Anderson*.

On the 8th of August, 1853, *Anderson* charged the premises comprised in the mortgage to *Dolman* of the 12th of January, 1852, with a further sum of money advanced by *Dolman*.

In February, 1854, *Dolman's* mortgage and further charge, and also the mortgage to *Mary Marshall*, having been paid off, *Dolman*, by a deed of the 1st of February, and *M. Marshall*, by a deed of the 9th of February, 1854, surrendered the land comprised in the original demise of the 10th of November, 1851, to the intent that the terms created therein by the indentures of the 12th of January, 1852, and the 14th of November, 1851, might be merged.

By an indenture of the 24th of February, 1854, *Buckell's* executors, after reciting that *Buckell's* mortgage of the 19th of May, 1852, had been paid off, and that a large sum remained due to *Green* and *E. Randall* on the security of the 29th of July, 1852, assigned to *William Randall*, in trust for *Green* and *E. Randall*, the premises in question for all the then residue of the term created by the indenture of the 19th of May, 1852.

On the 20th of March, 1854, *Anderson* obtained his certificate of discharge in bankruptcy.

By indenture of the 19th of May, 1854, reciting that money was still owing to *Green* and *Randall* on the security of the indenture

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of the 29th of July, 1852, and that the terms created by *Marshall's* mortgage and *Dolman's* mortgage of 1852 were not merged by the indentures of the 1st and 9th of February, 1854, because the terms granted by *Anderson* to *Buckell* (19th of May, 1852) and *Green* and *Randall* (29th of July, 1852) prevented a merger, and that, as it might be doubted whether the said first-mentioned terms, although satisfied, had ceased under the Act of 1845 for rendering the assignment of satisfied terms unnecessary (8 & 9 Vict. c. 112), *Anderson*, at the request of *Green* and *Randall*, and so far only as regarded the estate and interest (if any) of *Anderson* in the premises so agreed to be surrendered by him under the indentures of the 1st and 9th of February, 1854, and not with a view of surrendering or granting any other estate or interest which he might otherwise have had or been entitled to in the premises, did surrender unto *William Randall* the land, &c., to the intent that the respective residues then unexpired and existing of the several terms respectively created therein by the indentures of the 14th of November, 1851, and the 12th of January, 1852, might be merged and extinguished.

By an indenture dated the 28th of July, 1854, and made between *F. W. Dolman* of the first part, *E. Hughes* and *E. W. Edwards* (*R. Anderson's* assignees) of the second part, *Richard Anderson*, and *Mary Anderson* his wife, of the third part, and *J. E. Green* and *E. Randall* of the fourth part, reciting among other things the several indentures before mentioned, and reciting the bankruptcy of *R. Anderson*, and reciting that the sum of £4352 13*s.* 3*d.* was due to *Green* and *Randall*, together with a further sum of £386 5*s.* 9*d.* upon the securities aforesaid; and that the asignees, being satisfied that the premises comprised in the indenture of the 29th of July, 1852, then remaining unsold, with the fee simple of the premises comprised in the lease of the 10th of November, 1851, were not worth even the sum of £4352 12*s.* 3*d.*, had, with the sanction of the Commissioner, and with the concurrence of *F. W. Dolman*, agreed to grant, assign, or otherwise assure the same to *Green* and *Randall*, their heirs, executors, administrators, and assigns respectively, in the manner thereinafter mentioned, in consideration of the release by *Green* and *Randall* thereinafter contained; and reciting that, in order to carry the said recited

agreement into effect, the said *F. W. Dolman* and *R. Anderson*, and also the said *Mary Anderson*, had agreed to concur in the deed in manner thereinafter mentioned. It was witnessed that, in consideration of the release as to the said sums of £4352 13*s.* 3*d.* and £386 5*s.* 9*d.* on the part of *Green* and *Randall* thereinafter contained, the said *F. W. Dolman*, as to his interest under the indenture of the 8th of August, 1853, *E. Hughes*, and *E. W. Edwards*, as such assignees as aforesaid, and also *Richard Anderson*, and the Plaintiff, for the purpose of releasing and extinguishing her right of dower in the premises thereinafter mentioned, granted, released, and disposed of (*inter alia*) the premises comprised in the indenture of the 10th of November, 1810, and the 8th of August, 1853, unto *Green* and *E. Randall*, their heirs and assigns, for ever freed and discharged from all right and equity of redemption under the indenture of the 29th of July, 1852, or otherwise, and from all principal and interest due under the indenture of the 8th of August, 1853. And it was further witnessed that, in consideration of the grant and assignment, and other assurances thereinbefore contained, *J. E. Green* and *E. Randall* acquitted, released, and discharged the said *E. Hughes* and *E. W. Edwards*, as such assignees as aforesaid, and the lands, tenements, and other the estate and effects of *R. Anderson* from the said sums of £4352 13*s.* 3*d.* and £386 5*s.* 9*d.*, and from all actions, suits, claims, and demands in respect thereof.

The Plaintiff was made a party to this deed without her consent, and when it was tendered to her for execution she refused to execute it, or to be bound thereby. She submitted that by the execution of this indenture the term created by *Buckell's* mortgage of the 19th of May, 1853, and assigned on the 24th of February, 1854, to *William Randall* in trust for *Green* and *E. Randall*, became satisfied and attendant on the inheritance, and that the term thereupon absolutely ceased and determined, under the 8 & 9 Vict. c. 112, and could afford no protection against her right of dower.

By an indenture dated the 23rd of May, 1861, *Green* and *E. Randall* granted the premises to the Defendant *Pignet* in fee. The Defendant took an indemnity from the vendors against the claim of the Plaintiff as dowress.

By an indenture of even date *William Randall* and *A. M. Mathews*, at the request of the Defendant, and also *Green* and

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E. Randall, so far as related to the term of years created by the indenture of lease of the 10th of November, 1851, and the leasehold estate thereby demised, and all and every of them, as to their and each of their term, or estate, right, and interest therein, but not further or otherwise, at the like request of the Defendant, granted and confirmed the property unto *F. Carritt* for and during all the residue unexpired of the term of ninety-nine years created by the same indenture of lease, or for all and every or any other such term, estate, or interest as they, *W. Randall*, *A. M. Mathews*, *J. E. Green*, and *E. Randall*, had in the same leasehold premises, in trust, nevertheless, for the Defendant, his executors, administrators, and assigns, to be assigned, or otherwise disposed of, as he or they should direct, and subject thereto in trust to permit the same to attend the freehold and inheritance of the said premises, as limited by the indenture of even date therewith.

The bill charged that this indenture was wholly inoperative, inasmuch as the several terms thereby purported to be assigned to *Carritt* had become satisfied and merged or extinguished, and no estate or interest in the premises passed to *Carritt* thereby; but that the indenture was an ineffectual attempt on the part of the Defendant to interfere with the Plaintiff's inchoate right to dower out of the premises.

Upon the death of *R. Anderson*, the Plaintiff filed her bill against *Pignet* to enforce her claim for dower, and the Defendant demurred to the bill. The Vice-Chancellor overruled the demurrer, and the Defendant appealed from this decision.

Mr. *Joshua Williams*, Q.C., and Mr. *T. A. Roberts*, for the Appellant:—

The *Satisfied Terms Act* does not extend to terms made by subdemise, but only to those which are created immediately out of the inheritance: *Dart's* Vendors and Purchasers (1); *Davidson's* Precedents in Conveyancing (2). *Buckell's* mortgage term, created on the 19th of May, 1852, on which we rely, was a derivative term carved out of a building lease, and is not within the meaning of the statute.

But this term had never, in fact, become satisfied. A term can-

(1) 4th Ed. vol. iv. p. 465. (2) Vol. ii. p. 490.

not become satisfied until it is no longer wanted. The Act was not intended to alter the rights of parties as they previously existed; and before the Act passed, there is no question that this term would have protected a purchaser against dower. The charge in this case was not extinguished by the deed of the 28th of July, 1854. The debt was not paid off; the release by *Green* and *Randall* amounted to no more than a covenant not to sue or prove under the bankruptcy, and they had still a right to the benefit of the term: *Doe* v. *Jones* (1); *Shaw* v. *Johnson* (2). The intention of the parties must be looked at. It must be presumed that they intended to do what was most for their benefit; and the assignment of the term by the subsequent deed of the 23rd of May, 1861, is a conclusive proof that they meant to keep the term alive: *Mocatta* v. *Murgatroyd* (3); *Forbes* v. *Moffatt* (4); *Lindo* v. *Lindo* (5); *Parry* v. *Wright* (6); *Brown* v. *Stead* (7); *Hayden* v. *Kirkpatrick* (8); *Phillips* v. *Gutteridge* (9); *Lipscomb* v. *Lipscomb* (10); *Boyd* v. *Petrie* (11); *Greswold* v. *Marsham* (12); *Maundrell* v. *Maundrell* (13).

Toulmin v. *Steere* (14) is relied on by the other side to prove that the purchaser of an equity of redemption cannot set up a prior incumbrance which he has got in against intermediate incumbrances; but that decision has not been approved of in later cases: *Watts* v. *Symes* (15); *Gunter* v. *Gunter* (16); *Dart's* Vendors and Purchasers (17).

We also contend that the Plaintiff has no equity, on the ground that the deed of July, 1854, was prepared on the assumption that she would join in it for the purpose of releasing her dower; and if she cannot be bound by it, none of the other parties are bound: *Woodcock* v. *Monckton* (18); *Peto* v. *Peto* (19); *Bolitho* v. *Hillyar* (20).

(1) 13 Q. B. 774.
(2) 1 Dr. & Sm. 412. 7 Jur. N.S. 1005
(3) 1 P. Wms. 393.
(4) 18 Ves. 384.
(5) 1 Beav. 496.
(6) 5 Russ. 142.
(7) 5 Sim. 535.
(8) 34 Beav. 645. 10 Jur. N.S. 886
(9) 4 De G. & J. 531.
(10) Law Rep. 7 Eq. 501.
(11) Law Rep. 7 Ch. 385.
(12) 2 Ca. Ch. 170.
(13) 10 Ves. 246.
(14) 3 Mer. 210.
(15) 1 D. M. & G. 240. 3 Jur. N.S. 1013
(16) 23 Beav. 571.
(17) 4th Ed. vol. ii. p. 839.
(18) 1 Coll. 273.
(19) 16 Sim. 590.
(20) 34 Beav. 180. 11 Jur. N.S. 556

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Mr. *Kay*, Q.C., and Mr. *W. W. Karslake*, for the Plaintiff:—

The Plaintiff is dowress of the fee simple, which was not included in any of the mortgages. She has always insisted on her right, and refused to be bound by the deed of July, 1854. When *Green* and *Randall* found she would not join in the deed, they did not, as they might have done, take another form of conveyance, so as to protect themselves against her right, but elected to run the chance of her not surviving her husband. The Defendant purchased with full knowledge of her right, and took an indemnity from *Green* and *Randall*. He has, therefore, no claim for favourable consideration in this Court. It is a mere question of legal construction whether the term is "satisfied" within the meaning of the Act.

It is not correct to say that this was a derivative term. It was so when created; but by the merger of the original term it has become next to the freehold reversion, and there is no reason why it should not become attendant. The effect of the conveyance to *Green* and *Randall* on the 28th of July, 1854, and the release of their mortgage debt, was, that the term became not only satisfied, but attendant upon the inheritance, and it was consequently extinguished by force of the 2nd section of the 8 & 9 Vict. c. 112. Under the old law, whenever a term would have merged in the inheritance, if both had been in the same person, it was considered as attendant on the inheritance; and a term outstanding in a trustee to attend the inheritance would not protect a purchaser from dower, unless the term were actually assigned to a trustee for him: *Maundrell* v. *Maundrell* (1).

Under the statute this term would have ceased to exist, even though actually assigned in trust to attend for the benefit of the purchaser if it had been satisfied: *Doe* v. *Price* (2); *Sugden's* Real Property Statutes (3). The term might have been preserved if the mortgage had been kept on foot; but this was not done, and the deed of the 23rd of May, 1861, was an ineffectual attempt to revive it. *Toulmin* v. *Steere* (4) is in our favour, for it establishes that where a mortgage is paid off it ceases to exist for the benefit

(1) 7 Ves. 567; 10 Ves. 246.
(2) 16 M. & W. 603.
(3) 2nd Ed. p. 277.
(4) 3 Mer. 210.

of all persons interested in the estate; and it has never been overruled, and has been frequently approved: *Squire* v. *Ford* (1); *Davidson's* Precedents in Conveyancing (2). *Forbes* v. *Moffatt* (3) is not inconsistent with it.

LORD SELBORNE, L.C.:—

In this case it appears to us that the sole question is, whether the term which was vested in the trustee for *Green* and *Randall* is satisfied within the meaning of the *Satisfied Terms Act*. It seems to us that it is wholly unnecessary to consider the doctrine of the case of *Toulmin* v. *Steere* (4), because if the *Satisfied Terms Act* had never passed, and if this deed had been executed in the form in which we find it, it would be stretching the authority of *Toulmin* v. *Steere* beyond the point decided to hold it applicable to such a transaction as this. Here the transaction, putting the *Satisfied Terms Act* aside, is simply this: Mortgagees have got a legal term assigned to a trustee for them expressly to secure their debt: they never received payment at all, and they have no security upon the freehold interest, which is the reversion behind the term; but they deal with their debtors, who are entitled to that freehold interest, and are content to take from them a conveyance of the fee simple, which is not subject to the mortgage, leaving the term exactly where it was before, and in exchange for that conveyance giving a release to the assignees in bankruptcy of the estate of the debtor distributable under his bankruptcy. There is no principle and no authority that I am aware of for holding that such a transaction, where the debt is not paid off, where there is a valid subsisting term, and where that term is a security for the unpaid debt, puts an end to the unpaid debt, and to the right to the protection of the term as against an intervening incumbrancer, merely because the person who is the *cestui que trust* of the term and of the charge secured by it takes a conveyance for valuable consideration to himself of the fee. *Toulmin* v. *Steere* decided no such thing. *Toulmin* v. *Steere* is considered to have carried the doctrine of this Court to a greater length than many persons have approved

(1) 9 Hare, 47.
(2) Vol. ii. p. 294.
(3) 18 Ves. 384.
(4) 3 Mer. 210.

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of, as to which we say nothing, but certainly it is not a case to be extended in the manner which the argument upon that point would require.

Then we come to the question whether this is a satisfied term. Now, it appears to me that the deed, apart from the operation of that statute, would vest, in a perfectly efficient way, a new title in the creditors, and leave in them besides their old title to the term and the debt; and if there was any intervening incumbrance, or estate, or interest in respect of which it was material to them to maintain the distinction of those two titles, I can find nothing whatever in any part of the deed which would obliterate that distinction. So far from its being so in point of intention, it is distinctly apparent on the face of the deed that the object was to get the entire fee simple by means of the concurrence of the dowress, who is the present Plaintiff, and that the persons who agreed to convey the fee simple knew that they could only give a good title to the fee simple against the dowress by her concurrence; and the whole transaction upon the face of the deed proceeds upon the footing of that being the contract between the parties who alone made the contract, namely, the assignees on the one hand, and the creditors, who gave a qualified release, upon the other. There is no release whatever of the Plaintiff's equity of redemption unless she executes the deed. There is, on the other hand, in no part of the deed any release to her or conveyance to her of any right or interest which she did not possess before. On what conceivable principle can a deed, which was intended to give the purchasers the benefit of the release of her estate and to give her nothing, operate to destroy in her favour the pre-existing estate of the purchasers, when she does not, and because she does not, execute that deed? Can it possibly be said that the term is satisfied as long as there remains any useful purpose beneficial to the owner of the term and consistent with the trust on which, at the date of the transaction, the term was held? Is it not a mere abuse of language to call it a satisfied term? Is there anything in the statute which says that the term, under those circumstances, shall be considered as satisfied? I can find nothing. Therefore I come to the conclusion that, for the very reason that the contract was not carried into effect by

the execution of this deed by the dowress—for the very reason that her dower remained outstanding and her right to redeem the term in respect of her dower untouched—for that very reason the term was not satisfied, and that being so, that the statute does not apply.

The later deed, when we come to examine it, contains a special trust, and in my judgment a valid trust, for the protection of the purchaser, of the term which was not at the time satisfied; and as the 2nd section of the statute applies only to terms which are satisfied, that is, alone, sufficient reason for holding the later deed to be immaterial. At the same time, I think it right to say, that when I find an express declaration in a deed that a term not previously satisfied shall, upon becoming satisfied (although that did not happen here), become attendant upon the inheritance conveyed to a particular purchaser, to be assigned and disposed of and held for his benefit, I do not think the effect of the statute, according to the true construction, is to defeat that trust or to make the term cease for the benefit of somebody else who has not any part or share or interest in the inheritance which is conveyed by that particular deed. In that respect, I think I am following the construction (in my judgment the right and proper construction) which was placed upon the statute by the Court of Queen's Bench in the case which has been referred to of *Doe* v. *Jones* (1).

For these reasons, I am unable to concur in the opinion of the learned Vice-Chancellor, and I hold that the appeal should be allowed, and the bill dismissed with costs.

SIR W. M. JAMES, L.J.:—

I am entirely of the same opinion. I desire it to be understood as my clear opinion that the term does not become satisfied within the meaning of the Act of Parliament except the beneficial interest in the whole charge secured by the term, and the beneficial interest in the whole estate, are united and merged in one person.

SIR G. MELLISH, L.J.:—

I am of the same opinion. I think the question really turns upon

(1) 13 Q. B. 774.

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the question what effect was produced upon the true construction of the deed of the 28th of July, 1854, by the fact of Mrs. *Anderson* not having executed that deed. In my opinion, if Mrs. *Anderson* had executed the deed, the term would have become a satisfied term, because in that event the whole estate in fee simple free from incumbrances would have passed by the deed; and if the whole estate in fee simple free from incumbrances had passed by the deed, there would have been no object in keeping up the term, the term would then have become satisfied, and there being no necessity to have a formal surrender, it would have become extinct. What, then, was the effect of her not executing it? In order to determine that, you must look at what the object of the deed was, and what was the real agreement between the parties. Now, in my opinion, the real agreement was an agreement between the assignees and *Green* and *Randall*, that the assignees would procure the conveyance of the entire fee simple to *Green* and *Randall*, and that, as the price of the entire fee simple, *Green* and *Randall* would release to the assignees their claim to prove against the estate. That seems to me clearly apparent from the recitals in the deed. Then how did the parties carry out that agreement? First of all, they convey, Mrs. *Anderson* being joined as a conveying party, the entire estate absolutely, free from all right of redemption. Now Mrs. *Anderson* had a right of redemption as incidental to her right to dower. It is of course admitted on all hands that her right to dower did not pass on account of her not having executed the deed. Then if the right to dower did not pass, the right to redeem the estate by paying off the mortgage debts, which was incidental to her right to dower, did not pass. Therefore, as far as the conveying part of the deed is concerned, the right of dower and the right to redeem the estate on paying off the mortgage debts were left in Mrs. *Anderson*. But it is said that the mortgage debt was itself absolutely paid off and destroyed. Now the mortgage debt was not paid off. If it was put an end to, it was put an end to, not by being paid off, but by being released, and therefore the question turns upon what is the true construction of the clause of release. Now the clause is this: "And this indenture lastly witnesseth that, in consideration of the grant and assignment and other assurance

hereinbefore contained, the said *J. E. Green* and *E. Randall* do, and each of them doth, release, &c." Now what was the object and purport of putting in the consideration for the release? The release in itself does not require any consideration, and I apprehend the consideration is stated for the purpose of enabling the Court to limit and construe the effect of the release. But then what is the effect of one of the essential parties to the conveyance of that whole estate not executing it? The effect of it is, that they do not get that which is the price of the release. The assignees have not performed their agreement of procuring Mrs. *Anderson* to execute the deed. They have not paid the purchase-money, and therefore they are not entitled to the benefit of that release, which was only to be given to them in consideration that they procured the conveyance of the entire fee simple. It is, in my opinion, unnecessary to consider whether, although it cannot operate as a release, it might not operate as a covenant not to sue, so far as to prevent *Green* and *Randall* proving against the estate in bankruptcy. Possibly, and very probably, it might have that effect; but in my opinion, according to the true construction of the deed, which ought to be so construed as to carry out the real intention of the parties, it was never intended that it should operate as an absolute release of the entire debt so as to discharge the lands from the debt, unless and until the whole fee simple was conveyed to *Green* and *Randall*, which was not done because Mrs. *Anderson* never executed the deed.

Solicitor for the Plaintiff: Mr. *W. H. Waller*.
Solicitors for the Defendant: Messrs. *Helder & Roberts*.

L. C.
and L. JJ.

1872

Dec. 6, 9, 16.

JONES *v.* OGLE.

[1872 J. 35.]

Apportionment of Dividends—Will—Apportionment Act, 1870.

A testator bequeathed the dividends and income of his share and interest in the *L. Iron Company* to *A.* for life, and after his death he gave the said share and interest to his daughter absolutely. The testator died in October, 1870.

The *L. Iron Company* was a private trading partnership regulated by a deed of partnership, under which the accounts were made up in the January in each year, and the profits of the previous year ascertained, which account was settled and signed by all the partners. The managing partner then decided what dividend should be paid to the partners, and the dividend was paid by instalments in the next few months:—

Held (affirming the decision of the Master of the Rolls), that the dividend in respect of the profits realized during the year 1870, which was declared in January, 1871, was not a "dividend" or a "periodical payment" within the 2nd section of the *Apportionment Act*, 1870, and was not apportionable; and that the whole belonged to *A.*

Quære, whether the Act can affect the construction of a will previously made.

THIS was an appeal from a decision of the Master of the Rolls (1).

The question came before the Court on a special case, which stated as follows:—

H. M. Ogle, by his will, made the following bequest:—"As to the share and interest which I have in the *Lilleshall Iron Company*, I bequeath the dividends and income thereof to my uncle, *J. T. Ogle*, for his life, and after his death the same share and interest shall belong to his two daughters in equal shares." And he gave his residuary estate to trustees upon trust as therein mentioned, and appointed the Plaintiff his executor.

The testator died on the 21st of October, 1870.

The *Lilleshall Iron Company* was a private trading partnership, established under a deed of partnership, dated the 24th of January, 1802, and made between Lord *Granville Leveson Gower* of the one part, and *J. Rishton*, *J. Birch*, *J. Onions*, and *W. Philips* of the other

(1) Law Rep. 14 Eq. 419.

part, whereby it was agreed that certain messuages, mines, works, and stock-in-trade should be held by the several parties thereto in partnership in certain shares and proportions, upon condition (among other things) that *J. Birch*, *J. Onions*, and *W. Philips*, and their respective heirs, executors, administrators, or assigns should not have any voice in the management of the business. And it was agreed that the accounts of the partnership should be made up in the month of January or February in each year, and the profits ascertained and entered in a book, which should be signed and allowed by all the said parties, and that such dividends should be made from time to time among the said parties, according to their respective shares and interests, as Lord *Granville Leveson Gower* and *J. Rishton*, and their respective executors, administrators, and assigns should direct. It was also agreed that upon the death of any of the parties his share should belong to his executors or administrators, or to such other person to whom he should dispose of the same, who should thereupon stand in the place of the partner so dying in all things.

The usual custom as to the declaration of dividends was stated to be as follows:—The accounts were made up in January to the end of the preceding year, and upon the statement of account being laid by the manager before Lord *Granville*, his Lordship decided how much profit should be divided, and how much should be carried forward. No formal resolution was passed, but the manager, under Lord *Granville's* instructions, apportioned the dividend between the partners, and paid them by instalments, which were usually paid in February, April, July, and October, but were not necessarily of equal amount.

The first dividend after the testator's death was declared in February, 1871, on the profits of the year ending on the 1st of January, 1871, and was made payable in four instalments in February, April, July, and October. The total amount payable on the testator's share was £350 17*s.* 6*d.*

The Plaintiff, the executor, on behalf of the residuary legatees, claimed to be entitled to an apportioned part of the dividend proportioned to the time which had elapsed between the 1st of January, 1870, and the 21st of October, 1870, the date of the testator's

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death, under the 2nd section of the *Apportionment Act*, 1870 (1). That Act was passed on the 1st of August, 1870, which was after the date of the testator's will, but before his death.

The Master of the Rolls decided that it was not a case under the *Apportionment Act*, and declared the Defendant entitled to the whole of the dividend declared since the testator's death; and from this decision the Plaintiff appealed.

Mr. *Fry*, Q.C., and Mr. *Cozens-Hardy*, for the Plaintiff:—

The dividend is apportionable between the testator's estate and the specific legatee. Even under the old Act (4 & 5 Will. 4, c. 22) there would have been an apportionment of the dividend: *Hartley* v. *Allen* (2); *In re Maxwell's Trusts* (3); *In re Rogers' Trusts* (4); *Browne* v. *Collins* (5). Under the Act of 1870 it is still more clear, for the Act expressly mentions "dividends" and "periodical payments in the nature of income." By the 5th section the Legislature has shewn an intention that the word "dividends" shall be construed widely; and although this was not a registered public company, its dividends were declared in a similar manner. It also comes within the term "periodical payments," for the dividend was declared in January on the profits made in the whole of the previous year, and the postponement of the time of payment makes no difference.

Mr. *Roxburgh*, Q.C., and Mr. *Phear*, for the Defendant:—

There ought to be no apportionment in this case. What is called a "dividend" was not one within the ordinary meaning of

(1) 33 & 34 Vict. c. 35, s. 2: "From and after the passing of this Act, all rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise), shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly."

Sect. 5: "The word 'dividends' includes (besides dividends strictly so called) all payments made by the name of dividend, bonus, or otherwise out of the revenue of trading or other public companies divisible between all or any of the members of such respective companies, whether such payments shall be usually made or declared at any fixed time or otherwise."

(2) 27 L. J. (Ch.) 621.

(3) 1 H. & M. 610.

(4) 1 Dr. & Sm. 338.

(5) Law Rep. 12 Eq. 586.

the term. It is merely a division of the partnership profits, not becoming due at fixed periods, but depending upon the state of the business and the discretion of the managing partner. Such a payment was never apportionable under the old law: *Clive* v. *Clive* (1); *Bates* v. *Mackinley* (2); *Ibbotson* v. *Elam* (3); and it is not touched by the *Apportionment Act*, 1870. It is not a dividend declared by a "trading public company" within the 5th section: *Macintyre* v. *Connell* (4); nor is it a "periodical payment in the nature of income" within the 2nd section. But whatever the nature of the payment is, it clearly passes to the specific legatee under the will. He expressly gives "the dividends and income" of the shares. This would have passed the dividends under the old law, and the construction of the words cannot be affected by the Act, which was passed subsequently to the making of the will.

Mr. *Cozens-Hardy*, in reply.

LORD SELBORNE, L.C.:—

We all think the decision of the Master of the Rolls in this case is correct. First, to deal with the point upon the mere construction of the will independently of the Act of Parliament, it appears to be admitted, and we think it could not be contested, that the language of this will is sufficient to carry the dividends in question—calling them dividends for the sake of convenience only. If it were necessary to decide, I should have very great difficulty indeed in seeing my way to the conclusion that this Act of Parliament either was intended to alter, or has in this case had the effect of altering, the proper construction of words contained in a will made before the Act passed. If a will had been made afterwards, I can quite follow the argument which would say that in such a case a testator makes his will, having the Act of Parliament in view, and that the words he uses are not to be construed without regard to the Act of Parliament. But I apprehend the construction of the words of a specific gift will be taken generally according to the meaning of the words at the period the will was made, and it would have taken a great deal to persuade me, if I had thought

17 Eq 291

(1) Kay, 600.
(2) 31 Beav. 280.
(3) Law Rep. 1 Eq. 188.
(4) 1 Sim. (N.S.) 225.

35 Beav 594
8 Jur N S 199
8 SC 12 Jur N S. 114.

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it within the Act of Parliament, that when the testator, having a share or interest, which must certainly include whatever might be coming to him under any future declaration of dividends, makes an exhaustive gift of the whole of the share or interest, dividing it between a tenant for life and a tenant in remainder—it would, I say, have taken a great deal to persuade me that there is anything in the Act of Parliament which could possibly have the effect of causing some part of that share or interest not to pass to the specific legatee, but to go to his general estate. But the bequest does not stop there, for it goes on to bequeath the dividends, which must mean all the dividends and the income thereof. Is not this a dividend? Even if it is a dividend that was apportionable it would still be a dividend. If a man says, "I give all the dividends," being able to give whatever he pleases, does not that include, as its natural meaning would seem to do, the whole dividends, irrespective of any apportionment? And why should it be limited to a part of them? Then, as to the word "income," it is a general expression, signifying what comes in; and that expression is used, as it happens, in the Act of Parliament itself, with reference to a periodical payment in the nature of income. Why should it not include periodical payments in the nature of income? I should therefore have been disposed to agree with the Master of the Rolls in the construction of this particular will, even if I had entertained more doubt than I do about the reading of the Act of Parliament.

But I also think that this is not really a dividend or a periodical payment in its nature apportionable under that Act. The real object of the statute was to obliterate technical distinctions between different kinds of fixed income recurring from time to time at stated periods, upon which, on account of their nature, those in receipt of income would rely for their maintenance and their ordinary arrangements in life. For one, I should be very sorry, and all the members of the Court would be sorry too, to put any narrow construction on that Act of Parliament which would tend to diminish its beneficial operation for the purpose evidently intended. But, on the other hand, it is not for us to put upon it any interpretation going beyond that purpose, and which must tend materially to embarrass or interfere with the working out of trading partnerships and other kinds of business which pay what may be called divi-

dends, but are really payments of an entirely different nature, and do not proceed upon the basis of a fixed income recurring from time to time.

Now in this particular case there was a mere private partnership; the partners had made a deed which provided for all the partners annually making out accounts from January or February, not to any specified time. They might have fixed any time that was convenient as the period over which those accounts might extend. It was, no doubt, a very natural thing they should take them to the end of the preceding year; but if it suited them to take them at an earlier date, or had it been practicable to take them at a later date, there was nothing to prevent them. All the partners are to concur in the statement and settlement and allowance of those accounts, and then the managing partners are to have power at their discretion, not at any fixed period of time, but whenever they shall think fit, to declare dividends. It seems to me that the use of the word "dividends" there does not make this a dividend within the meaning of the word in the Act of Parliament, which is either a dividend, properly so called, by which I understand such dividends as those upon stocks in the public funds, where a person, under the obligation to make the periodical payments, hands to the persons through whose hands the payment is to be made funds for the purpose of division among the persons entitled; or, as the 5th clause says, "payments made by the name of dividends, bonus, or otherwise, out of the revenue of trading, or other public companies, divisible between all or any of the members of such respective companies, whether such payments shall be usually made or declared at any fixed times or otherwise," where, it will be observed, the Legislature thought fit to relax the rule, and to make the dividends of that class of companies apportionable, even though they might be declared at variable times; because it was known that the shares of such companies were in the nature of investments for the production of ordinary income. Is this a trading or other public company? The word "other" plainly shews that the trading company must also be a public company. It is admitted this is not so: therefore, under the terms of the 5th section, this dividend in this private partnership cannot be brought in at all.

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Can it then be brought under the words of the 2nd section, "all rents, annuities, dividends, and other periodical payments in the nature of income, whether reserved or made payable under an instrument in writing or otherwise." The first observation I would make on the words, "and other periodical payments in the nature of income," is, that dividends have been expressly mentioned, and evidently, therefore, other kinds of periodical payments not properly dividends are here in the contemplation of the Act. But, secondly, they must be payments which are made periodically, recurring at fixed times, not at variable periods, nor in the exercise of the discretion of one or more individuals, but from some antecedent obligation; and, further, they must be in the nature of income; that is, coming in from some kind of investment, as in the other cases with which the Act deals.

It appears to me that the profit declared on these shares, though called by the name of dividend in the deed, has not the nature of a periodical payment of income within the true meaning of those words in the Act of Parliament. I have already said it is not a dividend, as the word dividend is used in the 5th section: and the conclusion I come to is that this is not the sort of payment the Act intended. I am, therefore, of opinion that the judgment of the Master of the Rolls, on whichever ground it proceeds, is correct.

SIR W. M. JAMES, L.J.:—

I am of the same opinion. I entirely concur in the judgment on both points as to the construction of the will and the construction of the Act of Parliament itself.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

Solicitors: Mr. *Worthington Evans*, agent for Messrs. *Jones, Paterson, & Jones, Liverpool;* Messrs. *Flower & Nussey*, agents for Mr. *Heane, Newport, Shropshire.*

In re CHARITABLE GIFTS FOR PRISONERS. *Ex parte* GOVERNORS OF CHRIST'S HOSPITAL.

L. C. and L. JJ.
1872
Dec. 19.

Charity Scheme—Endowed Schools Commissioners—Endowed Schools Act, 1869, s. 30—*Charitable Trusts Act*, 1853, s. 28—*Jurisdiction—Appeal.*

If the Endowed Schools Commissioners have not made a declaration under the 30th section of the *Endowed Schools Act*, 1869 (32 & 33 Vict. c. 56), that it is desirable to apply, for the advancement of education, the income of a charitable endowment not previously applicable to education, the mere pendency of a scheme before the Commissioners is no reason why the Court of Chancery should not exercise its jurisdiction to settle a scheme for the management of the charity; but the governing body of the charity ought to have an opportunity of proposing their own scheme in Chambers, in opposition to the scheme of the Attorney-General.

Order of *Bacon*, V.C., affirmed.

The right of appeal from an order of the Vice-Chancellor, under the 28th section of the *Charitable Trusts Act*, 1853, extends to cases where the aggregate income of several charities dealt with by the order exceeds £100, although the income of each charity separately is less than that amount.

THIS was an appeal from a decision of Vice-Chancellor *Bacon*.

The Attorney-General had taken out a summons under the 28th section of the *Charitable Trusts Act*, 1853 (16 & 17 Vict. c. 137), for the purpose of having a scheme settled by the Court for the future management and regulation of several old charitable endowments established for the relief of poor prisoners for debt. In consequence of the passing of the *Debtors Act*, 1869, by which imprisonment for debt was abolished, these charities became useless, and the Attorney-General was desirous that they should be amalgamated and applied for the establishment of an industrial school.

The endowments were vested in various bodies of trustees, among whom were the Governors of *Christ's Hospital*, who were the trustees of four such endowments, and several of the City companies.

The *Endowed Schools Act*, 1869 (32 & 33 Vict. c. 56), s. 30, provides that, in the case of any endowment not an educational endowment as defined by the Act, but the income of which is applicable wholly or partially to any of the purposes therein mentioned, including (*inter alia*) the relief of poor prisoners for

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debt, it should be lawful for the Commissioners, with the consent of the governing body, to declare, by a scheme under the Act, that it is desirable to apply, for the advancement of education, the whole or part of such endowment; and thereupon, for the purpose of the Act, the same shall be deemed an educational endowment, and may be dealt with by the same scheme accordingly.

Within two months after the commencement of the Act the Governors of *Christ's Hospital* gave notice, under the 32nd section of the Act, of their intention to propose a scheme for the future management of the four endowments vested in them, and in July, 1870, they submitted a scheme for the approval of the Commissioners. By this scheme it was proposed that these four endowments should be declared to be applicable to educational purposes, and that they should be applied towards the establishment and support of schools under the control of the governors.

No order had been made by the Commissioners upon this scheme.

When the summons taken out by the Attorney-General came on to be heard before the Vice-Chancellor on the 8th of May, 1871, it was opposed by the Governors of *Christ's Hospital*, and also by the trustees of some of the other endowments; but the Vice-Chancellor made an order directing inquiries as to the property belonging to the various charitable endowments comprised in the summons, and that a scheme or schemes for the future management and regulation thereof, and for the application of the future income, should be settled.

The Governors of *Christ's Hospital* appealed from the order.

On the appeal being opened,

Mr. *Vaughan Hawkins* (the *Solicitor-General*, Sir *G. Jessel*, with him), for the Attorney-General, took the preliminary objection that, although the aggregate income of the four charities vested in the Appellants exceeded £100, the income of each was below that sum, and consequently there was no appeal from the decision of the Vice-Chancellor under the provisions of the 28th section of the *Charitable Trusts Act* (16 & 17 Vict. c. 137).

The LORD CHANCELLOR:—We are of opinion that the provision

of the 28th section limiting the right of appeal is not applicable where the aggregate income dealt with by the order exceeds £100.

Mr. *Lindley*, Q.C., and Mr. *Freeling*, for the Appellants:—

We do not deny the jurisdiction of the Court to make the order, but we contend that the Court ought to exercise a judicial discretion, and either except the charities which we represent, pending the consideration of the scheme by the Endowed Schools Commissioners, or give some special direction respecting them. If the Commissioners had made a declaration that these charities are applicable to educational purposes, they would have come under their jurisdiction, and this Court would not have interfered: *Attorney-General* v. *Lepine* (1). The Court, therefore, ought to make no order till it sees what the Commissioners propose to do.

The *Solicitor-General* and Mr. *Vaughan Hawkins*, for the Attorney-General, were not called on.

LORD SELBORNE, L.C.:—

We are clearly of opinion that the order that has been made in this case is perfectly right. These are four out of a considerable number of charities which have become derelict, if I may use the expression, by reason of the cessation of imprisonment for debt. The Attorney-General, who is the officer properly charged with the duty of seeing that charities are rightly administered, has applied to this Court, which is the proper authority for that purpose, to have the whole aggregate funds belonging to the various charities mentioned in the summons dealt with, under the order of this Court, by some proper scheme; and the Vice-Chancellor has made an order, apparently at large, leaving it open to the Attorney-General, or to any other competent party, to propose any scheme whatever which may be right. Now it is suggested that, because the *Endowed Schools Act*, by the 30th section, gives a power to the Commissioners under that Act, with the consent of the governing body of any endowment, to divert endowments of the character which these particular endowments possess from their original destination to educational purposes; and because

(1) 2 Sw. 181.

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the Governors of *Christ's Hospital*, in connection with a particular scheme which they have submitted to the Endowed Schools Commissioners, have expressed a willingness to give a consent as to four of these charities—it is suggested, for that reason, that the Vice-Chancellor ought not to have made the order which he has made. It is suggested, not that the order is absolutely wrong, but that the Court ought, in exercise of a sound judicial discretion, under these circumstances, either to have refused to include these four charities in its order, or to have included them with some special direction relative to the application which was being made to the Endowed Schools Commissioners. As to refusing to include these four charities within the order, they being charities in the same situation with all the others, except in the particular respect to which I have adverted, I, for my part, cannot see how the Court would have been justified in doing so. If the Petition had been presented as to those four charities alone, of course the Court, if it had thought right, might have directed the hearing of the Petition to stand over for any reasonable time, in order to see whether the matter would be taken out of its hands by the Endowed Schools Commissioners under their Act; but no one can seriously say that the fate of a great number of other charities with respect to which no application to the Endowed Schools Commissioners is pending should be kept in suspense because of the possibility of their dealing with these four charities. Therefore the order was, in my judgment, right, and it was the duty of the Court to make such an order as it has made with respect to the whole.

As to any particular direction that the Court should have regard to the scheme, that, I apprehend, would be clearly wrong. The merits of the scheme were not to be decided by the Court at that time, and if the Court did not intend to express an opinion in favour of the scheme upon its merits, it would have been improper to introduce any such direction; more especially as it is, under the order which has been made, entirely competent to the Court in Chambers to give every consideration which may be right or proper to the fact of the pendency of the scheme and to the substance of the scheme itself. There is no difficulty at all in proposing, with regard to these four charities, if that is the best

way of dealing with them, that they should be dealt with in connection with the educational charities over which the Commissioners have exclusive jurisdiction, subject, of course, to the concurrence of the Commissioners, whose concurrence would, as to those educational charities, be necessary. Of course any other scheme whatever may be proposed, whether it would or would not have the effect of bringing them under the authority of the Endowed Schools Commissioners.

The matter is perfectly at large, and the argument of Mr. *Lindley* when it is carefully examined really comes to this, that we are not to trust this Court to do what is right, and to exercise a sound judicial discretion in working out this order. If the best thing is that which the Governors of *Christ's Hospital* wish to do, the Court may be trusted to concur in all proper measures in order to have that thing done. If it be not the best thing, then the fact of the Governors of *Christ's Hospital* desiring it, honourable and respectable as that body is, can be no possible reason why this Court should interfere with the ordinary course of the administration of justice in order to assist in promoting a scheme which, on that hypothesis, is not the best that can be suggested. On all grounds I cannot but think that this is an appeal which has been presented rather in deference to the wishes of a most respectable body of trustees than with any hope of success, and that the only thing we can do with it is to dismiss it with costs.

SIR W. M. JAMES, L.J. :—

I desire only to add that this Court has always been in the habit, in these matters, of placing great confidence in the discretion of the Attorney-General as to whether he would or would not press for an order, and as to whether he would or would not press the execution of the order.

SIR G. MELLISH, L.J. :—I agree.

Solicitor for the Appellants: Mr. *J. J. Maberley.*
Solicitor for the Attorney-General: Mr. *Fearon.*

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and L. JJ.

1873

Jan. 17.

In re HODGES.

Bankruptcy—Debtor Summons—Practice—Debt due to Registered Company—Bankruptcy Act, 1869, *s.* 7.

A debtor summons was taken out in the name of the secretary of a company, limited, for a debt due to the company:—
Held, that the summons was irregular.

J. C. HODGES, a non-trader, was indebted to the *Leeds and County Loan and Investment Company, Limited*, in the sum of £162 8*s.* 3*d.* upon a bill of exchange accepted by him and indorsed to the company.

Mr. *B. Leathley*, the secretary of the company, took out a debtor summons against *Hodges*, under the *Bankruptcy Act*, 1869, in which *Hodges* was warned that unless within three weeks he paid to "*B. Leathley*, the secretary of the *Leeds and County Loan and Investment Company, Limited*," the sum of £162 8*s.* 3*d.*, the sum claimed by him, according to the particulars thereunto annexed, or should compound for the same to his satisfaction, he would have committed an act of bankruptcy, in respect of which he might be adjudged a bankrupt on a bankruptcy petition being presented by the said *B. Leathley*.

In the particulars of demand *B. Leathley* was described as "the secretary, and person duly authorized to make the demand, of the *Leeds and County Loan and Investment Company, Limited*."

Hodges applied to Mr. Registrar *Hazlitt* to dismiss the summons, on the ground that he was not indebted to *B. Leathley*, but the Registrar dismissed the application with costs; and he now renewed the application before the Court of Appeal.

Mr. *E. C. Willis*, for the Appellant, contended that the summons ought to have been taken out by the company. No debt was due to *Leathley*. A servant could not take out a summons for a debt due to his master, although he might be authorized to collect it. He referred to the 15th of the *Bankruptcy Rules*, 1870, and the 7th section of the *Bankruptcy Act*, 1869.

Mr. *Mackeson*, Q.C., for the company, argued that the summons

was in substance the summons of the company. *Leathley* was described in it as the secretary of the company.

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LORD SELBORNE, L.C.:—

This summons is a special statutory proceeding, involving important consequences, and all proper forms must be strictly complied with. The appeal must be allowed, and the summons dismissed with costs.

The LORDS JUSTICES concurred.

Solictors: Messrs. *Poole & Hughes;* Messrs. *Singleton & Tattershall.*

MERRY *v.* NICKALLS.

[1869 M. 125.]

L. C. and L. JJ. 1873 *Jan.* 29.

Practice—Staying Proceedings pending Appeal—Costs.

Proceedings on an order to pay money and costs stayed pending an appeal, on payment of the money by the Defendant to the Plaintiff, the Plaintiff giving security for repayment, or if the Plaintiff preferred it on payment into Court, the costs to be paid to Plaintiff's solicitor on his undertaking to repay them if directed.

The applicant, in such a case, must pay the costs of the application.

Burdick v. *Garrick* (1) distinguished.

THE Defendant in this case had been ordered to pay to the Plaintiff a sum of about £1100 and the costs of the suit; as reported (2).

Mr. *Buchanan* now moved that the proceedings under the order for payment might be stayed, pending the Defendant's appeal to the House of Lords. The Defendant was willing to bring the money into Court.

Mr. *Davey*, for the Plaintiff, objected that his client would have to pay the money, and would then be out of pocket pending the appeal.

(1) Law Rep. 5 Ch. 453.

(2) Law Rep. 7 Ch. 733.

L. C. and L. JJ. 1873 MERRY v. NICKALLS.

THEIR LORDSHIPS made an order to stay proceedings under the order for payment; the Defendant to pay the money to the Plaintiff, the Plaintiff giving security for repayment if the Defendant succeeded on the appeal; or the Defendant, if the Plaintiff preferred that course, to pay the money into Court. The costs of the suit to be paid according to the decree, on the solicitor undertaking to repay if the Court should so direct.

Mr. *Buchanan* asked that the costs of the application might be costs in the cause, and cited *Burdick* v. *Garrick* (1).

THEIR LORDSHIPS thought that there must have been some special circumstances in that case. The Defendant came here to ask a favour, and must pay the costs of his application.

Solicitors: Mr. *W. A. Crump*; Messrs. *Morley & Shirreff*.

Dictum of LORD SELBORNE, L.C., at p. 211, *applied*. *Re* MANDER (*decd.*). [1950] 2 All E.R. 191.

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CHAMBERLAYNE *v.* BROCKETT.

[1870 C. 220.]

Charitable Gift—Cy-près—Perpetuity—Conditional Gift to Charity.

A testatrix, after stating to the effect that as she could not feel confidence that any of her relatives would spend her money in the way she would approve, she felt she was doing right in giving it in charity, bequeathed her residuary personal estate, consisting of pure personalty, to trustees upon trust to invest it in consols, and to make out of the dividends certain fixed annual payments for charitable purposes. She further directed that when and so soon as land should at any time be given for the purpose as hereinafter mentioned, almshouses should be built in three specified places. And she further directed that the surplus remaining, after building the almshouses, should be appropriated to making allowances to the inmates:—

Held (reversing the decision of the Master of the Rolls), that the residue was well given in charity, for that the gift to charity was not conditional and contingent, but there was an absolute immediate gift to charity, the mode of execution only being made dependent on future events, and an inquiry directed as in *Sinnett* v. *Herbert* (2).

THIS was an appeal by the Attorney-General from a decision of the Master of the Rolls.

(1) Law Rep. 5 Ch. 453. (2) Law Rep. 7 Ch. 232.

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Sarah Chamberlayne, by will dated the 13th of January, 1858, after giving various legacies, mostly for charitable purposes, proceeded as follows:—

"As I consider all my family the same to me, I wish to make no difference, and as I could not select any of them that I confidently could feel would not spend my money on the vanities of the world, as a faithful servant of the Lord Jesus Christ I feel I am doing right in returning it in charity to God who gave it. I therefore give and bequeath all the rest, residue, and remainder of my personal estate and effects, whatsoever and wheresoever, after payment of all my just debts, my funeral expenses, and legacies as aforesaid, unto my said brothers, *William Chamberlayne*, *John Chamberlayne*, and *H. T. Chamberlayne*, and to the survivors and survivor of them, and to the executors, administrators, and assigns of such survivor upon trust that they do and shall, with all convenient expedition after my death, invest the same and every part thereof in the stock called £3 per Cent. Consolidated Bank Annuities after selling such parts of the said residue as may be necessary for that purpose; and my will and desire is that the said trustees do and shall stand possessed of the said residue so invested as aforesaid upon the trusts, intents, and purposes following: (that is to say) upon trust to pay out of the annual dividends or proceeds of the said residue so invested as aforesaid the sums following, yearly and every year for ever (that is to say)":— [Here followed a list of small annual payments]. "And my further will and desire is, when and so soon as land shall at any time be given for the purpose as hereinafter mentioned, that an almshouse or almshouses, consisting of ten rooms with suitable appendages for ten poor persons, should be built in the parish of *Southam*, in the county of *Warwick*; also an almshouse or almshouses, consisting of five rooms with suitable appendages for five poor persons, in the parish of *Long Itchington*, in the county of *Warwick*" [similar directions as to two other almshouses], "all to be built in a plain substantial manner, no expensive ornament whatever." [Here followed directions as to the inmates]. "And my will and desire further is, that the surplus remaining after building the almshouses aforesaid should be appropriated to making weekly allowances to the inmates of each; and my will and desire is that each

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room in the several almshouses aforesaid should be supplied with a suitable Bible of a large type."

The above trustees were named executors.

William and *John Chamberlayne* predeceased the testatrix. *Henry Thomas Chamberlayne*, the sole surviving executor, proved the will, and filed his bill against the other next of kin for the administration of the personal estate. The Attorney-General was served with the decree. The residuary estate, which consisted of pure personalty, was found, on taking the account, to amount to upwards of £10,000. The Master of the Rolls, on the case coming on for further consideration, held that the residue was not effectually given in charity, but was divisible among the next of kin of the testatrix (1).

The *Solicitor-General* (Sir *G. Jessel*), and Mr. *Hemming*, in support of the appeal:—

There is here a general intention declared of giving the property in charity, and remoteness is out of the question: *Attorney-General* v. *Bishop of Chester* (2); *Sinnett* v. *Herbert* (3). The old doctrine was, that when once an intention was shewn to give property to charity, if the particular mode pointed out was impracticable, the disposition was carried into effect *cy-près*: *Moggridge* v. *Thackwell* (4); *Mills* v. *Farmer* (5); and the cases collected in *Jarman* on Wills (6). The distinction mentioned in the same treatise between a general gift to charity and a mere gift to a particular charity has never been sanctioned by the Court of Appeal, and we contend that it cannot be sustained; the current of authority

(1) 1872. June 10. WM (1872) 155 LORD ROMILLY, M.R., after giving his reason for holding some of the legacies void, continued:—

I am of opinion that the gift of the residue is also void, not as being affected by the *Mortmain Act*, but as being a perpetuity. Suppose a testator gave £1000 to be accumulated until some heir of *John Jones* should select a descendant of *A. B.* to receive it. That would be void on the ground of perpetuity, because an indefinite period might elapse before the selection was made. So here there is no gift in charity unless and until some person gives land for the purpose of the charity, which may not happen for an indefinite period. I am, therefore, of opinion that there is an intestacy as to the residue.

(2) 1 Bro. C. C. 444.

(3) Law Rep. 7 Ch. 232.

(4) 7 Ves. 36.

(5) 19 Ves. 483, 485.

(6) 2nd Ed. vol. i. p. 199.

shewing that a gift for any charitable purpose shews the general intent to give in charity, unless there is something affirmatively to shew that the testator means to give to a particular charity and not to any other. But assuming *Cherry* v. *Mott* (1) and that class of cases to have been well decided, they do not affect the present, for here a general intent to give in charity is in terms expressed. There being, then, a gift in charity, remoteness is out of the case, that doctrine having no application to a charity. *Martin* v. *Margham* (2) shews that the next of kin do not get the income the accumulation of which is forbidden by the *Thellusson Act*. The application of the *cy-près* doctrine is illustrated by *Hayter* v. *Trego* (3); *Loscombe* v. *Wintringham* (4); *Simon* v. *Barber* (5); *Da Costa* v. *De Pas* (6); *Cary* v. *Abbot* (7); *Attorney-General* v. *Ironmongers Company* (8); the only exceptions being such as *Attorney-General* v. *Goulding* (9); *Attorney-General* v. *Whitchurch* (10); and other cases of that class.

[They also referred to *Attorney-General* v. *Andrew* (11); *Andrew* v. *Merchant Tailors Company* (12), and *Andrew* v. *Trinity Hall* (13).]

Sir *R. Baggallay*, Q.C., and Mr. *Speed*, for the Plaintiff; and Mr. *Fry*, Q.C., and Mr. *Cadman Jones*, for the Defendants:—

There is neither authority nor principle in support of the proposition that a gift for charitable purposes cannot be void for remoteness. If property is once effectually given in charity then remoteness is out of the question, but there is nothing to protect a gift which does not devote the property to charity until the happening of a future event, which may be beyond the period allowed by the rule against perpetuities. That, we say, is the case here; there is no immediate gift to a charity, nothing but a gift if and when somebody gives land, the income in the meantime being left undisposed of. The case is thus distinguished from *Attorney-*

(1) 1 My. & Cr. 123.
(2) 14 Sim. 230.
(3) 5 Russ. 113.
(4) 13 Beav. 87.
(5) 5 Russ. 112.
(6) Amb. 228; 2 Sw. 487.
(7) 7 Ves. 490.
(8) Cr. & P. 208; 10 Cl. & F. 908.
(9) 2 Bro. C. C. 428.
(10) 3 Ves. 141.
(11) Ibid. 633.
(12) 7 Ibid. 223.
(13) 9 Ves. 525.

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General v. *Bishop of Chester* (1), *Sinnett* v. *Herbert* (2), and from *Henshaw* v. *Atkinson* (3), which, in other respects, is very similar to the present, and from all the cases in which the *cy-près* doctrine has been applied; for in all of them there was an immediate dedication of the property to the charitable purpose, the only futurity being in the actual carrying the charitable purpose into effect, without there being anything conditional in the terms of the gift. The conditional character of the present gift brings the case within *Cherry* v. *Mott* (4). Where a gift is conditional there is no instance of the *cy-près* doctrine being brought in.

Mr. *Hemming*, in reply:—

Henshaw v. *Atkinson* went on the ground that the doctrine of perpetuity in no way applies to a charity, and it is treated in *Phillpott* v. *Governors of St. George's Hospital* (5) as deciding this.

Dec. 16. LORD SELBORNE, L.C.:—

The only question which appears to us to require decision in this case is whether, upon the true construction of the will, a trust for charitable purposes of the whole residuary personal estate was constituted immediately upon the death of the testatrix, or whether the charitable trust as to the residue not required to make the fixed payments mentioned before the directions as to the almshouses and alms-people was conditional upon the gift of land at an indefinite future time for the erection of almshouses thereon. If there was an immediate gift of the whole residue for charitable uses, the authorities mentioned during the argument (*Attorney-General* v. *Bishop of Chester*, *Henshaw* v. *Atkinson*, and *Sinnett* v. *Herbert*, to which may be added *Attorney-General* v. *Craven* (6),) prove that such gift was valid, and that there was no resulting trust for the next of kin of the testatrix, although the particular application of the fund directed by the will would not of necessity take effect within any assignable limit of time, and

(1) 1 Bro. C. C. 444.
(2) Law Rep. 7 Ch. 232.
(3) 3 Madd. 306.
(4) 1 My. & Cr. 123.
(5) 6 H. L. C. 338.
(6) 21 Beav. 392.

could never take effect at all except on the occurrence of events in their nature contingent and uncertain. When personal estate is once effectually given to charity it is taken entirely out of the scope of the law of remoteness. The rules against perpetuities (as was said by Lord *Cottenham* in *Christ's Hospital* v. *Grainger* (1)) "are to prevent, in the cases to which they apply, property from being inalienable beyond certain periods." But those rules do not prevent pure personal estate from being given in perpetuity to charity; and when this has once been effectually done, it is (to use again, Lord *Cottenham's* language) "neither more nor less alienable" because there is an indefinite suspense or abeyance of its actual application or of its capability of being applied to the particular use for which it is destined. If the fund should, either originally or in process of time, be or become greater in amount than is necessary for that purpose, or if strict compliance with the wishes and directions of the author of the trust should turn out to be impracticable, this Court has power to apply the surplus, or the whole (as the case may be), to such other purposes as it may deem proper, upon what is called the *cy-près* principle.

On the other hand, if the gift in trust for charity is itself conditional upon a future and uncertain event, it is subject, in our judgment, to the same rules and principles as any other estate depending for its coming into existence upon a condition precedent. If the condition is never fulfilled, the estate never arises; if it is so remote and indefinite as to transgress the limits of time prescribed by the rules of law against perpetuities, the gift fails *ab initio*.

We agree with what was said by the Master of the Rolls in *Cherry* v. *Mott* (2), that "there may no doubt be a conditional legacy to a charity as well as for any other purpose;" and we think that the question whether this is so or not ought to be determined, like all other questions of construction, by the application of the ordinary rules of interpretation to the language of each particular will. We do not assent to the suggestion made by the Solicitor-General that *Cherry* v. *Mott*, and other cases of the same class which have followed it, were ill-decided. If we thought

(1) 1 Mac. & G. 464. (2) 1 My. & Cr. 132.

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(as appears to have been the view of the Master of the Rolls) that the case now before us was really the same as if the testatrix had left her residuary personal estate to devolve on her next of kin, subject to a contingent gift to trustees "when and so soon as land shall at any time hereafter be given for the purpose," for the erection of alms-houses upon the land to be so given, and the maintenance of alms-people therein, we should probably have concurred in the conclusion of His Lordship that such a contingent gift to trustees (although for a charity), having the effect of rendering the property inalienable during the whole continuance of the preceding non-charitable estates, must, in order to be valid, necessarily vest within the same limits of time as if the trustees had taken the residue (upon the same condition) for their own benefit, or for any other than charitable objects.

If, therefore, we differ (as we are compelled to do) from the decree at the Rolls, it is not on any principle of law, but upon the construction of this particular will. In this case the testatrix expressly declares her intention to "return" her whole residuary estate "in charity to God who gave it;" and she "therefore" gives and bequeaths it immediately upon her death to trustees to invest the whole in consols, proceeding to direct various specified payments to be made out of the trust fund so created, and adding the directions on which the present question arises for the erection of alms-houses and the maintenance of alms-people therein "when and so soon as land shall at any time hereafter be given for that purpose." According to *Green* v. *Ekins* (1), *Hodgson* v. *Lord Bective* (2), and other similar cases, a gift of the residue of personal estate carries with the *corpus* the whole income arising therefrom and not expressly disposed of as income, or expressly directed to be accumulated, from the day of the death of the testator. Here, therefore, nothing is undisposed of, there is no resulting trust for the next of kin. The intention in favour of charity is absolute, the gift and the constitution of the trust is immediate; the only thing which is postponed or made dependent for its execution upon future and uncertain events is the particular form or mode of charity to which the testatrix wished her property to be applied. Taking this view of the proper construction of the will, we hold

(1) 2 Atk. 473. (2) 1 H. & M. 376, 397.

the present case to be completely governed by *Attorney-General* v. *Bishop of Chester* (1), *Sinnett* v. *Herbert* (2), and the other authorities of that class; and we propose accordingly to vary the decree of the Master of the Rolls by a declaration that the residue of the personal estate of the testatrix (which we assume to be all pure personalty) is well given to charity, and by directing an inquiry similar in principle to that in *Sinnett* v. *Herbert*, whether any land has been given or legally rendered available for the purposes intended by the testatrix, further consideration being reserved. The costs of all parties of the suit and of the appeal will be paid out of the residuary estate, and the deposit will be returned.

The LORDS JUSTICES concurred.

Solicitors for the Plaintiff and Defendants: Messrs. *Taylor, Hoare, & Taylor.*

Solicitors for the Crown: Messrs. *Raven & Bradley.*

(1) 1 Bro. C. C. 444. (2) Law Rep. 7 Ch. 232.

L. JJ.
1872
Nov. 21.

MORLEY *v.* WHITE.

[1871 M. 243.]

In re WHITE.

Bankruptcy—Injunction—Restraining Proceedings in Chancery—Bankruptcy Act, 1869, *s.* 72.

A testator up to his decease carried on business in partnership with his son. The capital belonged to the father, and the articles contained provisions vesting the son's share immediately on the father's death in the father's executors. The father by will appointed the son and two other persons executors, with discretionary powers to sell the business to the son and to continue it in the meantime. The son alone proved, and continued the business with the testator's assets, and within a year from the father's death a suit was instituted by separate creditors of the father for the administration of his estate. A receiver was appointed in the suit, and shortly afterwards a trustee was appointed under a liquidation Petition which had been presented by the son before the receiver was appointed. The bill was amended by making the trustee a party, and praying an injunction to restrain him from meddling with the estate of the testator. The Registrar in Bankruptcy refused an application by the trustee for an injunction to restrain the Plaintiffs from taking any proceedings in the suit for the purpose of interfering with the realization and distribution of the stock-in-trade and effects of the firm, and *Malins*, V.C., in the suit, granted an injunction to restrain the trustee from interfering with the testator's assets, unless he should pay into the Court, in the names of the receiver and himself, a sum of £48,000 realized from the assets of the business :—

Held (reversing both decisions), that the Court of Bankruptcy was the proper forum for deciding the questions arising between the estates of the father and the son, and that the injunction in Chancery must be discharged, and an injunction in Bankruptcy granted, to restrain the Plaintiffs from taking any proceedings in Chancery against the trustee in respect of any property come to his hands.

THIS case came before the Court on two motions by *Baggs*, the trustee in liquidation of *Wm. Thompson White*—one in Chancery by way of appeal from an order of Vice-Chancellor *Malins*, and the other in Bankruptcy by way of appeal from an order of Mr. Registrar *Pepys*, acting as Chief Judge.

By articles of partnership dated the 20th of February, 1854, between *Wm. White*, his son *Wm. Thompson White*, and *Charles Gower Collins*, reciting that the premises on which the business was carried on belonged to *W. White;* that the business was

being carried on by *W. White*, *W. T. White*, and *Collins*; that *W. White* was alone entitled to the capital, stock-in-trade, and effects, and that *W. T. White* and *Collins* were entitled only in certain shares of the profits; it was, among other things, stipulated that *W. White*, *W. T. White*, and *Collins* would be partners in the profits of the business for twelve years from the 1st of January, 1854; that the capital should bear interest at £5 per cent.; that *W. White* might provide or withdraw capital at pleasure; that *W. T. White* and *Collins* might, with the consent of *W. White*, bring into or leave in the business such sums of money as they should think fit as capital, not to be withdrawn, unless on notice, without the consent of *W. White*, and to be withdrawn on notice from him, and on default to carry no interest; that the profits should be divided in the proportions therein mentioned; that in the event of the death of *W. White* during the partnership, the partnership should be immediately dissolved, and that the shares of *W. T. White* and *Collins* should thenceforth belong to *W. White's* personal representatives, or the party or parties to whom *W. White* should have bequeathed those shares, and that the business should thenceforth be carried on by *W. White's* personal representatives or the persons nominated in his will; that *W. T. White* and *Collins* should assist in the business for six months from his death, and should each be entitled to receive, from such representatives or nominees, a sum equivalent to his share of profits for six calendar months, to be estimated as therein mentioned, and £500 in addition; and that such representatives or nominees should, within two months from *W. White's* death, pay *W. T. White* and *Collins* their respective shares of profits from the then last half-yearly stock-taking up to *W. White's* death, to be ascertained as therein mentioned; and should, within six months from *W. White's* death, pay to *W. T. White* and *Collins* the amount thereinbefore provided for their services subsequently to his death, and the said £500 and also the amount of their respective capitals, if any, in the partnership, with interest from the death of *W. White*.

Collins retired, and his share became vested in *W. White*. The partnership was continued between *W. White* and *W. T. White*, on the footing of the above articles, till the death of *William White*, on the 19th of January, 1871.

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William White, by his will, gave his real and personal estate to *William Thompson White, George Thompson White,* and *A. W. White,* upon trust to convert the same into money, and stand possessed of the proceeds as to one-fourth for *William T. White,* as to one-fourth for *George T. White,* and as to the other two fourths upon the trusts therein mentioned, for the benefit of the testator's two daughters and their issue. And he declared that it should be lawful for, but not obligatory upon, his trustees or trustee to delay the sale and conversion of such part of his property as was engaged in his business, or any part thereof, for any period not exceeding two years from his decease, and then to sell the business to his said son *W. T. White;* and he directed that in the meantime his share of the profits should be paid to the persons entitled to the income of his trust estate. This will was proved in July, 1871, by *William T. White* alone, power being reserved to the other executors to come in and prove.

In December, 1871, the Plaintiffs, who were creditors of the testator under a covenant entered into by him with them, as trustees of the marriage settlement of *William T. White,* filed their bill against the three executors for the administration of the testator's estate. On the 7th of March, 1872, a receiver was appointed of the testator's estate.

William T. White carried on the testator's business with the testator's assets till the 2nd of March, 1872, on which day he filed a Petition for liquidation by arrangement in the Court of Bankruptcy, under which *Silas William Baggs* was, on the 21st of March, appointed trustee.

In April, 1872, the bill was amended by making *Baggs* a Defendant, and alleging that *Baggs* claimed to take all the assets of the testator embarked in the business as part of the estate of *William T. White,* and that *W. T. White* and *Baggs* refused to allow the receiver in the cause to take possession of them; and praying, among other things, that *William T. White* and *Baggs* might be restrained from meddling with the assets of the business, or other the real and personal estate of the testator, or any part thereof. The bill alleged the whole business property to have been the property of the testator at his death.

Baggs, by his answer in the suit, stated that the principal part of

the stock-in-trade and effects of the business existing at the death of the testator had been sold by *William T. White* before he filed his Petition for liquidation.

Baggs moved in bankruptcy for an order to restrain the Plaintiffs in the suit from interfering with him in the realization and distribution of the stock-in-trade, estate, and effects in bankruptcy, and from taking or prosecuting any proceedings in the suit of *Morley* v. *White*, for the purpose of interfering with the realization and distribution of the stock-in-trade, estate, and effects, the capital of the firm, and the real and personal estate of the testator employed in the trade.

On the 10th of July, 1872, Mr. Registrar *Pepys*, acting as Chief Judge, made an order refusing this motion.

On the 18th of July, 1872, Vice-Chancellor *Malins* made, on motion, an order in the suit, that *Baggs* should be at liberty, on or before the 25th of July, to deposit in a bank, in the joint names of himself and the receiver in the cause, £48,000, appearing by his affidavit to have been received by him in respect of the business, and that in default of such deposit being made an injunction should be awarded to restrain *Baggs* and *William T. White* from meddling with the assets of the business, or with any other real or personal estate of the testator, or with the proceeds of any part of such assets and estate respectively, and from preventing the receiver from taking possession of such estate and proceeds, and from parting therewith otherwise than by delivering and paying the same to the receiver, and from withholding such delivery and payment respectively. The £48,000 was paid in accordingly, and various consent orders made, under which parts of it were applied in redeeming mortgages on property of the testator which was claimed adversely by the Plaintiffs and by the trustee, the redemptions to be without prejudice to any question as to the right to these properties.

The trustee moved by way of appeal from both these orders.

Mr. *De Gex*, Q.C., Mr. *Speed*, and Mr. *Winslow*, for the Appellant:—

The injunction in bankruptcy ought to have been granted, for the Court of Bankruptcy is the proper tribunal for deciding what

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parts of the estate which has been realized ought to be distributed among the creditors under the liquidation: *Bankruptcy Act*, 1869, s. 72; *Tanqueray* v. *Bowles* (1). The injunction which has been granted interferes improperly with the administration in bankruptcy.

Mr. *Cotton*, Q.C., and Mr. *Hemming*, for the Plaintiffs:—

The Vice-Chancellor proceeded on this ground, that there were questions which could best be decided in the administration suit, namely, whether under the terms of the partnership the whole property of the partnership did not belong to the father, and how far it had become liable to be applied in payment of the son's debts; and the Registrar also thought that the questions could be most conveniently tried in Chancery. There is a discretion under sect. 72. The proceedings in Chancery had been instituted before the bankruptcy took place, and ought not to be stayed.

Mr. *Westlake*, for the executors.

SIR W. M. JAMES, L.J.:—

It appears to me that the Court of Bankruptcy is the proper tribunal to determine the questions arising in this matter. The case is one which shews how beneficial is the effect of the 72nd section. There are, no doubt, questions between the father's estate and the son's estate which have been mixed up together—questions between the joint creditors of the father and son, the separate creditors of the father and the separate creditors of the son. These questions must be determined somewhere before the assets can be distributed among the creditors. If the orders under appeal are to stand, the result must be that the whole administration of the estate, and its division among the creditors according to their respective rights, will be delayed until the suit is determined. It is true that there may be important questions to be determined before it can be ascertained how the distribution is to be made; but the Court of Bankruptcy is armed for that purpose with every power of a Court of Law and a Court of Equity, and there is not a single question stated to us as an im-

(1) Law Rep. 14 Eq. 151.

portant and difficult question arising in this matter which cannot be litigated and determined by that Court of Bankruptcy which the Legislature has thought to be the proper tribunal for the determination of it; and those questions, if decided in Bankruptcy, would come on appeal before the same Court as if they had been determined in Chancery, that is, before the same Judges sitting under one name instead of under another.

Under these circumstances I am of opinion that the proper forum to determine every one of those questions is the Court of Bankruptcy; that the order of the Vice-Chancellor, taking out of the jurisdiction of the Court of Bankruptcy the whole property which the trustee in bankruptcy has been realizing out of assets to a great extent consisting of things bought by the bankrupt himself since his father's death, was improvidently granted and ought to be recalled, and that the Registrar would properly have made an order restraining any suits against the trustee in respect of the estate got in by him in the course of the liquidation.

SIR G. MELLISH, L.J., concurred.

Nov. 22. Some further discussion took place as to the form of the order to be made, and it was determined that one order to the following effect should be made on both motions:—

Discharge the order of the Registrar.

Order that the Plaintiffs in the suit of *Morley* v. *White* be restrained from taking any proceedings in the said suit, or in any other suit, against the trustee under the liquidation in respect of any property which may have come to the hands of the said trustee.

Order that the balance of the moneys transferred into the joint names of the trustee and the receiver in the suit be transferred into the name of the trustee alone, and that the securities which any part of the said moneys has been applied to redeem be delivered up to the said trustee.

Discharge the order of the 18th of July, 1872, made in the suit, and order the Plaintiffs to pay the trustee's costs of the proceedings in the suit.

This present order, and any other order which has been made in these matters, either in Chancery or in Bankruptcy, shall be without prejudice to any question between the parties.

Solicitors: Mr. *W. Bristow;* Messrs. *Tyas & Huntington.*

L. JJ.
1872
Dec. 13.

Ex parte SMART. *In re* RICHARDSON.

Bankruptcy—Doctrine of Ex parte Waring—Double Insolvency—Bills drawn by a Third Party.

L. & Co. employed *S. & Co.* as their correspondents at *Havanah*, and *R.* as their correspondent in *London*. They consigned certain cargoes to *S. & Co.*, at the same time informing them that they would draw bills on *R.* for the value. This they accordingly did, and the bills were accepted by *R.* Before the bills came to maturity *S. & Co.* sent remittances in short bills to *R.* to cover the amount of the bills, telling him to take them "against the acceptances." *R.* became bankrupt, and the acceptances were not paid, and soon after *S. & Co.* became insolvent:—

Held (affirming the decision of *Bacon*, C.J.), that the remittances must be applied to meet the acceptances, under the rule of *Ex parte Waring* (1).

It is no objection to the application of the rule in that case that the party sending the remittances was not a party to the bills as drawer or indorser, provided the bills were drawn in respect of a transaction in which he is liable.

THIS was an appeal from a decision of the Chief Judge in Bankruptcy.

Messrs. *Langs, Sons, & Co.* were merchants residing at *Bremen*. They employed Mr. *A. J. Richardson* as their correspondent in *London*, and Messrs. *Stephani & Co.* as their correspondents at *Havanah*.

On the 17th of November, 1871, Messrs. *Langs* drew two bills for £541 8*s.* 7*d.* and £600 (making together £1141 8*s.* 7*d.*) on *Richardson*, at four months after date, against a shipment of cheese made at the same time to Messrs. *Stephani*.

Messrs. *Langs* notified this to Messrs. *Stephani* by a letter, dated the 22nd of November, 1871, in which they inclosed the duplicate bills of lading of the cheese, and said, "In settlement of this account we made free to value upon Mr. *A. J. Richardson* for your account, £1141 8*s.* 7*d.*, payable 17 March, 1872."

These bills of exchange were accepted by *Richardson*, but when presented for payment at maturity were dishonoured by reason of *Richardson's* insolvency. On the 17th of February, 1872, Messrs.

(1) 19 Ves. 345.

Stephani sent to *Richardson* short bills to the amount of £2838 8*s.* 7*d.*, with a letter of that date, in which they said:—

"Enclosed we hand you first of" [mentioning the bills, amounting to £2838 8*s.* 7*d.*], "to the debit of your bill account against your acceptances of" [among others] "£1141 8*s.* 7*d.*, due 20 March, on *Langs, Sons, & Co.*"

On the 26th of October, 1871, Messrs. *Langs* made a consignment of tea to Messrs. *Stephani*, and against such consignment drew a bill for £402 upon *Richardson*, dated the 29th of October, 1871, payable five months after date. This bill was accepted by *Richardson*, but dishonoured when presented for payment at maturity.

By a letter, dated the 4th of November, 1871, Messrs. *Langs* duly advised Messrs. *Stephani* of their having drawn the last-mentioned bill, and on the 2nd of March, 1872, Messrs. *Stephani* remitted to *Richardson* short bills to the amount of £1600 in a letter, in which they said, "the distribution of which we will give in our next."

Accordingly, on the 9th of March, Messrs. *Stephani* wrote again to *Richardson* a letter in which they said, "The engagements you have come under for our account have been noticed and passed in conformity to the different accounts. Our last remittance of £1600 you will take against" (among other bills) "£402 4*s.* 9*d.*, due 1st April, on *Langs, Sons, & Co.*"

On the 13th of March, 1872, Messrs. *Stephani* suspended payment, and their estate was being wound up according to the law of *Havanah*.

On the 22nd of March *Richardson* received from them the following telegram:—"Pay bills maturing; otherwise, return remittances;" and in reply he telegraphed to them:—"Through your failure I have stopped. Cannot return remittances."

On the same day *Richardson* filed a Petition for the liquidation of his affairs by arrangement, and a resolution to that effect was passed by the creditors on the 11th of April, and Mr. *F. B. Smart* was appointed the trustee of his estate. At this date some of the bills remitted by Messrs. *Stephani* still remained in *Richardson's* possession.

Messrs. *Langs* claimed that such of the remittances made by

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Messrs. *Stephani* to *Richardson* as remained in specie at the date of the liquidation, might be applied to meet the particular bills for which they were intended, upon the principle of *Ex parte Waring* (1). The Chief Judge made an order that the proceeds of the remittances, so far as they existed in specie at the date of the liquidation, should be applied for the purposes for which they were remitted, as expressed in the letters referred to in the evidence, and that an inquiry should be made for the purpose of ascertaining who were the persons entitled to such proceeds under the foregoing declaration. From this decision the trustee of *Richardson's* liquidation appealed.

In an affidavit made by *Richardson* he said: "I acted as the *London* agent for *Stephani & Co.*, and accepted, in the course of my business transactions with them, numerous bills on their account. There was no agreement or undertaking on my part with them to specifically apply any moneys or drafts which they might remit to me for any particular purpose, or to the payment of any particular bill or bills which might be drawn by them or others on and accepted by me. The remittances made from time to time by them to me were not remittances of cash or bank notes, but were of bills drawn at from sixty to ninety days' date or sight on merchants in *London,* and such bills were paid by me into my bankers and placed to my general account, for which I was charged the usual bankers' discount, and I also had to pay for the necessary stamps affixed to such bills. I had, prior to the filing of my Petition, accepted bills on account of *Stephani & Co.* amounting to £28,569 or thereabouts, and they had remitted to me drafts on *London* mercantile houses amounting to £6300 or thereabouts. I did not consider the said bills so remitted were specifically applicable to the payment of any particular bills. On the contrary, I treated such remittances as general remittances on account from *Stephani & Co.*, and took them to my bankers and discounted them in the usual way as I required funds, without reference to any specific application of the same to the bills mentioned in *Stephani & Co.'s* letters as coming due."

In the course of the argument before the Lords Justices *Richardson* was examined *viva voce* in Court, and stated that,

(1) 19 Ves. 345.

Messrs. *Stephani* always used to send short bills, so as to keep him in funds before the acceptances became due. He always understood that they would cover him in time. He was formerly in partnership with Messrs. *Stephani*, when they acted in the same way, and this course of business had been continued after the dissolution of the partnership for about three years. When the particular remittances now in question were sent there were no acceptances already due which had not been provided for.

Mr. *Dowdeswell*, Q.C., and Mr. *Jackson*, for the Appellant:—

This case differs in two respects from *Ex parte Waring* (1). In the first place, there was no specific appropriation of the remittances to the particular acceptances, but they were applicable to the general bill account betwen *Stephani* and *Richardson*. *Stephani* could not have filed a bill against *Richardson* to get back the remittances without paying off the whole account. In the second place, the rule in *Ex parte Waring* only applies as between the drawer or indorser of a bill and the acceptor. Here Messrs. *Stephani* were no parties to the bills, and it would be extending the rule beyond any previous authority to hold it applicable where the person sending the remittances is no party to the bills, and under no liability in respect of them. Again, in *Ex parte Waring* the funds in dispute were not remittances sent after the bills were drawn, but securities deposited with the bankers to induce them to accept the bills: *Powles* v. *Hargreaves* (2); *Hickie & Co.'s Case* (3); *Ex parte Stephens* (4).

What the Respondent contends for is a violation of the bankruptcy laws; for it would give Messrs. *Langs* a preference to which they are not entitled over the other creditors. It is a mere accident that they have the advantage of the remittances by *Stephani*, for which they had never bargained.

Mr. *Davey*, and Mr. *Finlay Knight*, for *Langs & Co.*:—

The correspondence shews distinctly that the remittances were sent to meet particular bills. If *Richardson* had discounted any of them, he might have been restrained from applying the proceeds

(1) 19 Ves. 345.
(2) 3 D. M. & G. 430.
(3) Law Rep. 4 Eq. 226.
(4) Ibid. 3 Ch. 753.

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to any other purpose. He might have refused to accept the bills drawn upon him, but having accepted them he could not apply the remittances to any purpose except to meet them: *Inman* v. *Clare* (1). We have a right to prove against *Richardson's* estate in respect of his acceptances, and also against *Stephani's* estate for the price of the goods. We have, therefore, a right to insist on the appropriation of the remittances to meet the acceptances of *Richardson*. We are not seeking to extend the rule in *Ex parte Waring* (2). The rights of the Plaintiffs are the same as in that case. It can make no difference whether the person sending the remittances has drawn the bills or not, provided the acceptances have been given at his request and on his credit. The same difficulty arises in both cases, and there is no way of getting out of it but by applying the same rule. The principle of this case is well laid down by Lord *Hatherley* in *City Bank* v. *Luckie* (3).

Mr. *Dowdeswell*, in reply.

SIR W. M. JAMES, L.J.:—

The long, but not too long, and very able discussion of this case has convinced me that the decision of the Chief Judge ought to be sustained.

Two questions have been argued, which may be considered separately. First, as to the question of the appropriation of the remittances by *Stephani & Co.* to *Richardson*: I am of opinion that this question cannot be governed by what subsequently took place, but must be considered in the same way as if on the day when the acceptances became due, *Stephani & Co.* had been solvent and *Richardson* alone had been bankrupt. Under these circumstances *Richardson* would have received bills sent to him for the specific purpose of meeting bills being drawn upon him and to become due on that particular day, and if *Stephani & Co.* had heard that *Richardson* was becoming bankrupt in time to prevent the remitted bills from being issued, they would have been entitled to file a bill to say that they were sent for the purpose of taking up particular bills, and this would have been quite inde-

(1) Joh. 769. (2) 19 Ves. 345.
(3) Law Rep. 5 Ch. 773.

pendent of the taking of any accounts between them and *Richardson*. Otherwise it might have been ruin to them, if they had made all their arrangements on the footing of these particular acceptances being met.

That being so, the question arises, in the second place, whether this state of circumstances is not precisely the same as in *Ex parte Waring* (1) and *Powles* v. *Hargreaves* (2), and whether we ought not to come to the same conclusion as in those cases. *Stephani & Co.* had a right to say that the bills should not be applied for the general purpose of paying *Richardson's* creditors, but for the specific purpose for which they were intended; and, on the other hand, they had no right to leave *Richardson's* estate liable to pay his acceptances. Accidentally another person gets an advantage for which he had not stipulated, by reason of the adjustment of equities between the parties. It is said that we ought not to extend the doctrine of *Ex parte Waring*, but the rule laid down in that case has been often before the Court, and neither the Court nor the Legislature has shewn any disapproval of it. We are not really pressing it further. I cannot follow the argument that has been urged upon us, that the doctrine only applies where all parties are parties to the same bills, and does not apply to a case where there are distinct contracts. In truth the contracts which the holder makes with the drawer and acceptor of a bill are really distinct contracts; but it does not appear to me that the decision in *Ex parte Waring* depends on any such connection between the parties. The reason of the decision is, that the equity cannot be worked out without the application of such a rule.

I think the Chief Judge was right, and the appeal must be dismissed with costs.

SIR G. MELLISH, L.J.:—

I am of the same opinion. Taking *Richardson's* statement of the course of business to be correct, I think there was a specific appropriation of the remittances to take up the particular bills. There had been a partnership, and on the dissolution of the part-

(1) 19 Ves. 345. (2) 3 D. M. & G. 430.

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nership the same course of business continued; and the course was, that when *Stephani* purchased goods of *Langs & Co.* in *Havanah, Richardson* accepted bills drawn by *Langs & Co.* for the accommodation of *Stephani*, and that other bills were transmitted by *Stephani* to meet them as they became due, and that *Stephani* always specified the bills which the remittances were intended to meet. Therefore I think there was specific appropriation of these remittances. If *Richardson* had dishonoured any of the bills sent to him for acceptance, he might have been compelled to apply the remittances to meet them.

Then, does the doctrine of *Ex parte Waring* (1) apply? If Messrs. *Stephani* had drawn the bills themselves and endorsed them to *Langs & Co.*, it would clearly have been within the rule. Does it make any difference that they got *Langs & Co.* to draw for them to meet the debt; so that the only difference was, that if the bills were dishonoured, instead of *Langs & Co.* having a remedy on the bills against Messrs. *Stephani*, they could only bring an action for the value of the goods? I think the same difficulty arises as in *Ex parte Waring;* and there is no way of adjusting the equities between the parties except by applying the bills to meet the particular acceptances to which they were appropriated.

Solicitors: Messrs. *Mercer & Mercer;* Mr. *W. A. Crump.*

(1) 19 Ves. 345.

KENNARD *v.* KENNARD.

L. JJ.
1872
Dec. 12.

[1871 K. 21.]

Power—Defective Execution.

A lady having a power of appointment by deed or will over certain leasehold property, which in default of appointment was vested absolutely in her, wrote and signed an unattested paper, by which, after referring to the property in terms sufficient to identify it, she proceeded: "If I die suddenly I wish my eldest son to have it. My intention is to make it over to him legally if my life is spared." She died within three months, leaving this memorandum among her papers, and without having otherwise exercised her power:—

Held (affirming the decision of the Master of the Rolls), that the memorandum was a defective execution of the power, and that equity would relieve against the defect in favour of the eldest son.

In 1842 *Mary Anne Kennard* was entitled under the will of her father to one undivided moiety of certain freehold and leasehold properties, her sister, Mrs. *Mann*, being entitled under the same will to the other moiety.

By deed dated the 6th of December, 1842, duly acknowledged by *M. A. Kennard*, she and *R. W. Kennard*, her husband, conveyed her moiety of the freeholds to *B. Davies* in fee, and assigned to him her moiety of the leasehold, by way of mortgage for securing £1200 advanced by *Davies* to Mr. *Kennard;* and it was witnessed that in pursuance of the desire of *R. W. Kennard* and *Mary Anne* his wife, of limiting and reserving to her a power of appointment over her moiety of the premises, and in consideration of her concurrence in the deed, each of them, *R. W. Kennard* and *M. A. Kennard*, with his concurrence, granted, declared, and agreed with the other of them that the moieties thereby granted and assigned of and in the freehold and leasehold premises respectively, but subject to the conveyance and assignment, and to the £1200 and interest, should respectively, as well before as after the mortgage should be paid off, be in trust for such person or persons for such estate or estates, interest and interests, and with, under, and subject to such powers, provisoes, and directions as *M. A. Kennard*, whether covert or sole, by any deed or deeds, instrument or instruments, in writing

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to be by her sealed and delivered in the presence of and attested by one witness at the least, or by her last will and testament, or any codicil or codicils, to be by her signed and published in the presence of and attested by two credible witnesses present at the same time, should in her uncontrolled discretion nominate or appoint; and that the said moieties of the said freehold and leasehold premises should, if and when the £1200 and interest should be paid off, be conveyed and surrendered accordingly to the appointees of *M. A. Kennard*, or subject to the power aforesaid, as the case might be, discharged from the said £1200 and interest. The proviso for reconveyance was to reconvey and reassure the said moieties, subject and without prejudice to the powers limited to *M. A. Kennard*, unto or to the use of *R. W. Kennard* and *M. A.*, his wife, for such estates or interests as they were respectively entitled to therein before the execution of the mortgage deed, or otherwise as the appointment of *M. A. Kennard*, and the acts, defaults, and deaths of the parties, or other circumstances, should require.

In 1856 *R. W. Kennard* paid off the mortgage, but no reconveyance was executed. *Kennard* died in January, 1870, leaving his wife surviving.

On the 2nd of December, 1868, *Kennard* gave to his wife the following memorandum :—

"Dearest *Anne*,—I lately signed my will. I did not include in it any of the bequests made by your father in his will, which you are aware I never touched, but handed it over to you from time to time. I never intended to touch it, and I leave it entirely and absolutely to your will and pleasure.

"Ever your affectionate husband,
"*Robert William Kennard.*"

Shortly after *Kennard*'s death, Mrs. *Kennard* wrote and signed the following paper, which she placed in the same envelope with her husband's note :—

"My own money saved intended for *Bruce*.

"The money I had with my sister, Mrs. *Mann*, was left to me. I let my late husband have it when he was in difficulties as security for money. He never took it, and wrote the inclosed for me to keep to prove what I have written.

"If I die suddenly, I wish my eldest son, *Robert Bruce Kennard*, to have it and the money that I have saved in my iron safe. My intention is to make it over to him legally if my life is spared.

"*M. A. Kennard.*

"January, 1870."

Mrs. *Kennard* was taken ill on the 21st of March, 1870, and died on the 23rd without making any other disposition of her property by will or otherwise.

The above freehold and leasehold properties were the only property, real or personal, which Mrs. *Kennard* ever held jointly with Mrs. *Mann*. It was admitted that by "*Bruce*" was intended *Robert Bruce Kennard*.

The money saved by Mrs. *Kennard* in her iron safe was £545.

Robert Bruce Kennard filed his bill for administration of Mrs. *Kennard's* personal estate, and for a declaration of his rights in respect of the leaseholds and the £545, under the deed of the 6th of December, 1842, and the memorandum of January, 1870. As he was heir-at-law of his mother no question arose as to his right to the freeholds.

The Master of the Rolls made a decree declaring that the document in the bill mentioned, dated "January, 1870," and signed "*M. A. Kennard*," operated as an effectual appointment under the indenture of the 6th of December, 1842, of the property of *M. A. Kennard* comprised in that indenture, but did not pass the money deposited by Mrs. *Kennard* in the iron safe.

Howard John Kennard, the administrator, and one of the next of kin of Mrs. *Kennard*, appealed from this declaration.

Mr. *Fry*, Q.C., and Mr. *Cracknall*, for the Appellant:—

The question in all such cases is, whether there is an intention immediately and irrevocably to exercise the power. We contend that in the present case there was no such intention. Mrs. *Kennard* only expressed an intention to deal with the subject matters of this document by a subsequent instrument, and did not mean this writing to be a disposition: *Carter* v. *Carter* (1);

(1) Mos. 366, 369.

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Proby v. *Landor* (1); *Garth* v. *Townsend* (2), which last is almost identical with the present case.

Mr. *Southgate*, Q.C., and Mr. *W. Pearson*, for the Respondent, were not called upon.

SIR W. M. JAMES, L.J.:—

I am of opinion that the decision of the Master of the Rolls is quite right. In favour of purchasers or children the Court relieves against the defective execution of a power, provided it sufficiently appears that there was an intention on the part of the donee to give the property which he had power to dispose of. Here the lady had power to give the property by an instrument sealed and delivered. By an instrument not sealed and delivered she expresses her intention that her son shall have the property which is subject to the power, and the case is one in which a Court of Equity will relieve against the defective execution. In *Garth* v. *Townsend* I considered that, upon the true construction of the instrument, there was no intention to give the property, but only to request the persons taking it in default of appointment to make a certain application of it, without legally binding them to do so.

SIR G. MELLISH, L.J.:—

I am of the same opinion. A doubt which I felt, whether this instrument was not intended to be a will, and whether an instrument intended to operate as a will, but incapable of doing so, could operate in another way, has been removed during the argument. The donee of the power expresses an intention to give the property by a more formal instrument, but still shews her intention to give it. She means in any event to give it, but to do so by a more formal instrument if her life is spared.

Solicitor for the Appellant: Mr. *William Moon.*

Solicitors for the Respondent: Messrs. *Collette & Collette.*

(1) 28 Beav. 504. (2) Law Rep. 7 Eq. 220.

Ex parte HOOSON.
In re CHAPMAN & SHAW.

L. JJ.
1872
Dec. 13.

Bankruptcy—Power of Imprisonment for Debt—Conviction under Debtors Act, 1869, ss. 4, 9—Money received by way of Fraudulent Preference—Fiduciary Capacity.

A creditor who has received money from a bankrupt by way of fraudulent preference, and has been ordered to repay it to the trustee of the bankrupt's estate, is not a person holding money in a fiduciary capacity under the 4th section of the *Debtors Act*, 1869 (32 & 33 Vict. c. 62), and cannot, therefore, be committed to prison under that section.

The 9th section of the *Debtors Act*, 1869, does not preserve to the Court of Bankruptcy any powers of imprisonment for debt which have been taken away from other Courts by the Act.

Decision of *Bacon*, C.J., affirmed.

THIS was an appeal from an order of Sir. *James Bacon*, the Chief Judge in Bankruptcy.

Messrs. *Chapman & Shaw*, the bankrupts, were building contractors at *Halifax*. Shortly before the bankruptcy *Shaw* paid a sum of £300 to *Hannah Louisa Wood*, a married woman, in repayment, as she alleged, of a loan of that amount made by her. A jury which was impannelled on the 17th of June, 1872, found that the money was paid to Mrs. *Wood* by way of fraudulent preference, and the Judge of the County Court, sitting at *Halifax*, made an order directing her to repay the amount to the trustee in the bankruptcy. Mrs. *Wood* disobeyed the order, and the County Court then made an order, on the application of the trustee, committing Mrs. *Wood* to prison for nine months, being of opinion that the case came within the 3rd clause of the 4th section of the *Debtors Act*, 1869 (1).

(1) 32 & 33 Vict. c. 62, s. 4: "With the exceptions hereinafter mentioned, no person shall after the commencement of this Act be arrested or imprisoned for making default in payment of a sum of money.

"There shall be excepted from the operation of the above enactment" [then follow six exceptions, of which the third is as follows:—]

"3. Default by a trustee or person acting in a fiduciary capacity, and ordered to pay by a Court of Equity any sum in his possession or under his control:

"Provided that no person shall be imprisoned in any case excepted from the operation of this section for a longer period than one year."

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From this order Mrs. *Wood* appealed to the Chief Judge, who reversed the order of the Judge of the County Court; and the trustee under the bankruptcy now appealed from the decision of the Chief Judge.

Mr. *Bagley*, and Mr. *W. Barber*, for the Appellant:—

The Respondent held the money in a fiduciary character within the meaning of the 4th section of the *Debtors Act*, 1869.

[The LORD JUSTICE JAMES:—The order on the face of it is wrong, for it is an absolute order of committal for nine months for contempt of Court in non-payment of money. This is a penal sentence. The Court of Chancery never made an order in this form.]

If the order is informal it may be amended. It was meant to be under the 4th section, which reserves power to commit for a period not exceeding one year: *Middleton* v. *Chichester* (1). The 9th section of the *Debtors Act*, 1869, provides that "nothing in this part of the Act shall in any way affect any right or power under the *Bankruptcy Act*, 1869, to arrest or imprison any person." This Act was passed before the *Bankruptcy Act*, 1869, but (by sect. 3) it is provided that it shall not come into operation till the day on which the *Bankruptcy Act* comes into operation. Then the *Bankruptcy Act*, 1869, s. 66, enacts that "every Judge of a Court of Bankruptcy shall, for the purposes of this Act, in addition to their ordinary powers as a County Court Judge, have all the powers and jurisdiction of a Judge of Her Majesty's High Court of Chancery." It follows, therefore, that the effect of the 9th section of the *Debtors Act* was to reserve to the local Court of Bankruptcy all the powers of imprisonment for debt which the Court of Chancery had before the *Debtors Act* came into operation. Such an order might have been made by the Court of Chancery before the Act.

Mr. *De Gex*, Q.C., and Mr. *Ambrose*, for Mrs. *Wood*, were not called on.

(1) Law Rep. 6 Ch. 152.

SIR W. M. JAMES, L.J.:—

I am of opinion that this is a very idle appeal. The trustee ought to have been advised not to insist on the improvident order of the County Court Judge. The order of committal was such as had never been made by the Court of Chancery, and was justly characterized by the Chief Judge as novel and surprising. There was no fiduciary relation between the bankrupt and the creditors, still less between Mrs. *Wood*, who received the money by fraudulent preference, and the rest of the creditors. The order of the Chief Judge was quite correct, and the appeal must be dismissed with costs.

SIR G. MELLISH, L.J.:—

I am of the same opinion. The only question was as to the construction of sect. 4 of the *Debtors Act*, 1869. I think it was only intended to reserve to the Court of Bankruptcy all those special powers of imprisonment which were given to it by the *Bankruptcy Act*, 1869, and that it was not intended to reserve to it a power of imprisonment for debt, of which the Court of Chancery is itself deprived. It would be very surprising now that all matters relating to the estate of a bankrupt are tried in the Court of Bankruptcy, if the power of imprisonment for debt should remain in all cases in which the creditor became a bankrupt, though it is abolished in other cases. This is simply a case of payment of money by fraudulent preference, the remedy for which must be enforced in the ordinary way.

Solicitors for the Appellant: Messrs. *Williamson, Hill, & Co.*, agents for Messrs. *Norris, Foster, & England, Halifax.*

Solicitors for the Respondent: Messrs. *Bower & Cotton*, agents for Mr. *Jubb, Halifax.*

L. JJ.
1872
Dec. 13.

Ex parte HUNT. *In re* HUNT.

Bankruptcy—Debtor Summons—Affidavit to prove Service—Bankruptcy Act, 1869, *s.* 6, *cl.* 6—*Bankruptcy Rules*, 1870, *r.* 63—*Date of Affidavit.*

A non-trader was adjudicated bankrupt, the act of bankruptcy being his failure to comply with the requisitions of a debtor summons. When the copies of the petition for adjudication were sealed by the Registrar, an affidavit of service of the debtor summons was shewn to him, but it had not been filed, as required by the Rule 63 of the *Bankruptcy Rules*, 1870. The affidavit was filed a few days afterwards, and the adjudication was then made:—

Held, that although the Registrar ought to have refused to seal the copies of the petition till the affidavit had been filed; yet the Rules being merely directory, the adjudication was not invalidated by his omission to do so.

The affidavit stated that the service was made on the "19th August instant," but it was not sworn till September:—

Held, that the affidavit was sufficient.

THIS was an appeal from an adjudication of bankruptcy made by Mr. Registrar *Hazlitt*.

The bankrupt, *Thomas Hunt*, was a non-trader. The act of bankruptcy alleged was the failure by *Hunt*, for twenty-one days, to comply with the requisitions of a debtor summons, which was issued against him on the 14th of August, 1872, and served on the 19th of August.

The petition for adjudication was presented on the 3rd of October. At that time an affidavit of service of the summons had been sworn, but had not been filed in accordance with the 63rd rule of the *Bankruptcy Rules*, 1870, which is as follows: "Service of the summons or petition shall be proved by affidavit, with a sealed copy of the summons or petition attached, and filed in Court forthwith after the service." But the affidavit was shewn to the Registrar when he sealed the copies of the petition for adjudication for service. The affidavit was filed on the 9th of October. It stated that service of the debtor summons was made "on the 19th August instant;" but it was not sworn till the month of September.

Mr. *Bush Cooper*, for the bankrupt, contended, first, that the

service of the debtor summons had not been proved in the manner prescribed by the Rules, and that the subsequent proceedings were therefore invalid. Secondly, he argued that the affidavit itself was insufficient. It was sworn in September, and stated that the service was made "on the 19th August instant," from which it was uncertain what the real date of the service was.

Mr. *De Gex*, Q.C., Mr. *T. E. Winslow*, and Mr. *Brough*, for the trustee, were not called on.

SIR W. M. JAMES, L.J.:—

I am of opinion that the Registrar was quite right in making the adjudication. It is, no doubt, important that the rules should be strictly observed; but, after all, they are merely directory. The 6th section of the *Bankruptcy Act*, 1869, says that an act of bankruptcy shall be committed by a non-trader when he has, for the space of three weeks succeeding the service of the summons, neglected to pay the debt, or to secure or to compound for the same. It says nothing about filing an affidavit of service. If the Registrar was satisfied that the summons had been duly served, and that the debtor had failed to comply with it, there was no reason why he should not make the adjudication. There are no negative words in the Rule; and I cannot read it as laying down that if the service is not proved in that particular way, it cannot be proved in any other way.

SIR G. MELLISH, L.J.:—

I am of the same opinion. There is no question that the Appellant has committed an act of bankruptcy under the 6th section of the Act of 1869; but it is said that the service of the summons has not been properly proved. No doubt the 63rd Rule says that the service is to be proved by an affidavit filed forthwith; and the 32nd Rule shews why it is to be filed forthwith; because the Registrar ought to see that a proper affidavit has been filed before he seals the copies of the petition for adjudication; and in this case, if the Registrar had acted properly, he would have refused to seal the petition until the affidavit had been filed. But

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he did not do this; and then afterwards, before the adjudication was made, the affidavit was put on the file. There is no real question as to the fact of the service. I am of opinion that the Rules must be considered as merely directory. This will not amount to annulling the Rules, for it is the Registrar's duty to see that they are complied with.

I am also of opinion that there is no force in the other objection. The words "August instant" can only refer to August last past. The appeal must be dismissed with costs.

Solicitors for the Appellant: Messrs. *Sankey, Son, & Flint, Canterbury.*

Solicitor for the Respondent: Mr. *J. N. Mason.*

Ex parte SHEFFIELD.

L. C.
1872
Dec. 13.

Patent—Opposition—Law Officer—New Questions.

In opposing the grant of letters patent, the burden is on the opponent to shew that the grant would be clearly wrong.

Where the facts on which the opponent relies were within his knowledge when he opposed before the law officer, he cannot, when before the Lord Chancellor, raise a new legal argument on these facts; nor can he then bring forward evidence which he might have brought before the law officer.

JAMES SHEFFIELD, on the 11th of May, 1872, applied for a patent for an improvement in furnaces for melting glass, and left with his Petition a complete specification of his invention.

On the 31st of May he gave notice of his intention to proceed. Objections were lodged by *A. C. Stevenson*, who had, on the 22nd of March, 1872, applied for letters patent and left a provisional specification of a similar invention. The objections were: That *Sheffield* was not the first and true inventor; that the invention was in part substantially the same as that of *Stevenson*; and that the application was in fraud of the rights of *Stevenson*. *Sheffield* also lodged objections to *Stevenson's* patent.

Both sets of objections were argued before the Attorney-General. *Stevenson* appeared to have then relied principally on evidence that *Sheffield* took his invention from *Stevenson*, and that the statements of *Sheffield* on the subject were false. The Attorney-General dismissed *Stevenson's* objections, and ordered him to pay the costs.

On the 21st of August a warrant for sealing *Sheffield's* patent was made, and on the 26th of August *Stevenson* filed objections to the sealing, one of which was that the invention had been previously in use.

On the 10th of September *Sheffield* presented a Petition that letters patent for his invention might be sealed. *Stevenson* then applied to the Attorney-General for a rehearing, which was at first refused but afterwards granted by the Attorney-General. The case was re-heard before him on the 7th of October, when he refused to alter his decision, and ordered the opponent to pay the costs. There was a dispute whether the Attorney-General then entered into the merits and had read further evidence offered by *Stevenson*,

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or considered that a complete specification was a bar to any opposition.

Sheffield's Petition now came on to be heard.

Mr. *Aston*, Q.C., and Mr. *Lawson*, for the Petitioner:—

It is clear that there can be no opposition on facts which have already been placed before the Attorney-General: *Re Simpson* (1). There is some new evidence, but it is only to the facts previously stated. If a *primâ facie* case for a patent is made out, the patent will be granted. *In re Vincent's Patent* (2) shews that the Lord Chancellor will not interfere with the decision of the law officer unless fraud or surprise is shewn. If this point is decided in our favour, we need not go into the evidence.

Mr. *Kay*, Q.C., and Mr. *Macrory*, for *Stevenson*:—

We do not intend to argue the points which were decided by the Attorney-General, but we say that the evidence shews a prior publication of the patent. On this point we propose to offer new evidence which could not have been given before.

[The LORD CHANCELLOR:—I cannot allow objections founded on known facts to be for the first time raised at this stage of the proceedings.]

The Attorney-General on the rehearing thought that the complete specification was a bar to our obtaining a patent, and did not go into the other questions.

[The LORD CHANCELLOR:—I must consider that the Attorney-General looked at the evidence. If he had decided on that technical point he would not have made *Stevenson* pay the costs.]

If this was an appeal from the Attorney-General it would be competent to either side to raise new questions on the facts. There is no rule that such questions shall not be raised in patent cases, and it would not be right to establish such a rule. *Stevenson* may be quite right, and ought not to be subjected to the expense of disputing the validity of a patent.

But this is not an appeal. We oppose at a different stage and

(1) 21 L. T. (O.S.) 81. (2) Law Rep. 2 Ch. 341.

on different grounds, and we may bring in new evidence. The only question is whether the patent is good, and that ought to be decided now.

[The LORD CHANCELLOR:—The Court never decides that question, but merely decides whether the applicant can be allowed to proceed.]

In *In re Russell's Patent* (1), and *Re Adamson's Patent* (2), the Lord Chancellor considered himself bound to decide on the validity. Even where there had been no opposition before the Attorney-General, opposition to sealing has been allowed: *Ex parte Manceaux* (3). Your Lordship must either decide this question or refer it back to the law officer.

LORD SELBORNE, L.C:—

It appears to me that the whole facts upon which the opposition to this patent is founded were perfectly and fully within the knowledge of *Stevenson*, who opposed actively before the Attorney-General, and who took his own course in that opposition. I am, therefore, not prepared to allow the case to be reargued upon the legal effect of those facts when presented in a somewhat different point of view from that in which they appear to have been presented to the Attorney-General. If that were to be permitted, the consequence would be, that the preliminary inquiry before the Attorney-General would be attacked in every case; and the whole matter which it is his proper business to investigate would be opened and gone into *de novo*.

Now that is not a practice which has ever been followed, or which, as far as I can see, was in the contemplation of the Legislature. If parties having full knowledge of the facts, and taking their own course in their manner of using the materials within their knowledge, either do not raise before the Attorney-General a particular argument upon the facts, or do not bring forward all the evidence bearing on those facts and then at their command, they, in my judgment, are not entitled to the indulgence of having the matter remitted back to the Attorney-General, nor have they any

(1) 2 De G. & J. 130. (2) 6 D. M. & G. 420.
(3) Law Rep. 5 Ch. 518.

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right to call upon the Lord Chancellor to discharge in that respect the office of the Attorney-General.

It has been often said, and I think justly said, that in all these cases the whole burden is upon the opponent, who has to shew that he has so clear a case as to make it right to do that which, if wrongly done, would, so far as relates to the patentee, be irreparable, but which, if left undone, would not inflict upon the opponent any irreparable injury. No doubt new facts might raise a totally different question, but to offer new arguments upon the old facts, in order to bring the Lord Chancellor to the conclusion that the case is so clear as to make it right to shut out the patentee for ever by refusing to seal his patent, would really be a hopeless task; and in my judgment it would be a very unwise thing, if any encouragement whatever were given to such a course of practice. None of my predecessors, as far as I am aware, have ever done so, and it is evident that in the case of *Ex parte Manceaux* (1) the Lord Chancellor was of opinion that when an objection had not been brought before the Attorney-General, the proper course, if there was a case for any indulgence, was, not for the Lord Chancellor to discharge the Attorney-General's office, but for the Lord Chancellor, as a matter of indulgence, and upon terms, to refer it back for the Attorney-General's decision.

Now in this case the whole matter was fully gone into by the Attorney-General. He gave a considered judgment upon the case as it had been presented to him. [His Lordship then stated the further proceedings.] In that state of circumstances, to refer the matter back to the Attorney-General would, I think, be to express a doubt which I do not feel, as to his having properly exercised the authority given to him, or as to his having properly discharged his duty.

On the whole, it seems to me that the usual course must in this case be followed. The patent must be sealed; and then, if Mr. *Kay's* client is really able to establish the fact that there was a prior publication and user of this same identical invention, or any material parts of it, before the application for the patent was made, of course he will be entitled to raise all such questions at law.

I am afraid I must give to the Petitioner the costs of this applica-

(1) Law Rep. 5 Ch. 518.

tion. I say "I am afraid" because in cases of this sort the real merits of the patent cannot be ascertained; and it may possibly be the case that an opponent has a perfectly good case to be made at the proper place and at the proper time. However, I must give the costs.

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Solicitor for the Petitioner: Mr. *J. H. Johnson.*
Solicitors for the Opponent: Messrs. *Bristows & Carpmael.*

LONDON AND SOUTH WESTERN RAILWAY COMPANY *v.* JAMES.

L. C. and L. JJ. 1872 *Dec.* 4.

[1872 L. 99.]

Shipowners—Carriers—Limitation of Liability—Injunction—17 & 18 *Vict. c.* 104, *s.* 514—25 & 26 *Vict. c.* 63, *s.* 54.

A railway company carrying passengers and goods partly by railway and partly by their own ships, is entitled to the limitation on the liability of shipowners imposed by the Merchant Shipping Acts.

A railway company, known to be also shipowners, contracted to carry passengers and goods from *London* to *Guernsey*. The passengers and goods were taken by railway from *London* to *Southampton*, and were there put on board a ship which belonged to the company. The ship, on her way to *Guernsey*, came into collision with another ship and sank, with several of the passengers and all the goods. Actions were brought against the company by surviving passengers for loss of luggage and for delay, by shippers of goods for loss of goods, and by the administrators of lost passengers for damages:—

Held, that, as to all the damages (except those for delay), the liability of the company was, by the Merchant Shipping Acts, limited to the amount of £15 per ton on the tonnage of the ship; that the amount so payable should be distributed by the Court of Chancery, and that all the actions against the railway company (except those for delay) should be restrained.

Order of the Master of the Rolls varied.

THE *London and South Western Railway Company*, the Plaintiffs in this suit, were by Act of Parliament empowered to own steam-vessels, and to run them between *Southampton* and *Guernsey* and *Jersey*. Ever since the year 1848 the company had accordingly run their steam-vessels, and had carried by them passengers, goods, &c., the steam-vessels being called by the company and known as the Royal Mail Steam Ships. The company had during this time

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been in the habit of advertising the times and places of departure of these steam-vessels, and had in the usual manner advertised that they would, throughout the month of March, 1870, run a steam-vessel every day from *Southampton* to *Guernsey* and *Jersey*. During that month they issued tickets to persons booking from *London* to *Guernsey* or *Jersey*. These tickets ran, "Royal Mail—*Waterloo* to *Guernsey* or *Jersey*, *viâ Southampton*," and stated that the ticket was issued subject to the bye-laws, conditions, and rules of the company. They also took goods and merchandise, subject to the bye-laws, one of which was, "That in respect to any animals, luggage, or goods booked through by them or their agents for conveyance partly by railway and partly by sea, and partly by canal and partly by sea, the company shall be exempted from liability for any loss or damage which may arise during the carriage of any such animals, luggage, or goods, from the act of God, the Queen's enemies, fire, accident from machinery, boilers, and steam, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever, in the same manner as if the company had signed and delivered to the consignor a bill of lading containing such conditions."

One of the steam-vessels owned by the company was called the *Normandy*, and on the 16th of March, 1870, she left *Southampton* for *Guernsey* and *Jersey* with a cargo and about thirty passengers. On the morning of the day following she came into collision with another steam-vessel called the *Mary*, and soon afterwards sank. Many of the passengers, with their luggage and effects, and all the cargo of the *Normandy* were lost; and in cross-suits between the owners of the two vessels, the High Court of Admiralty held the *Normandy* alone to blame for the collision.

Several actions were commenced against the company; some by passengers for loss of luggage, injury, and delay; some under *Lord Campbell's Act*, by the administrators of passengers lost; and some by consignors of goods lost. It appeared that in all the cases the passengers and goods had been booked in *London*, had been brought by the railway to Southampton, and had there gone or been put on board the *Normandy*.

The High Court of Admiralty, in a cause of limitation of liability instituted by the company, made an order restraining all the

actions on payment by the company into Court of the sum of £6376 (being at the rate of £15 a ton on the gross tonnage of the *Normandy*) and interest. On the 27th of January, 1872, the Court of Exchequer, in the case of one *John James*, who had commenced an action against the company, adjudged that a writ of prohibition should go to prohibit the Judge of the Court of Admiralty from enforcing his injunction; and this judgment was, on the 21st of June, 1872, affirmed by the Court of Exchequer Chamber (1).

This judgment left the persons who had brought actions, or intended to bring actions against the company in respect of the collision, at liberty to proceed at law against the company. The company thereupon filed the bill in this suit against the owner of the *Mary* and against several persons who had commenced or threatened to bring actions against the company, stating the facts as above stated, and stating that the collision occurred without the actual fault or privity of the company; that the company, as owners of the *Normandy*, were entitled to such limitation of liability as in that behalf provided by the *Merchant Shipping Act*, 1854, and the *Amendment Act*, 1862; that the company admitted, for the purposes of this suit, their liability to the extent and in the manner mentioned in the Acts as above mentioned, and were willing to pay into Court £15 a ton on the gross tonnage of the *Normandy*, and interest on that sum. And the bill prayed a declaration that the company, as owners of the *Normandy*, were entitled to the benefit of the limitation of liability under the Merchant Shipping Acts; that the losses and damage in respect of which the Plaintiffs were answerable might be determined as the Court should direct; and that the Defendants might be restrained from proceeding in their suits or actions against the company.

The company moved before the Master of the Rolls for an injunction. Some only of the Defendants were served—*James*, who claimed damages for loss of luggage and delay, and who denied that he had any notice of the bye-law or of what vessel he was to go by; Messrs. *Milburn* and their trustee in bankruptcy, who claimed damages for loss of merchandise sent; and Mrs. *Jackson*, whose husband had been lost, and who, as administratrix of her

(1) Law Rep. 7 Ex. 287.

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husband, claimed, under *Lord Campbell's Act*, damages for the loss, and also for the loss of 350 sovereigns which her husband was said to have had with him. The company had allowed judgment in all these cases to go by default, but the damages had not been assessed.

The Master of the Rolls granted an injunction against all the Defendants except *James;* those Defendants being at liberty to have their damages assessed but not to levy them (1).

(1) 1872. July 15. W.N.(1872) 171

LORD ROMILLY, M.R., after stating the facts of the case, continued:—

In this case several important questions have to be considered. It must be borne in mind that the railway company, besides being owners of the vessel, entered into a special contract with Mr. *James*, which is wholly independent of the question of maritime law. They themselves fill a double character: they are carriers by land, and they are at the same time owners of the ship *Normandy;* and in my opinion these two characters must be kept quite distinct.

With respect to all actions brought against the owners of the ship for loss sustained by mismanagement of the ship, the total loss is limited to £15 per ton. And in the case of *Glaholm* v. *Barker* (34 Beav. 305) I held, and the Lord Justices affirmed the decision (Law Rep. 1 Ch. 223), that this limitation was extended to any action brought under *Lord Campbell's Act* for the loss of life caused by the mismanagement of the ship. This, therefore, would cover the case of Mrs. *Jackson* so far as regards the damages in respect of the loss of her husband. Whether it would cover the £350 which he had with him is open to another question, which I will presently mention. It also, of course, includes the loss of goods in respect of which Messrs. *Milburn* and their trustee have made a claim, because this was a damage occasioned by the loss of the vessel itself. It will also include the loss sustained by the owners of the *Mary*. Whether it includes the claim of the Defendant *James* appears to me to depend on these considerations. He sues the railway company on a special contract, which he says was broken, whereby he has sustained a loss quite distinct from any damage for which the owners of the ship may be liable. An action would lie against them, supposing they were not the owners of the ship: and in that case I have to consider whether they could claim the benefit of an enactment applying only to the owners of the ship, and aver that the Plaintiff who sued them at law had his remedy against the owners of the ship for the loss sustained, and therefore could not sue the company. I can easily suppose that two actions for different matters might in that case be against different persons. Suppose that the company contract to carry goods to *Guernsey*, and that they fail to do so by reason of the loss of a vessel in which they have no share, and with the management of of which they have nothing to do—suppose that by the same vessel the father of the consignor of the goods is drowned, and that the consignor brings, under *Lord Campbell's Act*, an action against the owners of the vessel for the loss sustained by him by the death of his father—would this stop his suit against the company? I am of opinion that it would not. Nor if they were owners of the ship could they merge both actions together, and say that,

The company appealed. The appeal was opened before the Lords Justices, who thought that it ought to be heard by the full Court, and it now came on accordingly.

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having an interest in the ship, the Act limits the liability upon both losses to the £15 per ton. Their character as Defendants to the action for breach of contract is distinct from that of shipowners; and if *James* had the option of suing whichever he pleased, and elects to sue them as a railway company, the fact of their filling both characters does not give them a better right, and they are not able to contend that their liability is limited to the £15 per ton.

This also raises the question, whether they had given him notice that they were not to be liable for any damage by sea. Now I am of opinion that this notice rather applies to a case where they are not the owners of the vessel, than to one where they are the owners of the vessel; and that if a person takes another vessel the railway company does not undertake that their contract shall govern the conveyance by the vessel over which they have no control, and that it would be difficult to say that this notice applied to the vessel of which they are the owners.

But, however this may be, I am of opinion that no such notice was given to Mr. *James*, and it does not appear that any species of information was given to him that the railway company refused to be liable for any losses sustained by sea.

With respect to Mrs. *Jackson* this question also arises: Her husband, as I understand, carried 350 sovereigns, and she claims this as against the company. The company say that, as regards the carriage of gold, they, by their bye-laws, are not answerable unless the carriage of the gold is given notice of to the company, and the proper insurance is paid. In this case I am not at all clear whether notice of this bye-law was given or not. I have no evidence at all on the subject, or how this notice was given, whether it is one of those bye-laws which is printed and given notice of to everybody; and therefore I wish to keep that as a separate and distinct matter.

With respect to the action of Mr. *James*, I am of opinion that it should be settled at once; and I am of opinion that the limitation under the *Merchant Shipping Act* does not bind him, and that he is at liberty to sue the railway company under a separate and distinct contract, and therefore as regards him I shall refuse the motion with costs; but as regards all the others I shall grant an injunction to restrain the levying of execution; but I think it would be shorter and more simple if the amount of damages in each case were ascertained at law instead of in Chambers.

I propose, therefore, to stay the execution of the judgment, that is to say, the levying of the damages, until I have ascertained what is the amount of the claims against the fund, and to restrain any other actions. The costs of the Defendants, except *James*, will be costs in the cause. I have never known whether it was determined that the amount to be divided is to be divided with reference to the debt alone or to the debt connected with the costs. That is a question which will arise hereafter, and I wish the amount of Mrs. *Jackson's* damages to be ascertained independently of the sovereigns which her husband carried. In other respects, the

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Sir *R. Baggallay*, Q.C., Mr. *C. W. Wood*, Q.C., and Mr. *Locock Webb*, for the company :—

There are two questions on this appeal, one as to the case of *James*, the other general, whether the Defendants ought not to prosecute their claims in this Court instead of going to a jury. The damages to be paid are limited by the *Merchant Shipping Act*, 1854 (17 & 18 Vict. c. 104), and the *Amendment Act*, 1862 (25 & 26 Vict. c. 63). Limitations were created by the first Act, sects. 503, 504, and 505, and jurisdiction was given to this Court by sect. 514 (1). The present limitations are contained in the Act of 1862, s. 54 (2), sects. 504 and 505 of the former Act being repealed.

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costs of the motion will be costs in the cause, and of course there will be no injunction against the other Defendants who have not appeared, and have not been served.

(1) Sect. 514 of 17 & 18 Vict. c. 104, is as follows :—In cases where any liability has been, or is alleged to have been, incurred by any owner in respect of loss of life, personal injury, or loss of or damage to ships, boats, or goods, and several claims are made or apprehended in respect of such liability, then, subject to the right hereinbefore given to the Board of Trade of recovering damages in the *United Kingdom* in respect of loss of life or personal injury, it shall be lawful in *England* or *Ireland* for the High Court of Chancery, and in *Scotland* for the Court of Session, and in any British possession, for any competent Court, to entertain proceedings at the suit of any owner for the purpose of determining the amount of such liability, subject as aforesaid, and for the distribution of such amount rateably amongst the several claimants, with power for any such Court to stop all actions and suits pending in any other Court in relation to the same subject-matter; and any proceeding entertained by such Court of Chancery or Court of Session, or other competent Court, may be conducted in such manner and subject to such regulations as to making any persons interested parties to the same, and as to the exclusion of any claimants who do not come in within a certain time, and as to requiring security from the owner, and as to payment of costs, as the Court thinks just.

(2) Sect. 54 of 25 & 26 Vict. c. 63, is as follows :—The owners of any ship, whether British or foreign, shall not, in cases where all or any of the following events occur without their actual fault or privity, that is to say,

(1.) Where any loss of life or personal injury is caused to any person being carried in such ship ;

(2.) Where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board any such ship ;

(3.) Where any loss of life or personal injury is, by reason of the improper navigation of such ship as aforesaid, caused to any person carried in any other ship or boat ;

(4.) Where any loss or damage is, by reason of the improper navigation of such ship as

We say that *James* took his ticket for a journey partly by land and partly by sea, and we contend that the contract is what has been called divisible, so that as to the sea portion his rights came under those Acts. The converse was decided in *Pianciani* v. *London and South Western Railway Company* (1); *Le Conteur* v. *London and South Western Railway Company* (2). But it is not quite accurate to say that the contract is divisible, and the true reason of the decisions was that the company were carriers by land and carriers by sea also. No doubt difficult cases might arise upon these Acts, or might be put, but there is no difficulty about this. The company have power to carry by land and to carry by sea under the laws applicable to each.

Then as to the general question: Assuming the liability of the company to be limited, it will be very inconvenient to allow these claimants to prosecute their claims separately at law. The company will be the Defendant in each case, and will have no interest in keeping down the damages, which will only affect the other claimants. Moreover, if necessary, the Court may direct any case to be tried before a jury. *Lord Campbell's Act* (9 & 10 Vict. c. 93) does not make the decision of a jury necessary. As to the merchandise lost, it was not necessary to put on the ticket or to make any special contract that the company claimed the benefit of the Merchant Shipping Acts: *Baxendale* v. *Great Eastern Railway Company* (3). Still we say that the Defendants must be taken to have had notice of the ownership of the vessel and of the terms under which the company were carriers.

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aforesaid, caused to any other ship or boat, or to any goods, merchandise, or other things whatsoever on board any other ship or boat;

be answerable in damages in respect of loss of life or personal injury, either alone or together with loss or damage to ships, boats, goods, merchandise, or other things, to an aggregate amount exceeding fifteen pounds for each ton of their ship's tonnage; nor in respect of loss or damage to ships, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, to an aggregate amount exceeding eight pounds for each ton of the ship's tonnage; such tonnage to be the registered tonnage in the case of sailing ships, and in the case of steamships the gross tonnage without deduction on account of engine room.

(1) 18 C. B. 226.

(2) Law Rep. 1 Q. B. 54.

(3) Law Rep. 4 Q. B. 244.

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Mr. *C. T. Simpson*, and Mr. *W. G. Harrison*, for the Defendant *James*:—

Our client brings his action for breach of contract simply; the company have admitted this, and they have suffered judgment to go by default. The limitations of the Merchant Shipping Acts do not, therefore, apply. If any one contracts to carry me, and hires a vessel in which part of the journey is performed, and in which I am injured, my damages are not to be limited. My damages are not recoverable under the Merchant Shipping Acts, and this Court ought not to interfere. At all events, as to the delay, the action at law cannot be affected by any limitation. I have nothing to do with the other persons damaged. Is each of us to be allowed to contest the claim of each of the others? Who is to pay the costs? It is not admitted that the company will pay them. How can damages be assessed, having regard to the claims of others? If the vessel had belonged to some one else, how would it be? If the theory of the Plaintiffs is correct, strange consequences would follow, and it would make a great difference if a carrier sends goods by water instead of by land. The limitations of the *Merchant Shipping Act* apply only to a shipowner. An underwriter's liability is clearly not so limited. Suppose that the company had entered into a contract of insurance as to these goods, then their liability as insurers would not be limited. The company have contracted as common carriers, and have rights and liabilities as such. If the passenger had paid his fare separately on board the steam-vessel the case might be different, as he would then know that he was contracting with the shipowner. If another railway company had issued the ticket, that company would clearly be liable: *Wilby* v. *West Cornwall Railway Company* (1).

Mr. *Bathurst*, for Messrs. *Milburn*, consignors of goods, who had become bankrupt, objected to being made parties.

Mr. *R. Roberts*, for a partner with Messrs. *Milburn*.

Mr. *Oppenheim*, for Mrs. *Jackson*, claimed the right of having the damages assessed by a jury, and contended that the case did not come under the Merchant Shipping Acts: *Smith* v. *Brown* (2).

(1) 27 L. J. (Ex.) 181, 4 H. & N. 703 (2) Law Rep. 6 Q. B. 729. 4 Jur. N. S. 254

Mr. *Miller*, Q.C., for the owners of the *Mary*, asked for their costs of the proceedings before the Court of Admiralty: *African Steam Shipping Company* v. *Swanzy* (1).

Sir *R. Baggallay*, in reply:—

The 514th section of the *Merchant Shipping Act* gives this Court jurisdiction in all cases of damage at sea: *Glaholm* v. *Barker* (2). *Lord Campbell's Act* was law at that time, and the Legislature must have intended cases under it to be within the jurisdiction of this Court.

The company are as much shipowners as railway owners, and in fact are sued as such. The Defendants must have known this, and must have known that the vessels of the company were to be used, and made their contracts on that understanding. The Acts may not be perfectly clear, and cases may be put where it would be difficult to discover the meaning; but here there is no difficulty, and the Court is bound to apply the Act. The Plaintiffs are willing, if the Court thinks it should be done, to pay the costs of the injunction.

LORD SELBORNE, L.C.:—

We all think that the proper course will be to grant the injunction upon the terms that the Plaintiffs shall pay the costs, including the costs of the appeal.

With regard to the main question in the case, it will, of course, be understood that, so far as Mr. *James* is concerned, it relates only to that particular kind of loss and damage which is within the language of the Act—that is to say, the loss of his luggage; but the principle applies to all goods lost by any persons whose goods were being carried on board this vessel.

It has been but faintly, if at all, argued that the limitation of liability imposed by the Merchant Shipping Acts has no application to the cases of persons and goods carried by the shipowner as a carrier. Mr. *Harrison* did, indeed, suggest the possibility of putting this limited construction, which would exclude every case in which the shipowner was the carrier; but we think it manifest that the ordinary case, or at least one of the most ordinary cases, in all

(1) 4 W. R. 692. (2) Law Rep. 1 Ch. 223. 12 Jur. N.S. 82

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contracts of affreightment, is, that of the shipowner carrying on board his own ship. The corresponding term, "carriage," occurring in the 505th section of the Act of 1854, with what is there said about freight, appears to me to shew that the ordinary case was not excluded, and that every case where the owner would be liable, whether he was carrier or not, was intended to be within the relief intended to be given to the owner; nor is this inference rebutted by the subsequent repeal of this section.

Then, supposing that to be so, I do not understand that it was ever contended that if this particular contract had been in terms to carry by railway to *Southampton*, and from *Southampton* by the ship *Normandy*, belonging to the railway company, to *Jersey* or *Guernsey*, the limitation of liability would not have applied. But it is not the ordinary course in a contract of freightment or in a bill of lading to state upon the face of the instrument to whom the ship belongs. It cannot, therefore, have been the intention of the Legislature to make that necessary in order to give the relief to the shipowner, when the shipowner was both the carrier and the person liable.

In this particular case the shipowner was in fact both the carrier, and the person liable; but if it be material to go further and see whether the persons who or whose goods were conveyed, actually with their own knowledge entered into a contract for conveyance by one of the company's own vessels—if, I say, it be material, then it appears to me that the just and proper inference to be drawn from the facts, which are not in dispute, is, that this was the case. For a long course of years the company had, under lawful authority, been carrying passengers from *Southampton* by their own steam-vessels, of which this was one; nor is it suggested that they ever carried in any other manner. They had for many years issued public advertisements as to the times and places of departure of their steam-vessels and so forth: and although it might be possible that they might fulfil their contract otherwise, yet, *primâ facie*, and in the natural course of things, it was rather to be presumed that they would do so by their own vessels than otherwise. Any one dealing with them is, I think, rather to be taken as believing and knowing that to be the actual course of business. We find further that the term "Royal Mail Steam Ships" is, as I

understand, proved to be the term by which the company's steam-vessels which carry the mails of the Crown were called and commonly known. This vessel was one of them, and upon the face of the ticket in this case were the words "Royal Mail," shewing that the contract was to carry the passenger by the mode of conveyance known by that term. It seems to me to be exactly the same thing as if the particular ship had been mentioned. It is hardly necessary to carry it to the next step farther, which is this, that, as a matter of fact, both the passenger and the company concurred in the fulfilment of the contract by one of the company's own vessels.

It appears to me, therefore, that it is a case of a claim against the carrier as owner, and thus within the plain meaning of the Act.

For this reason, I am of opinion that, as far as the principle is concerned, the Appellants are right, and that, as far as the particular case of the loss of life is concerned, the 514th section of the Act of 1854 shews plainly that it was intended to give this Court full jurisdiction in such cases. That jurisdiction is to extend not only where there has been an ascertained liability in respect of loss of life, but where such liability is alleged to have been incurred. And, again, where it might be, not known but apprehended only, that other claims of the same sort might arise, power is given to the Court to determine the amount of liability, and also to suspend all questions and suits pending in any other Court in relation to the same subject matter, and to do this in such manner and subject to such regulations as the Court may think fit.

Is there, then, any reason of practical convenience which makes it better to direct that actions shall proceed in all these cases of loss of life—any reason which makes that more convenient than to refer the whole matter for inquiry in Chambers, where it will be ascertained in how many of those cases there is a real contest which may require a decision, it may be with the aid of a jury, or it may be without? Upon that subject I say nothing at present. But I understand that the experience acquired in the case of *Glaholm* v. *Barker* (1) has shewn that similar claims may be all settled in Chambers without incurring much further expense.

(1) Law Rep. 1 Ch. 223. 12 Jan 1882.

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It appears to me that the wiser and the better course will be to refer the whole matter for inquiry in Chambers, it being entirely in the power of the Court, if it should eventually appear necessary, to determine any question by taking the opinion of a jury.

SIR W. M. JAMES, L.J. :—

I am of the same opinion. I think it right merely to add that the difficulty which pressed on me when the matter was partly argued before us as Lords Justices, has been satisfactorily removed by an observation of Sir *Richard Baggallay*. It may be possible, as he observed, to suggest hypothetical cases, in which it might be difficult or impossible to apply the Act, but I agree that this is not the legitimate mode of ascertaining the construction of an Act when the case is clearly within the words and the meaning of the Act. I am now satisfied that the Act does apply, both in words and in spirit, to the case actually before us.

SIR G. MELLISH, L.J. :—

I am also of the same opinion; and I think that the case clearly comes directly within the words of the Act. The *London and South Western Railway Company* were the owners of the ship *Normandy*, and they are sued by Mr. *James* for damages on account of the loss of goods which were being carried on board that ship. The case being directly within the words, it ought to be held within the Act, unless it is clearly not within what was the scope and intention of the Legislature in passing the Act. But what was the scope and intention of the Legislature in passing the Act? Ever since the reign of *George* II. there has been a limitation on the liability of the owners of ships. It has been thought a matter of public policy to encourage persons to embark their capital in ships by limiting the liability to be incurred by the loss of goods; and this, previously to *Lord Campbell's Act*, was the principal liability. It was thought expedient to limit the liability, because a ship might carry gold, or goods of great value, and then, from some trifling act of neglect on the part of the master, or on the part of the man steering the vessel, the shipowner might be made subject to enormous liability. On that account the Legislature thought it was for the public

advantage that there should be this limit on the liability of the owner. Why should not that apply to the the case before us? The *London and South Western Railway Company* are encouraged by that limitation of liability to embark, as shipowners, in the trade of carrying passengers and goods between *Southampton* and *Jersey*, and I do not understand what the grounds are upon which it is said they are not to avail themselves of the limitation. The ground put by the Master of the Rolls is simply that the passenger took a through ticket from *London* to *Jersey*. It was admitted that if the passenger had taken a ticket from *London* to *Southampton*, instead of from *London* to *Jersey*, and when he got to *Southampton* had walked on board the ship and had gone as a passenger to *Jersey*, then he would be subject to the limitation. But what possible object can there be in holding that, in order that the company may avail themselves of the limitation, it shall be necessary to deprive all their passengers of the convenience of paying for their ticket at one time, instead of paying on two different occasions? Such a decision would not deprive the company of the benefit of the Act, and would only put the passengers to inconvenience. In my opinion the case is both within the words and within what I think was the spirit of the Act.

The LORD CHANCELLOR afterwards explained that as to *James* the injunction would extend only to his claim for loss of luggage or goods.

Solicitor for the Plaintiffs: Mr. *L. Crombie.*

Solicitors for the Defendants: Mr. *J. Rae*; Mr. *Franklyn*; Mr. *W. R. Philp*; Mr. *Joel Emanuel.*

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Dec. 11.

In re PARAGUASSU STEAM TRAMROAD COMPANY.

BLACK & CO.'S CASE.

Company—Winding-up—Calls—Set-off.

In winding up a company, debts cannot be set off against calls.

A contractor agreed with a company to supply them with steam-engines at a fixed price, and to take shares in the company, payment of the calls on which should not be enforced until at least two engines should have been paid for, and the contractor might set off against the calls the money due to him. The contractor took shares accordingly, and made two engines for the company, which were not taken by the company or paid for. The company was afterwards ordered to be wound up by the Court, and a call was made by the liquidator:—

Held (reversing the decision of *Bacon*, V.C.), that the contractor could not set off the amount due to him from the company under his agreement as damages or otherwise against the amount due by him on the calls.

Brighton Arcade Company v. *Dowling* (1) disapproved of.

ON the 20th of October, 1868, Messrs. *Black & Co.*, engineers, made an agreement with the *Paraguassu Steam Tramroad Company* for the supply of locomotive engines to the company on the following terms:—That *Black & Co.* would, for ten years, make all locomotive engines which the company should require, at £1100 for each engine, to be paid as therein provided. That during each of the first five years the company would accept at least four of such engines, and during each of the next two years two of such engines. That the first order was to be for two engines. That all engines should be paid for when the delivery notes of the same were presented at the offices of the company. That instead of paying cash the company might give acceptances as therein provided. That *Black & Co.* would, by themselves or their nominees, subscribe for at least 198 £20 shares in the company, and would pay £6 on each share, being the amount of calls then made; and that no further payment of calls should be enforced in respect of such shares until at least two engines should have been paid for in the manner thereinbefore provided; and during the continuance of this agreement *Black & Co.* might set off against the calls upon all or any of the said shares the

(1) Law Rep. 3 C. P. 175.

amount which was due to them or for which they held the company's acceptances. That the company should pay, by way of liquidated damages, the sum of £500 for each engine which they should order and not accept.

Black & Co., in execution of this agreement, duly applied for and were allotted 198 shares, and paid £6 on each; and they were duly registered as shareholders. They then made two engines, and on the 6th of July, 1869, wrote to the company to say that they were ready. They received an answer that, pending advices from *Brazil*, the directors were anxious not to send out any engines. *Black & Co.* were not able to induce the company to take the engines, which remained in the hands of *Black & Co.*

On the 22nd of January, 1870, an order was made for winding up the company by the Court. An official liquidator was appointed, and a call of £12 a share was made.

Black & Co., who had been placed on the list of contributories in respect of the 198 shares, claimed to be creditors of the company for, 1, the sum of £2200 and interest for the two engines made, and a sum of £38 for the cost of warehousing them; and, 2, £500 liquidated damages for each of twelve other engines not made, but, as they contended, ordered; and they claimed to set off these sums against the call made on them. They produced evidence that the engines could not be disposed of, being of an unusual gauge, and that they had gone to the expense of machinery on purpose for making these engines.

The matter came before the Vice-Chancellor *Bacon* on summons, and His Honour made an order that *Black & Co.* were entitled to set off against the call, £1000 as liquidated damages for the two engines actually made, £10 for interest thereon, and £38 for the cost of warehousing the engines; and that *Black & Co.* were to be at liberty to prove for other damages by reason of the non-performance of the agreement by the company, and to set off the sum so proved against the amount payable by them under the call (1).

The company appealed.

(1) 1872. Nov. 7. WM (1872) 195 SIR JAMES BACON, V.C., said that he did not think the 25th section of the *Companies Act*, 1867, and still less the decision of the Vice-Chancellor *Wickens* in *Cleland's Case* (Law Rep.

L. C. and L. JJ. 1872 BLACK & Co.'s CASE.

Mr. *Eddis*, Q.C., and Mr. *Jackson*, for the Appellants:—

We say that calls cannot be set off against debts unless the contract to do so is registered under the *Companies Act*, 1867 (30 & 31 14 Eq. 387), had anything to do with the matter before the Court. The statute prohibited the allotting of shares on any other terms than those of payment in cash; but that prohibition did not apply to this case. This was an allotment of shares, and they were to be paid for in cash. There was no necessity for any registration of such a contract. The contract constituted by the allotment of the shares was a contract for the payment of money in respect of the shares. The question was, whether it was competent to the company, who were entitled to allot the shares and entitled to exact the payment for them in cash, to stipulate that when that payment in cash came to be made, then, by reason of other transactions between the parties, the amount of the debt due to the company should be set off against the payment in cash. His Honour did not find that *Cleland's Case* touched that question in the slightest degree. In *Cleland's Case*, a man to whom (let it be assumed) a debt was due, agreed to cancel that debt if the company would give him shares which he should not be required to pay for in cash. That was as directly in the teeth of the Act of Parliament as anything could be; but in neither of the subsequent cases, nor in any of the observations made by the Vice-Chancellor *Wickens*, was there anything which resembled or referred to a case like this.

The directors were perfectly at liberty to enter into this contract—a perfectly just, proper, and business-like contract. There was no money to pay with, and they entered into the contract with manufacturers for the supply of engines which were absolutely necessary for the accomplishment of the object of the company, agreeing to pay certain moneys at certain times in a certain way, and stipulating that the contractors should take shares in the company. There was a further stipulation that the company would not call upon the contractors for the payment in actual cash, and that if the company owed the contractors any money they should be at liberty to set it off against the cash due for the calls. What was there unreasonable in that? How did *Grissell's Case*, or any other case which had been cited, affect the question. It was a plain, simple, and honest contract, as to which his Honour saw no difficulty whatever.

To the extent of the liquidated damages there was a clear right of set-off.

The unliquidated damages stood on a different footing. His Honour agreed with *Black & Co.* that they might set off against the calls upon all or any of the shares the amount due to them or for which they held the company's acceptances; but the amount due to them could only be ascertained and become due from the company when a jury, if it went to a jury, had determined the amount of the unliquidated damages to which they are entitled.

The £500 could not be taken as the right sum for damages.

After having heard further argument on this point, his Honour came to the conclusion that there must be an inquiry as to the amount of the unliquidated damages. The evidence was

Vict. c. 131, s. 25): *Grissell's Case* (1). In *Brighton Arcade Company* v. *Dowling* (2) the company was voluntarily wound up, and, moreover, the debt was subsequent: *Cleland's Case* (3). In some cases, such as *Elkington's Case* (4), the company got the equivalent of cash: here they got nothing. The public are entitled to know that the whole capital called up actually comes to the hands of the company, either in money or in money's worth. Here the only claim of *Black & Co.* is for a tort committed by the company in not taking and paying for these engines. It is the very mischief which this clause in the Act is intended to prevent. The rules in Bankruptcy do not prevail in winding up.

Mr. *Kay*, Q.C., Mr. *Higgins*, Q.C., and Mr. *C. Hall*, for *Black & Co.*:—

We only took our shares on the faith of this agreement, and if the company is not bound by the agreement, we are not bound to take the shares, and ought to be struck off the list: *Alabaster's Case* (5). At all events, we ask to set off the sums due to us at the date of the call. At law we should have a right to set off the sums actually due to us, and the Winding-up Acts make no difference in the legal rights of the shareholders and creditors, but only in the mode of administering these rights. The 98th and 103rd sections of the *Companies Act*, 1862, do not interfere with any rights which shareholders may have. The only alteration is, that the liquidator takes the place of the directors. It is not true that

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that *Black & Co.* had made preparation for the execution of these orders, and had sustained a loss in consequence of not completing them, and they would probably have a right to compensation for the loss which they had sustained by reason of their not being able to complete their engines, and by reason of the default of the company in taking the whole number of engines. *Grissell's Case* had decided that for any debt a shareholder could not, in the absence of special agreement, set off any call, but must come in and prove as a creditor. The 158th section of the Act of 1862 provided for all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages; and the 25th Rule of the Gen. Ord. of 11th November, 1862, provided for valuing the claim as at the date of the order to wind up, the meaning of which was that there should be no after-claims.

(1) Law Rep. 1 Ch. 528.
(2) Ibid. 3 C. P. 175.
(3) Ibid. 14 Eq. 387.
(4) Ibid. 2 Ch. 511.
(5) Ibid. 7 Eq. 273.

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shareholders must always pay: *Elkington's Case* (1); *Pellatt's Case* (2). The case of unliquidated damages is expressly provided for by sect. 158 of the Act of 1862. It is not pretended that the agreement was not valid and within the powers of the directors; and the Act of 1867, with the exception perhaps of the 25th section, actually extends the powers of the directors: *In re Baglan Hall Colliery Company* (3). If the directors had given *Black & Co.* a mortgage on the calls, that would have been valid, and this is exactly the same. The agreement to take shares was part of the original agreement, and the company cannot hold *Black & Co.* to one part of the agreement and repudiate the other part. Whatever may be the case as to the damages for the other engines, the right of *Black & Co.* as to the two engines made is undeniable.

LORD SELBORNE, L.C.:—

The argument of the Respondents has extended to two points, one of which was and the other was not the subject of the decision of the Vice-Chancellor.

I propose first to advert to that point which was not the subject of decision by the Vice-Chancellor.

It has been argued that unless the Respondents are entitled to the set-off which they claim, they are entitled to be entirely exonerated from the liability of shareholders, and to have their names taken off the list of contributories. For that contention I can find no ground whatever, the facts being simply these:—[His Lordship then stated the facts of the case.] I should have thought, until I heard this argument, that it was much too late for any one to suggest that in a question with creditors, a registered shareholder could possibly be taken off the list on the ground of anything contained in such an agreement as that of the 20th of October. That is not the contract between himself and the company under which he was constituted a shareholder, but is a collateral and preliminary contract, though no doubt made in the expectation of his becoming a shareholder in consequence of the arrangement then made. The case of *Oakes* v. *Turquand* (4) decided that when a man has, under the 123rd section of the Act of

(1) Law Rep. 2 Ch. 511.
(2) Ibid. 527.
(3) Law Rep. 5 Ch. 346.
(4) Ibid. 2 H. L. 325.

1862, with his own consent, become fully a legal shareholder by registration of shares which he has agreed to take, equities which might be good as between the shareholder and the company cannot, after a winding-up, be set up against the creditors of the company. In this case, putting the argument of Mr. *Kay* and Mr. *Higgins* at the highest, it would be simply this, that we ought to set up an equity to rescind and avoid the contract for shares, on the ground that the consideration for that contract had more or less failed. In *Oakes* v. *Turquand* the House of Lords held that down to the very day of the winding-up, that is to say, the day which is to be considered under the Act of Parliament as the commencement of the winding-up, the contract was voidable at the option of the parties. But they further decided, that that option not having been exercised so as to avoid the contract before winding-up, it then ceased to be capable of being avoided as against creditors; and putting the argument of the Respondents at the highest, it could not be carried beyond that point. This is a question with creditors, and creditors only, and it arises after the winding-up, no attempt having been made to have their names withdrawn from the register before the commencement of the winding-up.

Pellatt's Case (1) has really no application whatever. There, according to the view the Court took of the facts, the liability of the alleged contributory to be treated as a shareholder rested *in fieri*. There had been no registration of him as a shareholder with his consent, and there can be no doubt that in that state of things creditors can have no better right than the company to the specific performance of an unexecuted contract with a person whose name is not duly upon the register. In those cases, what is a defence against the company is a defence against the creditors, because the alleged contributory is not a member, and cannot be made so except upon the terms of the contract, if any, by which he has agreed to become one.

Elkington's Case (2) is, in its circumstances, very similar to *Pellatt's Case*, with the exception that there Messrs. *Elkington* had, besides making the original agreement, at the same time applied for shares, had received notice of allotment, and had been registered in due course as shareholders. That case was decided the other

(1) Law Rep. 2 Ch. 527. (2) Law Rep. 2 Ch. 511.

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way, and it was held that, being complete legal shareholders, they could not, as against creditors, be released on the ground of anything collateral which might be contained in any other agreement. *Stace and Worth's Case* (1) has no application at all. There the shares, in respect of which alone the man could be made a shareholder, were held not to be well created.

I pass, therefore, from that portion of the case, and now come to the other. The Vice-Chancellor has here held, apparently upon the ground that an agreement had been made between the parties expressly to that effect, that calls made in the winding-up, and under the powers of the Act of Parliament, should be set off against the debt claimed by the shareholders, who are also creditors of the company. His Honour has gone further, and has said that this doctrine applies not only to the debt, but also to any unliquidated damages in respect of a breach of contract to be ascertained under the winding-up; and he has held that calls might be set off because there was a special agreement to that effect, though this is not merely a voluntary winding-up (if that would make any difference), but a winding-up by the Court. The point, therefore, which his Honour has decided is simply this: that a company may contract with one of its shareholders, so as to take him, in case of a winding-up, out of the law laid down in *Grissell's Case* (2), and give him, in substance, a right to be paid out of his own calls in preference to other creditors; which right, but for such special contract, he would not have had. It is probably enough to say that the law generally has been settled by *Grissell's Case* upon the interpretation of the Act of Parliament, and of the rules laid down in that Act of Parliament, as to the mode in which, under a winding-up, the money arising from calls is to be applied in payment of the debts of the creditors, *pari passu*, and without preference.

That case (being decided by an authority which we ought to treat as binding on ourselves, even if we doubted that it was right) has determined that in general such a set-off is not to be allowed. That decision being founded upon the interpretation of the Act of Parliament, it is very difficult to understand how it can be seriously argued that a company and one of its shareholders can, by

(1) Law Rep. 4 Ch. 682. (2) Law Rep. 1 Ch. 528.

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any agreement they choose to enter into between themselves, override, and relieve themselves from the operation of the Act of Parliament. The principle of the winding-up enactments is like that of the Bankruptcy Acts. It is a particular statutory mode of doing justice between the members and the creditors of companies which have ceased to carry on business, and which, generally speaking, are insolvent. It is to be observed that, if the company is not insolvent, the law laid down in *Grissell's Case* (1) will do the shareholder no harm, because, if there is a surplus after paying all the debts in full, of course his debt will be paid among the rest, and the right of set-off will not be wanted to do justice between him and the other shareholders. That being so, it is impossible to entertain the idea that, if the law is as laid down in that case, any company can, by any private contract, take a particular creditor, who is also a shareholder, out of the operation of that law unless the contract comes within the permissive portion of the 25th section of the Act of 1867. But in this case the course prescribed by that section has not been followed, and I do not propose to say more on the subject, except that I greatly doubt whether that Act does not supply additional reason against holding that the set-off in this case can be allowed.

I think it right, rather in consequence of what was said by the Court of Common Pleas in the case of the *Brighton Arcade Company* v. *Dowling* (2) than for any other reason, to observe that I entertain no doubt whatever that *Grissell's Case* was decided on the soundest principles. What is the ordinary law of set-off? It is what in the civil law was called compensation, and simply means this: that when you have got two cross demands of a nature substantially the same, and due to and from *A.* and *B.* in the same right, that is to say, when the one is a creditor in his own right and debtor also in his own right to the other, the one debt may be set off against the other at the option of the party from whom payment is demanded. But it is essential in such cases that the rights should be substantially the same. If they were apparently the same at law but different in equity, set-off would not be allowed here; nor do I suppose that, in the present state of the law, it would be allowed at common law either. But here the rights

(1) Law Rep. 1 Ch. 528. (2) Law Rep. 3 C. P. 175.

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are substantially different. The moment that the winding-up takes place, the whole administration is carried on with a view to the payment of the debts of the creditors, and in the first instance to payment *pari passu*. The different sections of the Act—those which define the liability of limited companies, the 7th, 8th, 23rd, and 38th—those which deal with the administration of assets, the 98th, 101st, and 133rd—those which give the power to make calls, not in the ordinary way, but specially for the purposes of this Act, the 102nd and 133rd—all have in view the payment, *pari passu* and equally, of the debts due to the creditors; and the hand which receives the calls necessarily receives them as a statutory trustee for the equal and rateable payment of all the creditors. The result of this contention, that one particular creditor may pay himself in full by retaining his own calls and not paying them, would, in effect, be to give him a preference, and to exonerate him from his obligation as a shareholder to contribute towards the payment of the debts of the other creditors. That appears to me to be utterly opposed to the whole principle of the law of set-off, and to all the provisions of the Act which bear on the subject.

As the case in the Common Pleas substantially is not before us I think it wiser and better not to say more on that subject than this: that, although recognizing the soundness of *Grissell's Case* (1), when the winding up is by the Court, or voluntary under the supervision of the Court, and professing not to depart from it, the Court of Common Pleas has thought it inapplicable to a case of voluntary liquidation where the Court has not intervened; and, in order to arrive at that conclusion, has certainly shaken, by some of the observations made, a portion of the foundation for the conclusion in *Grissell's Case*—I mean that part of the judgment of Lord *Chelmsford* which relates to the 133rd section. The Court of Common Pleas apparently thought that a voluntary liquidation under the Act is a matter in which the shareholders merely are concerned. Whenever that subject shall be required to be reviewed and further considered, I hope attention will be paid to several sections in the Act, to which, as far as I can see, attention was not particularly directed on that occasion. I own that I am rather at a loss to see how that application of the

(1) Law Rep. 1 Ch. 528; 12 Jur. N.S. 518

assets in payment of all the debts *pari passu*, which the 133rd section expressly requires, can be made if one creditor is to retain the whole of his debt out of his calls in a way which will give him a preference over others. Yet that section is one which expressly applies to every voluntary liquidation; and if it should be said that creditors have no interest in a voluntary liquidation because the company may be presumed to be solvent, I hope, whenever that question comes to be considered again, attention may be directed to the third branch of the 129th section, which shews that the pecuniary difficulties of the company are contemplated as one of the reasons for voluntary liquidation. I hope attention will also be directed to the 135th section, which, in a case of voluntary liquidation without reference to supervision, enables the meeting to delegate the liquidation to its creditors; also to the 152nd and 161st sections, which, in cases of voluntary liquidation, enable a majority of creditors to bind the minority by an arrangement which they make with the liquidators. Attention should also be directed to the 158th section, which introduces new rules as to proveable debts and liabilities, which are equally applicable to the case of voluntary liquidation; and, further, to the 138th section, which introduces in those cases, if an application is made to the Court, all the power which the Court would have in a case where it was itself winding up the company. This, in my judgment, would include, if proper applications were made, the power to allow a set-off in certain cases and not in others, as specified in the 101st section, and also the power to stay the actions of creditors.

I have thought it right to say so much, because it does seem to me a matter of great importance that a distinction tending to introduce different principles of administration, so far as creditors are concerned, between the cases of voluntary winding-up and winding up under supervision or by the Court, may not be finally established unless it be on very full consideration of everything in the statute that is material. It does not seem to me, I confess, a very satisfactory mode of arriving at such a distinction to say that the creditors may always go to the Court and get an order for supervision or for a compulsory winding-up, and that if they do not they may be considered as having no substantial interest

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in what is going on. This Court has on many occasions shewn a great disposition to encourage and support, as far as may be right and proper, the practice of voluntary winding-up. If creditors under a voluntary winding-up are in substantially a different position, there are probably very few cases in which it would not be expedient for them to induce the Court to interfere. If they are entitled fully to the same rights, they probably will not think it necessary to apply to the Court unless there is some reason to distrust the way in which the affairs are being conducted. Here, however, that point is not before us, because this is not the case of a voluntary winding-up. The circumstances are exactly those which happened in *Grissell's Case* (1). It is, in fact, that case over again.

I am clearly of opinion that it is not competent for any persons whatever, by any antecedent contract, to alter the administration of the assets of the company under such a winding-up. I am not at all sure that, on the construction of this particular contract, it is necessary to hold that there has been any attempt to do so; but even if there was an attempt, my judgment would be that that attempt is necessarily ineffectual, because it would be an attempt, by private agreement, to get out of and over-ride an Act of Parliament.

SIR W. M. JAMES, L.J.:—

I am of the same opinion; and I desire it to be understood that I concur in the doubts which the Lord Chancellor has expressed whether the case in the Common Pleas can be reconciled with *Grissell's Case*.

SIR G. MELLISH, L.J.:—

I am of the same opinion. The effect of the 38th section of the Act of 1862 is clearly to make every person who is at the time of the winding-up a shareholder, liable to contribute to the debts of the company, that liability being limited to the amount unpaid upon his shares. If there be an amount which at the time of the winding-up is unpaid on his shares, then he is liable to contribute that amount towards payment of the debts of the company.

(1) Law Rep. 1 Ch. 528.

In the present case that was plainly the position of *Black & Co.* at the time when the winding-up order was made. Then the 98th section says that the assets, which clearly include the unpaid portions of all shares, are to be applied in discharge of the liabilities. If the case stood upon that section alone it might be a very considerable question whether the meaning was not that the money was to be called up and applied among all the creditors, so that the shareholder should only receive his share of his debt; but that is, in my judgment, made quite clear by the 101st section. Although that section does not in terms say that there is to be no set-off, yet it shews that the Legislature, in framing that section, thought it had already been enacted that there should be no set-off, because in the 101st section they proceed to say that where there is unlimited liability, then, in the case of any independent contract, there may be a set-off. The reasonable distinction between a company with unlimited and limited liability is obvious. In the case of unlimited liability the reason of allowing the set-off in respect of one particular call is, that it does not at all prejudice the rights of the other creditors, because all the shareholders are liable to the fullest amount of everything they possess, and therefore if that call does not pay the creditors all their debts in the case of an unlimited company, then another call may be made on the shareholders, including this particular shareholder, and so on, until the shareholders have been made to pay everything they can pay and the debts are satisfied. Therefore it appears to me to be plainly enacted that the assets are to be so dealt with, and it is quite clear that the company cannot, by making an agreement with a particular shareholder, save him from that liability which the Act of Parliament has imposed upon him.

Then as to the question whether this is *ultrà vires*, I am disposed to think that the contract is not really *ultrà vires*. It is only that the statute has put a certain construction upon it. Certain persons had agreed that there should be a set-off, and then the Act of Parliament says that that set-off shall not prevent the liability to pay up all the unpaid calls upon shares, but shall be binding as between the particular shareholder and the other shareholders after the creditors have been paid in full. The contract, as it appears to me, must be construed with reference to

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the provisions of the Act of Parliament, and the effect therefore is, that without being *ultrà vires* it cannot prevent those who plainly are contributories from being liable to be called upon in respect of the unpaid sums due from them.

Solicitors: Messrs. *Williamson, Hill, & Co.*; Messrs. *Wansey & Bowen.*

L. C. and L. JJ. 1872 *Dec.* 18.

In re CONTRACT CORPORATION.

GOOCH'S CASE.

Contributory—Past Member—Infant Transferee—Adult.

A shareholder in a company transferred shares to an infant, who transferred them to another infant, who transferred them to an adult, and all the transfers were registered. The company was ordered to be wound up more than a year after the first transfer, but less than a year after the last transfer:—

Held (reversing the decision of the Master of the Rolls), that after the company had once obtained an adult shareholder, the intermediate transfers could not be avoided, that the shareholder ceased to be such at the date of the first transfer, and that he could not be put on the list of past members.

ON the 14th of January, 1865, *Thomas Gooch*, who held a large number of shares in the *Contract Corporation, Limited*, executed a deed purporting to transfer forty of them to one *Adams*, an infant, and the transfer was duly registered. On the 16th of August, 1865, *Adams* executed a deed purporting to transfer twenty of the shares to *Dove*, also an infant, and that transfer also was duly registered. On the 5th of December, 1865, *Dove* executed a deed purporting to transfer these twenty shares to *Beal*, a person *sui juris*, and that transfer also was duly registered. On the 20th of March, 1866, a Petition for winding up the company was presented, upon which a winding-up order was made on the 23rd of April, 1866.

Beal was placed on the list of contributories in respect of these twenty shares, and a balance order was made against him. He afterwards became bankrupt. *Gooch* had died in December, 1865, and the official liquidator applied before the Master of the Rolls to have *Gooch's* name, and that of his executor, placed on the B list of contributories in respect of these twenty shares. There was

evidence that the officers of the company were not aware that either *Adams* or *Dove* was an infant; and that the official liquidator did not make the discovery until after the balance order had been made.

The Master of the Rolls held that *Gooch's* liability did not cease until the transfer to *Beal* was registered, and His Lordship placed *Gooch's* name on the B list; as reported (1).

Gooch's executor appealed.

The *Solicitor-General* (Sir *G. Jessel*), and Mr. *Bagshawe*, for the executor:—

This case is unlike the case of a mere transfer to an infant. Here the company had an adult shareholder, and accepted him. He has been placed on the list of contributories, and a balance order obtained against him. *Beal* could not have repudiated, and the company cannot be entitled to two contributories for the same shares. *Gooch* is either on the A list or on no list at all. If these deeds are all void he has been always on the register. Suppose that it had been *Gooch's* estate which was insolvent, then the company would have taken *Beal*. They cannot be allowed to play fast and loose in this way. *Lumsden's Case* (2) has been overruled. When once the company has an adult shareholder it is all over: *Parsons' Case* (3). They might have inquired as to the new shareholder.

[They also cited *Mitchell's Case* (4), *Symons' Case* (5), and *In re Bahia and San Francisco Railway Company* (6).]

Sir *R. Baggallay*, Q.C., and Mr. *Chitty*, for the official liquidator:—

It has never been held that a company is bound to retain a shareholder merely because they have treated him as such. It is the duty of the transferor to see that the transferee is a proper person: *Mann's Case* (7). The company did not until after the winding-up know the facts. *Gooch* did not transfer to a person who was competent to hold, and the subsequent transfers go for

(1) Law Rep. 14 Eq. 454.
(2) Ibid. 4 Ch. 31.
(3) Ibid. 8 Eq. 656.
(4) Law Rep. 9 Eq. 363.
(5) Ibid. 5 Ch. 298.
(6) Ibid. 3 Q. B. 584.
(7) Law Rep. 3 Ch. 459, n.

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nothing. We must have a shareholder on the list for the period between *Gooch's* transfer to the infant and the transfer to *Beal*. *Gooch* remains a shareholder, for the purposes of sect. 38 of the *Companies Act*, until a competent person is put on the register. The creditors are entitled to his liability for a year, and *Gooch* must for that time have a transferee capable of taking his liability: *Curtis' Case* (1); *Castello's Case* (2).

The *Solicitor-General*, in reply.

LORD SELBORNE, L.C.:—

It appears to us that this appeal ought to succeed.

Whatever is material to determine the question in this case had happened before the winding-up. Before the winding-up the share list had on it, so far as relates to the shares in question, a shareholder of full age, in all respects competent, having in him the legal liability for these shares; and his title to those shares the company is estopped from disputing. That title was derived from *Dove*, a previous shareholder, who was upon the register. After that transfer had been made, the company remained for some time before winding-up, and, in my judgment, they had during that time no right whatever to go back beyond the transfer which had been made to *Beal*, or to raise any question at all as to the voidability or otherwise of any intermediate transfers between that made by *Gooch* and that made to *Beal*. From the time when they had a good shareholder upon their register, with respect to whom they were bound, and who was bound with respect to them, they ceased to have any interest in the voidable character of the intermediate transfers.

Then, the question which remains is solely upon the interpretation of the 38th section of the *Companies Act*, 1862. What has been decided by at all events a considerable preponderance of authority in this Court, and in accordance with the general principles of law, is, that a transfer to an infant is voidable but not void. I will assume that it is voidable at the option of the company as well as at the option of the infant, subject to any difference which particular circumstances might make. That being so, the

(1) Law Rep. 6 Eq. 455. (2) Law Rep. 8 Eq. 504.

facts are these—as they probably would be in most of such cases: A transfer by deed having *de facto* taken place from *Gooch* to the infant *Adams*, that deed is accepted by the company; *Adams* is registered in their books in the place of *Gooch*; and at the proper time they return to the office for the Registration of Joint Stock Companies the particulars required by the Act of Parliament, one of which is the time when any one, having been a shareholder upon the lists previously returned, ceased to be shareholder. They returned *Gooch* as having ceased to be a shareholder; and all persons dealing with the company upon the faith of the returns made to the Registrar of Joint Stock Companies would from that time forth at all events cease to look to the liability of *Gooch* as a shareholder. It appears to be clear, and it was admitted in the course of the argument, that if the infant transferee, coming of age before any winding-up, had elected to stand by the transaction and to hold the shares, it could not have then been said that *Gooch* ceased to be a member at the date of the ratification, as he would have ceased to be a member at the date of the transfer to the infant. Then why should not any other act which substantially puts an end to *Gooch's* title in a manner binding upon the company and not voidable, be deemed to have relation to the original transfer, which was voidable but which was never avoided, and which, so far as the company is concerned, could not now be avoided?

It appears to me that a transfer having before the winding-up been made to an adult, who was to all intents and purposes a good shareholder, it was not possible before the winding-up order, and it is not possible under the winding-up order, for the company to go back and now to avoid, not the transfer by which the existing shareholder was constituted such, but transfers which are *functa officio*, which have been spent by intermediate transactions, and through which the title of the existing shareholder is derived.

I wish to say further, that, if I found in the 38th section words supporting the argument which has been offered, that there always must be some person against whom the liability for a year as a past shareholder can be enforced, of course I should think it necessary to give full effect to those words; but I do not find any such words. I find a clause which, in its affirmative part, says generally that all past members are to be liable to contribute; but that general enact-

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ment is subject to qualifications in their favour, the first being that no past member shall be liable to contribute to the assets if he has ceased to be a member for a period of one year or upwards prior to the commencement of the winding-up.

It appears to me that the Respondents are in this dilemma, that if *Gooch* did not cease to be a member when he made the transfer, he could not cease to be a member by the act of an infant, who, upon that supposition, derived no title from him; and if so, it is difficult to see why he, or his executor in his name, should not be a member still. The Act says that he is not to be liable to contribute if he ceased to be a member for more than a year; and in my judgment he must be regarded as having ceased to be a member for more than a year.

SIR W. M. JAMES, L.J. :—

I entirely concur in the opinion of the Lord Chancellor.

SIR G. MELLISH, L.J. :—

I am of the same opinion.

Solicitors for the Official Liquidator: Messrs. *Linklater & Co.*
Solicitor for Mr. *Gooch's* Executor: Mr. *H. W. Vallance.*

L. C. and L. JJ. 1873 Jan. 16, 17, 24.

In re PEN 'ALLT SILVER LEAD MINING COMPANY. FOTHERGILL'S CASE.

Company—Subscriber to Memorandum—Paid-up Shares—Payment in Cash—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.

F. and two other persons, by an agreement which was registered along with the memorandum and articles of association of a company formed in 1869, agreed to sell a mine to the company for £20,000, half of which was to be paid at once by 5000 fully paid-up shares of £2 each in the company, £6000 at the end of a month, and £4000 when the profits reached a certain rate. *F.* subscribed the memorandum of association for 1000 shares. The company took possession of the mine, and 5000 fully paid-up shares were allotted to the vendors or their nominees; 1600 of them being allotted to *F.*, who never had any other shares allotted to him. The company was

ordered to be wound up, at which time *F.* remained on the register for 275 shares, having sold the rest :—

Held (affirming the decision of the Master of the Rolls), that *F.* was liable to be placed on the list of contributories for the 1000 shares for which he had subscribed the memorandum, as shares on which nothing had been paid; for that, on the face of the registered documents, there was no connection between the 1000 shares for which *F.* subscribed and the 5000 paid-up shares, and that if there was any subsequent agreement for *F.*'s giving up, in satisfaction of his liability to pay for the 1000 shares, paid-up shares to which he would otherwise have been entitled, such agreement was invalidated by the *Companies Act*, 1867, *s.* 25.

Under the *Companies Act*, 1867, *s.* 25, the holder of shares (unless such agreement, as provided by that section, has been registered) cannot defend himself against an action for calls by anything which would only support a plea of accord and satisfaction, and would not support a plea of payment.

THIS was an appeal by *Fothergill* from an order of the Master of the Rolls placing him on the list of contributories of the *Pen 'Allt Silver Lead Mininy Company, Limited*, for 1000 shares.

The company was registered on the 8th of October, 1869, with a capital of £40,000, divided into 20,000 shares of £2 each. The memorandum of association stated one of the objects of the company to be, "to purchase and work a certain silver lead mine situate in the parish of *Llandwwg*, in the county of *Carnarvon*, known as the *Pen 'Allt Mine*, and to carry on and continue the operations hitherto carried on at the said mine."

The memorandum was subscribed by seven persons for shares amounting in all to 3350. *Fothergill* subscribed it for 1000 shares; *Craig*, whose name will occur again, for 1000; and *Pennington* for 100.

The 3rd of the articles of association was: "The directors of the company are hereby authorized to carry out the agreement set forth in the appendix to these articles."

Fothergill, *Craig*, and *Hewitt* were appointed by the articles the first directors.

The agreement in the appendix was an agreement dated the 30th of September, 1869, between *Fothergill*, *Craig*, and *Pennington* of the one part, and *Hewitt*, as a trustee for the company, of the other part, by which *Fothergill*, *Craig*, and *Pennington* agreed to sell and assign their leasehold interest in the mine to the company, when formed, at the price of £20,000, to be paid as follows :—£10,000 in fully paid-up shares of the company on the

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transfer of the mine being made; a further sum of £6000 on or before the 30th of October then next; and the balance so soon as a dividend of £15 per cent. per annum was paid by the company. The original of this agreement was registered with the articles.

The prospectus stated as follows:—"The consideration for the property, with right of lease for twenty-one years at a royalty of one-fifteenth, is £10,000 in cash and £10,000 in shares of the company. The vendors have agreed that £4000, part of the purchase-money, shall remain in the hands of the directors until the mine returns a profit equal to £15 per cent. per annum. The contract for the purchase thereof, bearing date the 30th of September, 1869, is entered into between [names and descriptions of the parties], which contract is subject to adoption by the directors."

The directors passed a resolution adopting the contract, and though no assignment of the mine was made, the company was let into possession. 15,000 shares in the company were allotted, of which 5000 were allotted as fully paid-up shares to nominees of the vendors. 1575 of these fully paid-up shares were allotted to *Fothergill*, and he never became the allottee of any others. He sold the greater part of them, and for the most part at a premium. On the 22nd of July, 1870, when an order was made for winding up the company, he was the holder of 275 only. The official liquidator then applied to put him on the list for the 1000 shares which he had, by subscribing the memorandum of association, agreed to take, and the Master of the Rolls decided that he must be on the list for those shares.(1)

Mr. *De Gex*, Q.C., and Mr. *Roxburgh*, Q.C., for the Appellant:—

The contract to take 1000 shares would, before the *Companies Act*, 1867, have been satisfied by the allotment of the paid-up shares: *Drummond's Case* (1); *Pell's Case* (2); *Forbes & Judd's Case* (3); *In re Baglan Hall Colliery Company* (4); *Jones' Case* (5). The contract to sell the property for paid-up shares having been registered, the Act does not alter the case.

(1) Law Rep. 4 Ch. 772, 781.
(2) Ibid. 5 Ch. 11.
(3) Law Rep. 5 Ch. 270.
(4) Ibid. 346.
(5) Law Rep. 6 Ch. 48.

(1) See W.N. (1872) 233.

Mr. *Southgate*, Q.C., and Mr. *Cracknall*, for the official liquidator:—

The only case since the Act is *Cleland's Case* (1), which shews that writing off a money claim not presently payable will not reckon as a payment in cash. The memorandum is in effect a contract by *Fothergill* to take 1000 shares and pay for them in cash: *Evans' Case* (2). There is nothing to shew that *Fothergill* was entitled to any specified proportion of the paid-up shares, nor is there anything in writing to shew that the 1000 shares for which he signed the memorandum were in any way connected with the shares given in payment for the mine. For anything that appears in writing *Fothergill* could have claimed the 1000 shares in addition to the paid-up shares, and any agreement setting off one against the other, not being registered, is void by the Act of 1867.

[They also referred to *Baron de Beville's Case* (3).]

Mr. *De Gex*, in reply.

Jan. 24. LORD SELBORNE, L.C.:—

This is a case in which Mr. *Fothergill*, by the memorandum of association of the company, became a subscriber for 1000 ordinary shares in the company, on which £2 per share was *primâ facie* payable in the ordinary way. The only question, in my view, is whether, in law or in fact, Mr. *Fothergill* has paid or satisfied £2000 to the company in respect of these shares. He clearly has not done so unless such payment could be and was effected by the appropriation thereto of his interest as a joint vendor, with two other persons, of certain mineral property which, by an agreement annexed to the articles of association, was covenanted to be sold to the company.

I will assume, for the purpose of this decision, that the authority given to the directors of the company by the articles to adopt that agreement, and its contemporaneous registration by the directors, made it binding, according to its true interpretation, upon the

(1) Law Rep. 14 Eq. 387. (2) Law Rep. 2 Ch. 427.
(3) Law Rep. 7 Eq. 11.

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company from the day on which the memorandum and articles were registered and the company formed. For the same purpose I assume also that the fact of the vendors being all from the beginning directors of the company would make no difference in this case to Mr. *Fothergill's* disadvantage. I must not, however, be supposed to express a judicial opinion on either of these points.

The contract of sale thus referred to in the articles was (as I have said) a contract by which Mr. *Fothergill* and two other persons, as joint vendors (without any disclosure of any several rights or interests which they may have had *inter se*), agreed with a trustee for the intended company, contingently on the adoption of the contract by the directors after the formation of the company, and on the allotment of shares therein, to sell the mining property from which the company derives its name to the company for a nominal consideration of £20,000, to be paid at the times and in the manner following, viz., £10,000 upon the completion of the contract by conveyance and assignment, in 5000 fully paid-up shares of the company, £6000 in cash at a later date, and the remaining £4000, also in cash, when but not until 15 per cent. profits should be earned by the company.

The argument of the Appellant is that the sum of £2000 due upon the 1000 shares subscribed for by Mr. *Fothergill* must be deemed to have been fully paid or satisfied by the appropriation thereto of an adequate part of that portion of the purchase-money for the mine which, under the agreement for purchase, was to be represented by 5000 fully paid-up shares in the company.

The first question is, whether, upon the true construction of the memorandum and articles of association and of the contract for sale, the agreement of the parties was that the amount due on the 1000 shares should be paid by so setting off against it part of the purchase-money to be represented by the fully paid-up shares, or whether there were two independent agreements; the one an ordinary subscriber's agreement to take 1000 shares, carrying with it the ordinary liability of a shareholder, without any stipulation as to the mode of satisfying that liability; the other an ordinary purchaser's agreement to buy leasehold property on the terms of paying for it (as to part of the consideration) in shares free from

liability, but entitling the vendors to an interest in subsequent profits of the company.

Upon the only principle of construction which I know of as applicable to such a case, it appears to me to be quite clear that there are here two independent agreements. No connection between them is expressed on the face of any one of the documents. They take effect at different times, in different events, on different conditions, and between different parties. By the subscription to the memorandum of association, under sects. 7, 11, and 23 of the *Companies Act*, 1862 (and according, if authority were needed, to *Evans' Case* (1)), Mr. *Fothergill* not merely agreed to take, but actually did take, and immediately on the registration of the company became the actual and legal holder of 1000 ordinary shares, in respect of which he was thenceforth liable absolutely and unconditionally to contribute to the funds of the company the full sum of £2000. By the agreement for the sale of the mine three persons jointly (of whom Mr. *Fothergill* was one) became entitled, not absolutely and immediately, but conditionally on certain events, which afterwards happened, to 5000 shares, without liability to pay anything upon them, the land with which the vendors parted by the contract being agreed to be taken by the company in lieu of the full amount of those shares. Shares cannot be set off against a money demand; a joint contract cannot be set off against a separate contract. Even if the two agreements had been contained in the same instrument, I should have thought it clear, as a mere matter of construction, that Mr. *Fothergill* and his co-vendors would be entitled to claim from the company (if they considered it for their interest so to do) performance of this contract by the delivery to them (on the due fulfilment of the conditions on which the sale depended) of the full amount of 5000 fully paid-up shares in addition to all the shares for which Mr. *Fothergill* and each of the other vendors had severally and individually subscribed. I should have thought it not less clear that the company were, by the effect of the two agreements taken together, entitled to insist on receiving from Mr. *Fothergill* £2000 in money, and on also receiving from him and his co-vendors the mine, without paying any consideration for it (so far as this part of its value was concerned)

(1) Law Rep. 2 Ch. 427.

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beyond the admission of Mr. *Fothergill* and his co-vendors to a one-fourth share of the profits of the undertaking without liability. To contend that, apart from any other or subsequent arrangement, Mr. *Fothergill* could, as against the company, insist on the extinction of his liability to pay them the £2000 in consideration of his renouncing (with or without the concurrence of his co-vendors) one-fifth part of this right to share, without personal liability, in the contingent profits, would have appeared to me simply extravagant. Any stranger proposing to give credit to the company, who might have gone to the Registrar of Joint Stock Companies and might have there seen those agreements, must have understood (supposing, to simplify the case, that the whole purchase-money for the mine had been payable in paid-up shares) that the company would have, to satisfy his claims, the mine itself, free from any liability to any person which could come into competition with his rights as a creditor, and also the £2000 either actually paid or legally payable on Mr. *Fothergill's* shares. The Appellant says he ought, on the contrary, to have understood that one of these assets of the company was in effect to be set off against the other. Even if the whole had been payable in money, the debt to the three could not, without more, have been set off against the liability of the one. And it appears to me to be a fallacy to speak of Mr. *Fothergill's* interest in the mine as then available for the payment of his liability on his shares. His interest in the mine had been already commuted by the agreement for sale into a joint interest in 5000 paid-up shares of the company, to be delivered in certain events. What these shares might have been really worth does not satisfactorily appear, but it is certainly not to be assumed that they would necessarily be equal to £10,000 cash in the hands of the company. Even if the fact had so turned out, it was not a fact patent on the face of the written instruments, nor could any creditor inspecting those instruments be deemed to have had notice thereof.

Taking this view of the true construction of these documents, it would not have been easy to persuade me that if the *Companies Act*, 1867, had never been passed, I should have been obliged by any authority to hold that Mr. *Fothergill's* liability to pay the £2000 was extinguished or satisfied. I have, however, carefully examined the authorities relied on by the Appellant—*Drummond's*

Case (1), *Pell's Case* (2), *In re Baglan Hall Colliery Company* (3), and *Jones' Case* (4)—all which, except the last, were decided in this Court by the late learned and excellent Lord Justice *Giffard*. I find, as I expected, that the question determined in each of these cases was one of fact rather than of law. It was held by the Court of Appeal to be established by the evidence in each of these cases that it had been agreed between a company and certain vendors of property to the same company, who were also subscribers for or allottees of shares therein (the whole scheme being, as in this case, connected with the original formation of the company), that the vendors should receive payment for the property which they had sold, and make payment for the shares which they had subscribed for, by one and the same operation, *i.e.*, by appropriating what was due to them as vendors to satisfy what was due from them as shareholders; and that the delivery of certificates for paid-up shares was intended to be, and was, according to the true meaning and intent of the several agreements in those cases, nothing more than a symbol of the double payments effected in this way. In the then state of the law this mode of paying up shares was held (and I suppose rightly held, if the transaction was *bonâ fide* and the agreement really of that nature) to be lawful and effectual.

That this is the true effect of those decisions is apparent from the judgments in all of them, but is most clearly explained by Lord Justice *Giffard* himself, in the following passage of his judgment in *In re Baglan Hall Colliery Company* (5). After referring to the 7th, 11th, and 23rd sections of the Act of 1862, he says: "Taking these sections together, a person who subscribes the memorandum of association is to be held to have agreed to be a shareholder for the number of shares in respect of which he subscribes it, to take them, and to pay a proper consideration for them. The 12th section provides that the memorandum of association can only be altered in certain particulars and in a particular way; if, therefore, the memorandum and the articles are inconsistent, the articles must give way; but there is not any inconsistency between a memorandum which is general in its terms, and

(1) Law Rep. 4 Ch. 772.
(2) Ibid. 5 Ch. 11.
(3) Law Rep. 5 Ch. 346.
(4) Ibid. 6 Ch. 48.
(5) Law Rep. 5 Ch. 346, 354.

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articles which state that the payment for the shares is to be made in a particular way, according to the terms of a contract referred to in the articles; nor do I see that payment in kind, according to a subsequent contract with the company, is inconsistent with such a memorandum. If there be a contract of such a nature that, on bill filed by the company, it could not be set aside, a payment for shares in kind according to that contract is legal." In the latest case (*Jones' Case* (1)), Lord Justice *Mellish* also said: "These gentlemen enter into an agreement to take 250 shares each, and bind themselves to pay fully for those shares. And they have paid fully, for they have given land, which is as good as money. . . . The memorandum and the articles shew the manifest intention of all parties that there should be only one set of shares. In the articles they are described as shares to be taken for the land, and it would be most unjust to hold these gentlemen liable to pay for 250 shares in any other way."

Mr. *De Gex* insisted that these authorities ought to bind us to place a similar construction upon the documents and facts in the present case. For this argument I can see no foundation at all. In two of the cases relied on (*Drummond's Case* (2) and *In re Baglan Hall Colliery Company* (3)) there were express and unequivocal words either in a prospectus (on the faith of which the Court considered all parties to have acted), or in the articles themselves, shewing that the shares subscribed or applied for by the vendors were to be paid up by means of the application thereto of part of the purchase-money of the property sold. In the two other cases the evidence and documents on which the Court proceeded do not appear fully (nor was it necessary that they should appear fully) in the reports. But there is nothing in the report of *Pell's Case* (4) from which I can infer that the terms of the documents there were similar to those in the present case. *Jones' Case* only, as it is reported (5), presents a state of circumstances which does appear more closely to resemble the facts with which we have to deal. But I cannot help inferring from what was said by both the Lords Justices (though Lord Justice *James* doubted how that case would have stood but for the

(1) Law Rep. 6 Ch. 48, 50.
(2) Ibid. 4 Ch. 772.
(3) Law Rep. 5 Ch. 346.
(4) Ibid. 11.
(5) Law Rep. 6 Ch. 48.

earlier decisions) that there must have been some other material evidence differing from any which is now before us, and leading to the conclusions of fact at which the Court arrived. If in the present case the parties really meant the same thing which Lord Justice *Mellish* thought was clearly proved to have been meant by the parties in *Jones' Case* (1), it is certain, in my judgment, that they have not expressed that meaning, either in the memorandum of association, or in the articles, or in the contract for sale, or in any other document at which we are entitled to look for evidence of their actual agreement. To suggest that the authorities cited ought to guide this Court, not only on points of law but in the determination of questions of fact in other cases upon different evidence, is to lay much too severe a strain upon these authorities, or, I should rather say, to press the doctrine of authority, as applicable to the duty which this Court has to perform, altogether beyond its proper limits.

But if these authorities went much further than they appear to me to do in support of the argument of the Appellant, there would still remain this insuperable difficulty in his way, that the law which is to be applied to the present case is different from that under which those cases were determined. The 25th section of 30 & 31 Vict. c. 131 applies to the present company; it did not apply to any of the companies in any of those cases. That section was evidently enacted to counteract and put a stop to the dangers and abuses incident to all such arrangements as those which led to the decisions which I have mentioned—dangers and abuses nowhere more powerfully or more justly described than by Vice-Chancellor *Stuart* in *Leeke's Case* (2). The section runs thus: "Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing and filed with the Registrar of Joint Stock Companies at or before the issue of such shares." If there were in this case the clearest possible proof, either by parol evidence or by any unregistered document, of an actual agreement that the shares which Mr. *Fothergill* subscribed for should be paid up by setting off against his liability on them the value of his

(1) Law Rep. 6 Ch. 48. (2) Law Rep. 11 Eq. 100.

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interest under the agreement for sale in that part of the consideration for the mine sold to the company which was not payable in cash, this agreement (not being registered) would be absolutely void by the statute. The 1000 shares for which Mr. *Fothergill* signed the memorandum of association could not have been issued, and they could not have been held after issue as shares payable in any such manner. I should certainly not be disposed to place any narrow or technical construction upon the words "payable in cash," as used in this statute. But to hold that shares payable in cash under this statute can be paid for by an agreement to set off against them other shares deemed to be paid up in the same company (which the company could not lawfully buy and of which the value must be wholly speculative), or even by ascribing to them the assumed value of land agreed to be sold to the company for any other than a money consideration presently payable in cash, would be to render this enactment (a wholesome enactment in my opinion, though of that it is not the province of this Court to judge) absolutely nugatory.

I think that the judgment of the Master of the Rolls in this case is right, and that the appeal motion must be dismissed with costs.

SIR W. M. JAMES, L.J.:—

I entirely concur in the judgment which the Lord Chancellor has just delivered, and desire to add but a few words. I doubted at the time when *Jones' Case* (1) was before my colleague and myself, and still doubt, whether *Pell's Case* (2) was rightly decided by the Court of Appeal. It appeared to me that it could only have been decided upon one of two grounds: either that there was accord and satisfaction, or that there was an agreement between the parties not expressed in the two contracts in writing, and that this agreement had been so acted upon *bonâ fide* between persons competent so to do, the company on the one side and the shareholder on the other, as to render it impossible for the company to have compelled the shareholder to take other shares, or for the shareholder to have compelled the company to give him other shares.

(1) Law Rep. 6 Ch. 48. (2) Law Rep. 5 Ch. 11.

It appeared to me in *Jones' Case* (1) that the same state of things arose, for that the conduct of the parties there was evidence of a *bonâ fide* arrangement by persons competent to make that arrangement, that one set of shares should be set-off against the other. That case, therefore, by no means governs the present.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

I do not think it necessary, and do not desire to give any conclusive opinion whether, if the Act of 1867 had never passed, there would not in this case have been sufficient evidence of a verbal agreement between Mr. *Fothergill* and the directors of the company that 1000 of the paid-up shares which were due to the vendors of the mine, and which, with their consent, were to be allotted to Mr. *Fothergill*, should be taken and accepted in lieu and satisfaction of the payment up of the £2000 due on the 1000 shares which Mr. *Fothergill* had subscribed for under the memorandum of association.

In *Jones' Case* I certainly came to the conclusion that it was the intention of all parties, that is to say, both of Mr. *Jones* and the directors, that he should be registered for 250 shares, and that those 250 shares were intended to be the 250 shares which he had subscribed for by the memorandum of association; and I thought that Mr. *Jones*, having assented to his being registered for 250 shares only, never could afterwards have claimed an additional 250 shares if the company had turned out to be a prosperous company, and, under those circumstances, I certainly thought that the company ought not, after they were ordered to be wound up, to be allowed to say that he was a shareholder for 500 shares instead of 250 shares; and no doubt I relied upon the decision of Lord Justice *Giffard* in *Pell's Case* (2) as, in my opinion, deciding that such an arrangement was not, in the then state of the law, *ultrà vires*, and beyond what it was within the power of the directors to enter into.

I am not at all certain that, if it were necessary to determine the same question of fact in this case, I should not come to the conclusion that the directors and Mr. *Fothergill* had all agreed that the 1575 shares for which Mr. *Fothergill* was registered should

(1) Law Rep. 6 Ch. 48. (2) Law Rep. 5 Ch. 11.

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include the 1000 shares which he had agreed to take by the memorandum of association; but I entirely agree with the view of the Lord Chancellor, and for the reasons which he has given, that it is utterly impossible to find such an agreement in the written documents, namely, the memorandum of association, the articles of association, and the registered agreement which was appended to the articles of association. If there was such an agreement, in my opinion it is an agreement which can be inferred only from the circumstance of Mr. *Fothergill*, with the consent of all parties, having been registered for 1575 shares only; but I am clearly of opinion that the 25th section of the Act of 1867 renders it impossible for him to rely upon any such verbal agreement. I think that the test of that is this: if, instead of this question having been raised under the winding-up, an action had been brought at law agains Mr. *Fothergill* for the £2 a share upon his 1000 shares, it is quite clear to my mind that he would have had no defence upon a plea that he had paid it in money, that is to say, he would have had no defence under an ordinary plea of payment; but, in order to make out any defence, he must have pleaded a plea, in the nature of a plea of accord and satisfaction, that it had been agreed between him and the directors that 1000 paid-up shares should be substituted for the payment up of the £2000 upon his shares, and that the directors had accepted that in satisfaction and discharge of his liability to pay up the £2000. I entirely agree that the effect of the 25th section of the Act of 1867 is, that the shares are to be deemed to be payable in cash. Indeed I think that would have been the effect before, because all shares subscribed for under the memorandum of association were deemed to be payable in cash; but the effect of this section is, that the liability to pay in cash cannot be altered at all by subsequent agreement and arrangement with the directors, it can only be affected by a written agreement, which written agreement must be entered into before the shares are issued, and must be registered.

Therefore I am of opinion that Mr. *Fothergill* has been properly made a contributory of this company in respect of the 1000 shares for which he subscribed the memorandum of association.

I have only made these observations for this purpose, that it is possible that some fresh case may arise where some similar trans-

action has taken place prior to the time when the Act of 1867 passed; and if any such case should come before us, I wish to be entirely unfettered as to the conclusion that I may come to upon such a case.

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Solicitors: Mr. *R. W. Stacpoole;* Mr. *W. Foster.*

Ex parte HALLIDAY. *In re* LIEBERT.

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Bankruptcy—Fraudulent Preference.

L. being on the eve of bankruptcy, drew out all his balance at his bankers and sent it to *K.*, who was employed by him as accountant, and to whom he owed a considerable sum. His object in sending the money to *K.* was to prevent its being attached by another creditor, who had issued a writ against him. *K.* took back the money, and refused to accept it unless the debtor consented to his paying himself out of it. After some discussion, the debtor agreed to this, and *K.* accordingly appropriated £421, part of the sum entrusted to him, in satisfaction of his own debt. The evidence did not establish that there had been anything which amounted to pressure for payment on the part of *K.* before the occasion on which he took back the money to *L.* Three days afterwards *L.* stopped payment, and soon afterwards presented his petition for liquidation:—

Held, that the act of the debtor in drawing out the balance from the bankers for the purpose of defeating the creditor who was suing him was in itself an act of bankruptcy, and that the payment of the £421 to *K.* was a fraudulent preference.

THIS was an appeal from a decision of Mr. Registrar *Spring Rice*, sitting as Chief Judge.

The application to the Registrar was made by the trustee under the liquidation of Messrs. *Liebert & Rogerson*, who were commission agents in *London*, for a declaration that a payment of £421 17*s.* 1*d.* made by *J. Liebert*, one of the insolvent firm, to Mr. *J. W. Kealy*, was void, as having been made with a view of giving him a fraudulent preference over the other creditors.

In the month of August, 1870, *Kealy*, who had been introduced to *Liebert* by a Mr. *Sevin*, was employed by the firm to make up their books and to act as their accountant, at a salary of £2 2*s.* a day of eight hours, and £1 1*s.* for each clerk employed by him.

On the 27th of September, the 31st of October, and the 23rd

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of December, 1870, *Kealy* received three several sums of £50 on account of his charges. At the time of the insolvency he claimed a balance due to him of £440 12*s.* 5*d.*

Kealy stated in his affidavit that during those months he repeatedly pressed *Liebert* for money on account of his charges; and in his examination he said that on the 23rd of December, when the last sum of £50 was paid, he told *Liebert* that he had a very heavy account against the firm, and asked him to pay it; and that *Liebert* said, "Very well, you may settle it; I will send you the money." But he could not remember that he named any particular sum as due. Mr. *Sevin* also stated that he had several times, in the months of November and December, applied to *Liebert* to settle *Kealy's* account. There was no evidence of any application for payment after the 23rd of December, 1870; but on the 7th of January 1871, *Liebert* sent him bank notes and cash to the amount of £851 17*s.* 1*d.*, accompanied by the following letter:—

"Dear Sir,—We beg to hand you herewith, as requested, £851 17*s.* 1*d.*, being the balance of cash in hand this day, as *per* statement at foot, and remain, dear Sir,

"Yours faithfully,

"*Liebert & Rogerson.*

	£	*s.*	*d.*
"Messrs. *Barnett & Co.*, balance . . .	520	17	1
„ *Dennison*	359	18	0
	£880	15	1

	£	*s.*	*d.*	
By Mr. *Gammon* . .	15	0	0	
„ Trade expenses . .	10	0	0	
„ *Barnett's* cheque .	4	18	0	
				29 18 0
				£851 17 1"

The firm were indebted to the executors of Mr. *J. Rogerson*, the father of the present partner, *E. Rogerson*, in a sum of £20,000, which he had invested in the business; and negotiations were pending with the executors, who had called for payment, to allow that sum to remain in the business, it being admitted that unless this was done the firm could not continue to carry it on.

On the 3rd of January, 1871, a cheque of the firm on *Barnett*

& Co., which had been paid into the *Consolidated Bank* at *Manchester*, was presented for payment and was dishonoured, and a writ was accordingly issued on the 7th of January against the firm by the *Consolidated Bank*.

Liebert admitted, in his examination, that he drew out the money which he sent to *Kealy* from *Barnett & Co.'s* and *Dennison's* banks, for fear that the creditors should attach the balances at the bankers.

Kealy was, however, unwilling to accept the money without more definite instructions as to its application; and, on the same day, as he stated in his affidavit, he took the money back to *Liebert*, and refused to accept the same unless the firm authorized him to pay himself and Mr. *Dollman*, the solicitor of the firm, what was due to them, and to cancel the letter; and he told *Liebert* that if he did not agree to his request, he should refuse to perform any more work for his firm. He pressed *Liebert* strongly to give him this authority, and, after considerable discussion, which lasted nearly two hours, he assented to *Kealy's* proposal, and gave him instructions to pay Mr. *Dollman* £100 for his charge, and also gave him authority to retain so much of the balance of the said sum of £851 17*s.* 1*d.* as would be sufficient to cover the amount of *Kealy's* charges.

Accordingly, on the same day *Kealy* wrote a letter to Messrs. *Liebert & Rogerson* as follows:—

"Dear Sirs,—I beg to acknowledge the receipt of £851 17*s.* 1*d.* According to your instructions, I have made the following payments, viz.:—

	£	*s.*	*d.*
To Mr. *Dollman*, for his charges .	100	0	0
„ myself, for my ditto . . .	421	17	1
	£521	17	1

which amount deducted from the above sum of £851 17*s*, 1*d.* will leave £330 to your credit. But inasmuch as there are other charges in contemplation, I shall hold the same as security for whatever expenses may be incurred from date of account.

"I remain, dear Sirs,

"Yours faithfully,

"*J. W. Kealy.*"

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The firm stopped payment on the 10th of January, and on the 19th of January presented their petition for liquidation; but *Kealy* denied that he had any knowledge that such a step was in contemplation, and that *Liebert* had led him to believe that funds would be forthcoming to meet the demands on the firm.

Under these circumstances, the Registrar was of opinion that the payment of the sum of £421 17*s.* 1*d.* was a valid payment to *Kealy*, and refused the application of the trustee, who now appealed from this decision.

Mr. *Little*, Q.C., and Mr. *J. Edwards*, for the Appellant:—

There is no doubt, from the facts proved in evidence, that *Liebert* knew that his firm was on the verge of bankruptcy on the 7th of January. The only question is, whether this payment was made in consequence of pressure by the creditor. There is no evidence of any pressure by *Kealy*, or even of any application by him for any definite sum; on the contrary, *Liebert* admits that that money was originally handed over to him to hold for the firm, in order that it might not be attached in the hands of the bankers. This was in itself a fraud upon the creditors, and an act of bankruptcy.

Mr. *De Gex*, Q.C., and Mr. *Brough*, for *Kealy*:—

A payment to a creditor on the eve of bankruptcy is not a fraudulent preference unless it is purely voluntary. The debtor may have other motives besides the fear of legal proceedings, but they will not invalidate the payment if the creditor really pressed for payment: *Edwards* v. *Glyn* (1); *Brown* v. *Kempton* (2); *Bills* v. *Smith* (3); *Strachan* v. *Barton* (4). In the last-mentioned case the debt was not even due at the time of payment, and yet the payment was held not to be fraudulent. In the present case, both *Kealy* and *Sevin* pressed for payment, and although it may be true that there was no special application on the day when the payment was made, yet it was made in consequence of previous pressure, and that is sufficient: *Ex parte Tempest* (5).

There was nothing fraudulent in the act of withdrawing the

(1) 2 E. & E. 29. (3) 34 L. J. (Q.B.) 68.
(2) 19 L. J. (C.P.) 169. (4) 11 Ex. 647.
(5) Law Rep. 6 Ch. 70.

balance from the bankers to prevent the creditors who had commenced proceedings from sweeping it all away. The debtors were merely changing the *situs* of the property, which they had a perfect right to do. It is not an act of bankruptcy to remove goods to avoid an execution. *Liebert* had no intention to defeat the general body of his creditors; on the contrary, the removal of the balance was really in their favour.

SIR G. MELLISH, L.J.:—

The question is, whether the payment of a sum of £421 17*s.* 1*d.* made by *Liebert*, one of the debtors, to *Kealy* on the 7th of January, 1871, was or was not a fraudulent preference and an act of bankruptcy. We must first consider in what circumstances the payment was made to him. There is strong and conclusive evidence that *Liebert* knew at the time when he made the payment that the bankruptcy of the firm was impending. The firm was, in fact, trading on a borrowed capital of £20,000. The lender had died, and his executors declined to continue the loan, and it was clear that if that sum was withdrawn they could not continue the business. A cheque drawn by the firm had just been dishonoured at the bankers, and a writ for the sum for which the cheque was drawn had been issued, and was served on the firm on the 7th of January. *Kealy* had been employed as an accountant to make up the books of the firm for a specified remuneration. There had been three payments on account of his salary, the last having been made on the 23rd of December, and he alleged that there was still due to him on the 7th of January above £421. The evidence of demand of payment was as follows:—Mr. *Sevin*, who had introduced *Kealy* to the firm, says, that in November and December he had made several general requests on *Kealy's* behalf for payment. *Kealy* admits, in his examination, that he made no demand himself subsequently to the 23rd of December, and it is not proved that he made any demand on that day; certainly he made no such demand for the payment of the whole of his debt. I cannot suppose that he could have meant to do so, otherwise he would have sent in his account, and would have said: "If you do not pay the account I will not go on keeping the books." But nothing of the kind was done, and the utmost that can be inferred is, that he asked

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for a sum as an instalment, as on former occasions. On the 7th of January *Liebert*, as appears from his letter, drew out the whole of the balance of the firm at their *London* bankers, and paid it to *Kealy*. Was that a fraudulent preference or not? It is clear to my mind that it was an act of bankruptcy, whatever view is taken of the intention of *Liebert* in sending the money. If his intention was that it should be applied in paying the debt of *Kealy*, that would clearly be a fraudulent preference under the 92nd section of the *Bankruptcy Act*, 1869. As a matter of fact, I should infer not only that the payment was not made, wholly or in part, in consequence of the pressure of the former demand, but that the debtors did not intend to make any payment at all, so long as they were able to go on with their business, and that when they found it impossible to go on they gave a preference to this particular creditor.

Another possible view of the case is, that *Liebert* did not intend the money to be applied by *Kealy* in the payment of any debts. Even in that view I think it would have been an act of bankruptcy, because it would have been done to defeat the creditors who were pressing for payment. It is not, however, necessary to decide that point, because I infer that, as a matter of fact, the money was sent for the purpose of preferring this particular creditor, and was on that account an act of bankruptcy. If so, what took place later on the same day could not alter the effect of the transaction. *Kealy* very naturally was not satisfied with receiving the money in the manner in which it had been sent, and he went to *Liebert* to have a more conclusive arrangement made. If no money had been sent before that interview sufficient pressure would have been shewn; but as in my opinion the payment of the money in the morning constituted an act of bankruptcy, what happened afterwards on that day could not alter it. The order of the Registrar must be discharged, and an order made for the repayment of the money to the trustee.

LORD SELBORNE, L.C., and SIR W. M. JAMES, L.J., concurred.

Solicitors for the Trustee: Messrs. *Phelps & Sidgwick*, for Messrs. *Sale & Co., Manchester.*

Solicitor for *Kealy*: Mr. *F. Dollman.*

Ex parte CHALMERS. *In re* EDWARDS.

L. C. and L. JJ.
1873
Jan. 24, 31.

Bankruptcy—Sale of Goods by Monthly Instalments—Insolvency of Purchaser—Right of Vendor to refuse further Delivery—Price of past Instalments—Stoppage in transitu—Rescinding Contract.

H. sold 330 tons of bleaching-powder to *E.*, to be delivered thirty tons per month, payment to be made in cash fourteen days after each delivery. The whole amount was delivered except one instalment of thirty tons due in December, 1871; but the November instalment was not paid for. On the 20th of December *E.* called a meeting of his creditors and declared himself insolvent. On the 23rd of December *H.* wrote a letter refusing to deliver any more bleaching-powder under the contract. In February following, *E.* was adjudicated bankrupt, and the trustee applied to the Court for an order upon *H.* to pay £150 damages for non delivery of the December instalment of goods:—

Held (affirming the decision of *Bacon*, C.J.), that although neither the non-payment of the November instalment nor the bankruptcy of *E.* would entitle *H.* to rescind the contract, yet he had a right, after the declaration of insolvency, to refuse to deliver any more goods till the price of both the November and December instalments had been tendered to him:

Held, also, that *H.'s* letter of the 23rd of December did not excuse the trustee of *E.'s* estate from tendering the price of the two instalments before claiming damages for the non-delivery of the December instalment.

THIS was an appeal from a decision of the Chief Judge in Bankruptcy.

On the 19th of October, 1870, Messrs. *Hall Brothers & Shaw*, of *Widnes*, contracted to sell to the bankrupt *Edwards* 330 tons of bleaching-powder, upon terms which were stated in the following letter written by their agent:—

"Dear Sir,—I have this day sold to you, on account of Messrs. *Hall Brothers & Shaw, Widnes*, 330 tons of bleaching-powder, 35 per cent., at 8*s.* 6*d.* per cwt., free on board here, to be delivered thirty tons per month from February to December, 1871, both inclusive. To be packed in oak casks, and to be unbranded. Payment by cash in fourteen days from date of each delivery, deducting 2½ discount."

Under the terms of this contract the monthly instalments up to and including the October instalment were delivered and paid for. The November instalment was delivered, but was not paid for.

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On the 20th of December, 1871, *Edwards* called a meeting of his creditors, at which he declared himself insolvent. Messrs. *Hall & Co.* attended this meeting, and on the 23rd of December they wrote a letter to *Edwards* in the following terms:—

"We give you notice that we refuse to deliver any more bleaching-powder upon contract."

Accordingly, the December instalment of bleaching-powder was never delivered.

On the 1st of January, 1872, *Edwards* filed a petition for liquidation by arrangement; but on the 19th of January it was resolved to proceed in bankruptcy, and he was adjudicated a bankrupt on the 8th of February following. Mr. *Chalmers* was subsequently appointed trustee.

Under these circumstances the trustee claimed the delivery of the thirty tons of bleaching-powder, and on *Hall & Co.* refusing to deliver them, he claimed, in the County Court at *Liverpool*, damages amounting to £150 against *Hall & Co.* for their breach of the contract. The County Court Judge having refused his application, the trustee applied to the Chief Judge in Bankruptcy, who affirmed the decision of the County Court Judge. (a) The trustee now renewed the application before the Court of Appeal.

Mr. *C. Russell*, Q.C., and Mr. *Bigham*, for the Appellant:—

The contract between the parties has never been rescinded. If there had been no insolvency, the vendors could not have refused to deliver the December instalment of bleaching-powder on the ground that the price of the November instalment had not been paid. They must have brought their action, and if *Edwards* had brought his action for non-delivery of the December instalment, the amounts recovered in the two actions would have been set off against each other. What passed at the meeting of the 20th of December did not have the effect of rescinding the contract. There was no absolute refusal to complete the contract as there was in *Withers* v. *Reynolds*. (1) On the contrary, *Edwards* was desirous of avoiding a bankruptcy, and going on with his business. There was here no right analogous to the right of stoppage

(1) 2 B. & Ad. 882.

(a) See W.N. (1872) 24.

in transitu. There can be no lien on future deliveries of goods for payments due in respect of previous deliveries. But, admitting that there was a lien originally, we say that it was put an end to by the vendor's letter of the 23rd of December. That was a direct breach of the contract. If it had not been for that letter it might have been incumbent on the trustee to tender the price of the December instalment when he claimed the delivery of it; but that letter has rendered it unnecessary to do so.

Mr. *Cohen*, for the Respondents, was not called on.

SIR G. MELLISH, L.J., after stating the facts of the case, continued as follows:—

The first question that arises is, what are the rights of a seller of goods when the purchaser becomes insolvent before the contract for sale has been completely performed? I am of opinion that the result of the authorities is this—that in such a case the seller, notwithstanding he may have agreed to allow credit for the goods, is not bound to deliver any more goods under the contract until the price of the goods not yet delivered is tendered to him; and that, if a debt is due to him for goods already delivered, he is entitled to refuse to deliver any more till he is paid the debt due for those already delivered, as well as the price of those still to be delivered. In *Bloxam* v. *Sanders* (1) *Bayley*, J., says: "If goods are sold upon credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of possession and the right of property vest at once in him; but his right of possession is not absolute, it is liable to be defeated if he becomes insolvent before he obtains possession. Whether default in payment when the credit expires will destroy his right of possession if he has not before that time obtained actual possession, and put him in the same situation as if there had been no bargain for credit, it is not now necessary to inquire, because this is a case of insolvency, and in a case of insolvency the point seems to be perfectly clear: *Hanson* v. *Meyer* (2). If the seller has despatched the goods to the buyer, and insolvency occurs, he has a right, in virtue

(1) 4 B. & C. 941, 948. (2) 6 East, 614.

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of his original ownership, to stop them *in transitu.* Why? Because the property is vested in the buyer so as to subject him to the risk of any accident; but he has not an indefeasible right to the possession, and his insolvency, without payment of the price, defeats that right. And if this be the case after he has despatched the goods, and whilst they are *in transitu, à fortiori* is it when he has never parted with the goods, and when no *transitus* has begun. The buyer, or those who stand in his place, may still obtain the right of possession if they will pay or tender the price, or they may still act upon their right of property if anything unwarrantable is done to that right."

In *Wentworth* v. *Outhwaite* (1), *Parke,* B., says: "What the effect of stoppage *in transitu* is, whether entirely to rescind the contract or only to replace the vendor in the same position as if he had not parted with the possession, and entitle him to hold the goods until the price be paid down, is a point not yet finally decided, and there are difficulties attending each construction. If the latter supposition be adopted (as most of us are strongly inclined to think it ought to be, on the weight of authority), the vendor is entitled to retain the part actually stopped *in transitu* till he is paid the price of the whole, but has no right to retake that which has arrived at its journey's end. His right of lien on the part stopped is revested, but no more."

And in *Griffiths* v. *Perry* (2), *Crompton,* J., says: "A vendor's lien on specific goods sold is gone when a bill is given for the price, but revives if that bill is dishonoured before he has parted with possession of the goods; or rather, he then acquires, not a lien, strictly speaking, but a right of withholding delivery, analogous to the right of an unpaid vendor to stop *in transitu. Miles* v. *Gorton* (3), and many other cases, shew that a part delivery of the goods does not do away with the right to withhold delivery of the rest, unless such part delivery is intended as a delivery of the whole. Then does it make any difference here that the goods were not specific goods? I think that *Valpy* v. *Oakeley* (4) is conclusive to shew that it does not; and I consider that case to have been rightly decided. . . . What, then, is the position of the

(1) 10 M. & W. 436, 452.
(2) 1 E. & E. 680, 688.
(3) 2 Cr. & M. 504.
(4) 16 Q. B. 941.

parties upon the bill becoming dishonoured and the vendee insolvent? According to Lord *Abinger's* view of the law in *Miles* v. *Gorton* (1), the contract to deliver is thereby put an end to altogether. I am not inclined to go so far as to say that; but I think that, at all events, the vendor has a right, in such a state of things, to say to the vendee, 'I will not deliver the goods until I see that I shall get my price paid.' So, in the present case the Plaintiff, or his assignees in bankruptcy, could not, I think, call upon the Defendant to deliver the rest of the iron without paying him for it."

In both *Bloxam* v. *Sanders* (2) and *Wentworth* v. *Outhwaite* (3) there had been a sale of specific goods, not merely an agreement to sell goods to be delivered by instalments; but it would be strange if the right of a vendor, who had agreed to deliver goods by instalments were less than that of a vendor who had sold specific goods; and the judgment of *Crompton*, J., in *Griffiths* v. *Perry*, to which I have referred, shews clearly that there is no difference between the two cases.

I am, therefore, of opinion that, in the present case, when the insolvency of the purchaser had been declared the vendor was not bound to deliver any more goods until the price of the goods delivered in November, as well as those which were to be delivered in December, had been tendered to him. The only question then is, what was the effect of the vendor's letter of the 23rd of December? Mr. *Russell* argued that the refusal to perform a contract before the time arrives for its performance is in itself a breach of the contract. But that can only be the case where the person who refuses to perform the contract is not entitled to refuse. Had the vendor in this case a right to refuse? In my view that depends upon the question whether the insolvent purchaser was ready and willing to pay the price both of the November and December instalments. It is clear that he was not. I admit that the mere non-payment of the price of the November instalment did not of itself give a right to the vendor to refuse to perform the contract; and I agree with what was said by *Crompton*, J., in *Griffiths* v. *Perry*, that the mere fact of the

4 Ch. D. 114

4 Ch. D. 11

(1) 2 Cr. & M. 504. (2) 4 B. & C. 941.
(3) 10 M. & W. 436.

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insolvency of the purchaser did not put an end to the contract. It certainly would be very unfair if it had that effect; for if the insolvent had any beneficial contracts remaining, it would be hard on him as well as on his creditors if they could not have the benefit of those contracts. But if an insolvent has any such beneficial contracts, it is his duty to inform his creditors or the Court of Bankruptcy, if the case be within its jurisdiction, of the fact, and he can then apply to have a sufficient part of his assets applied for the completion of the contracts, and if the contracts were beneficial this would, without doubt, be allowed by his creditors or by the Court. If this were done, and due notice were given to the vendor, I entertain no doubt that he would be bound to complete the contract on his part, and would not be allowed to take advantage of the insolvency of the other party to put an end to the contract. But where the insolvent or his trustee does nothing of the kind, he practically gives notice to his creditors and those with whom he has contracted that he does not mean to pay any of his debts or perform any of his contracts. In the present case, *Edwards*, by calling his creditors together and informing them of his insolvency, practically gave notice to *Hall & Co.* that he did not mean to pay them either for the November or the December instalment. Indeed he could not pay for the November instalment without the consent of the other creditors: it would have been a fraudulent preference. Both parties knew that he had no intention of paying any further sum; and *Hall & Co.'s* letter of the 23rd of December only means that on the assumption, which assumption they were, under the circumstances, justified in making, that the November and December instalments would not be paid, they refused to deliver any more bleaching-powder. In my opinion they had a right to say that, and they committed no breach of the contract by writing the letter. The appeal must therefore be dismissed with costs.

LORD SELBORNE, L.C.:—

I entirely agree in the judgment of the Lord Justice, and in the reasons he has given for it.

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SIR W. M. JAMES, L.J.:—

I am of the same opinion.

Solicitor for the Appellant: Mr. *W. W. Wynne*, agent for Messrs. *T. & T. Martin, Liverpool.*

Solicitors for the Respondents: Messrs. *Neal & Philpot*, agents for Messrs. *Jevons & Ryley, Liverpool.*

COTTERELL *v.* STRATTON.

L. C. and L. JJ.
1872
Dec. 3, 4, 9.

[1868 C. 141.]

Mortgagee—Mistake in Amount—Oppressive Conduct—Right to Costs—Appeal for Costs—Costs of Appeal.

A mortgagee will not be deprived of his costs in a redemption suit because he has over-stated the amount due to him.

The directors of a building society, in answer to one of their members and mortgagors, stated that £736 was due to the society on the mortgage, the society having been for some years in possession. Soon afterwards the directors informed the mortgagor that they intended to sell the mortgaged property, they having power under the mortgage deed so to do. The mortgagor thereupon filed a bill to restrain the sale, and for redemption. The directors informed the mortgagor that they had no intention to press a sale. The mortgagors then proposed that a decree for the usual accounts should be taken, and a decree for an account was accordingly taken. The mortgagor carried in surcharges to the amount of £1227, principally for fines and commission, which he claimed to have disallowed, but which were allowed to the mortgagees; the mortgagees were, however, charged for certain occupation rents, and were disallowed charges for repairs, so that the amount due at the filing of the bill was found to be £517 instead of £736:—

Held (reversing the decision of *Malins*, V.C.), that there was nothing in the conduct of the mortgagees which would deprive them of the right to add their costs of the suit to their security:

Held, that in such a case an appeal as to costs might be maintained; and that the costs of the appeal might be included in the costs of the suit.

THE Plaintiff, *James Cotterell*, was, in the year 1858, the owner of certain leasehold property in *London*, and applied to the *No.* 3, *Borough of Lambeth Permanent Benefit Building Society* for a loan of £900. They agreed to advance the required sum upon the Plaintiff becoming a member of the society and subscribing for fifteen

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shares of £60 each. He accordingly became a member on those terms; and the £900 was advanced to him, under an arrangement that he was to pay it off in ten years by monthly instalments of 14*s.* 2*d.* per share, making, on the fifteen shares, £10 12*s.* 6*d.* A mortgage was accordingly executed and the money advanced.

This mortgage was dated the 4th of December, 1858, and was made between *James Cotterell* of the one part, and *F. Doulton* and *J. W. Stratton*, trustees of the building society, of the other part; and by it *Cotterell* demised the several leaseholds therein described to the trustees of the society for the several terms of years for which the same were held, except the last days thereof respectively, by way of mortgage, for the securing to the said society the payment by *Cotterell*, his executors, administrators, or assigns, of 120 advance instalments of £10 12*s.* 6*d.* each by monthly payments, and also the payment of all fines and other sums of money, if any, which by or according to the rules of the said society might become payable. And it was agreed that, until default in payment of any of such instalments, or of any fine or other sum as aforesaid, for three calendar months after the same should have become payable, *Cotterell*, his executors, administrators, or assigns, might remain in possession of the leaseholds, or in receipt of the rents and profits thereof. But if any such default as aforesaid should be made, the trustees for the time being of the society might immediately, or at any time thereafter, enter into possession of the leaseholds, or into the receipt of the rents and profits, and appoint a collector thereof at a reasonable remuneration. And if the rents and profits should at any time be insufficient to satisfy the advancements, fines, and other moneys then due to the society, the trustees for the time being might sell the said leaseholds, or any of them, as they might think fit; and should, out of the moneys received by them, whether the same were rents and profits or purchase-money, in the first place pay the rents payable under the leases, and the rates, taxes, and other outgoings, and, in the next place, retain for the society all instalments, fines, and other moneys then due to the society, and also such further sum of money as should be equivalent to the sum which, according to the rules of the society, would then have to be paid by *Cotterell* if he were then about to redeem the mortgaged

premises; and should pay the surplus to *Cotterell*, his executors, administrators, or assigns.

The Plaintiff appeared to have fallen into arrear with his monthly payments, and in April, 1861, the society entered into possession, at which time £140 was due from the Plaintiff in respect of his instalments and of fines for non-payment.

The Plaintiff occasionally inquired what amount was due, and when informed he appeared to think that the amount due to the society ought to have been paid off by the rents. In February, 1868, the Plaintiff, by his solicitor, Mr. *Dinn*, proposed to redeem, and a correspondence ensued between him and the secretary of the society, in the course of which the secretary stated how the accounts of the money due were made out by the society. The secretary, on the 26th of March, wrote to Mr. *Dinn*: "The deeds are ready, and I beg to inform you that the amount required to redeem is now £736 2*s.* 3*d.* . . . . No further information can be given by me beyond that already furnished." This sum appeared to be the amount standing in the ledger of the society.

Nothing further was done until the 12th of May, when the secretary wrote to Mr. *Cotterell*, informing him that the board of directors of the society had passed a resolution that the whole of the property mortgaged by Mr. *Cotterell* should be sold forthwith, and that Mr. *Cotterell* be informed thereof.

Mr. *Dinn*, on the 15th of May, wrote to the secretary, saying: "I am very much surprised, as Mr. *Cotterell* is ready to pay any amount which is really due, and the only question is as to what this amount is. I must request that your society will not attempt to sell the property, and unless you send me your assurance by the bearer that the resolution will not be acted upon, I shall be under the necessity of at once filing a bill for an injunction. I shall be willing and hereby offer to deposit the amount you claim at some bank, or otherwise as may be agreed upon, until the accounts can be adjusted; and please let me know what is the present amount of your claim, and whether your society will acquiesce in this."

On the 19th of May the secretary wrote to Mr. *Dinn*, telling him that his letter had been handed to the solicitors of the society, and that the matter had been referred to them.

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On the 25th of May, 1868, the Plaintiff filed the bill in this suit against the trustees of the society, alleging that certain sums ought not to be charged against him, and praying a declaration that the Plaintiff was entitled to redeem, and praying for accounts and for an injunction to restrain the sale, the Plaintiff offering to pay or bring into Court anything which might be due on the security; praying also an account of rents and profits, and of what might have been received but for neglect and default; and that if anything was found due to the Plaintiff, the Defendants might be ordered to pay the same.

On the 27th of May the solicitors of the society wrote to acknowlege the receipt of the bill and of notice of motion, and said: "We had been daily expecting a letter or call from you, and as there has been no intention of pressing a sale on the part of our clients we do not hesitate to say that no sale shall take place until after you hear from us again. We presume that, under these circumstances, the motion can stand over for the present, and shall be glad to have your reply to that effect."

In answer to this Mr. *Dinn*, on the 28th of May, wrote as follows, referring to his notice of motion: "Allow me to suggest whether it would not be as well on that day to take an order for the necessary accounts, so as to avoid the necessity of your filing any affidavit or answer, and the accuracy of the accounts can then be debated in Chambers."

To this proposition the solicitors for the Defendants assented, and on the 3rd of June, 1868, a decree for an account as against mortgagees in possession was taken, the question of costs being reserved; but the decree did not include redemption.

The Plaintiff brought in surcharges to the amount of upwards of £122, raising questions as mentioned in the judgments of the Vice-Chancellor *Malins* and the Lord Justice *Mellish*, all of which questions were decided against the Plaintiff, so that these surcharges were disallowed; but the Defendants were charged by the Chief Clerk with rents not received, with occupation rents for property not let, and were disallowed certain money spent on repairs, so that the sum due when the bill was filed was found to be £517 19*s.* 5*d.*

The suit came on upon further directions, and the Vice-Chan-

cellor *Malins*, in making a decree for redemption, refused to allow the Defendants the costs of the suit (1).

(1) 1872. July 8. W.N. (1872) 164

SIR R. MALINS, V.C., after referring to the facts, continued:—

In March, 1868, the Plaintiff was very desirous of redeeming. He had a correspondence with the society, and asked what was due, and on what terms he would be at liberty to redeem.

There was a great difference between them as to the state of the account. Considering the nature of this society, and that it has a staff of officers and a secretary who were bound to know what their business was, I think they should have been able, at any time, to state with perfect accuracy what was due to them. They demanded £736 2*s.* 3*d.* in March, 1868, and this bill was filed upon the 25th of May, 1868. I do not think there was any material variation in the amount between March and May, and I think that the society must be considered as having demanded at that time £736 2*s.* 3*d.* With a view to the question of the costs, the Chief Clerk was to find what was due to them at the time of the filing of the bill, and he found that £517 19*s.* 5*d.* was, on the 25th of May, 1868, due to the Defendants for principal and interest on their mortgage in the pleadings mentioned. Therefore, while £517 19*s.* 5*d.* was due to them, they were demanding £736 2*s.* 3*d.*, more than £200 too much. But not only that, they persisted and passed the resolution of the 12th of May. [His Honour then read the resolution.]

I must say I think that it was a very arbitrary and a very uncalled for step, that, without giving him the opportunity of redeeming, they should proceed to sell his property.

The property was evidently a very good security; the state of the funds of the society did not require that they should take any step of that kind. I think they should have given him three or six months' notice, in accordance with the ordinary practice of mortgagees; for though they sometimes arm themselves with a power of selling without notice, it is one which is never approved of. Every man should have the opportunity of redeeming without the risk of his property being sold.

However, they determined to proceed to a sale. The Plaintiff's solicitor then wrote to them. [His Honour read the letter of the 15th of May.] It is true that this letter does not amount to a legal tender; but it is not necessary in this Court that there should be a legal tender in order to stop a sale. It is quite sufficient that the mortgagor is willing to pay, and the Court must in all these cases consider whether the conduct of the parties has been reasonable; or whether, on the part of either of them, it has been such as has led to the litigation. First of all, the mortgagees were bound to know the amount which was due. If, instead of demanding £736, they had demanded £517, the mortgagor might at once have redeemed; and it was only by means of the suit that the sale was stayed. I do not think the fault rested with the solicitors. They appear to have taken a very reasonable view of the matter; but it was the urgency of these directors, who insisted upon selling the property. Then the Defendants say that they should have the costs of the suit, because they have succeeded on all points of the contest. That is quite true; but though they have succeeded, it does not necessarily follow that they should succeed with costs, and the

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The Defendants appealed against so much of the order as disallowed them their costs.

Mr. *Cotton*, Q.C., and Mr. *H. J. M. Williams*, for the Appellants:—

A great part of the rents with which we were charged has since been received. We merely stated the accounts as they appeared in our books, and we had no notion that we should be charged with rents for unlet houses. The Plaintiff himself did not at first claim them, and every issue raised by him was decided against him. A mistake in the amount claimed will not deprive a mortgagee of his costs: *Norton* v. *Cooper* (1). We were willing to go into the accounts, and we have not been guilty of such vexatious conduct as to be punished by loss of the costs to which, as mortgagees, we are regularly entitled: *Dunstan* v. *Patterson* (2); *Harvey* v. *Tebbutt* (3).

Mr. *Glasse*, Q.C., and Mr. *T. A. Roberts*, for the Plaintiff:—

A mortgagee whose conduct has been unreasonable does not get

Court will look at the conduct of the parties.

The first point raised by the Plaintiff was that the society was not entitled to fines. They persisted in their right to fines, and I decided in their favour; but surely the society might quite well be satisfied with taking interest upon the arrears of £140. Instead of that the fines amounted to £3 a month, so that he was paying £36 a year on that account. Was that reasonable? I call it overbearing. The next point raised was that the society had charged him 5 per cent. for one of their own officers receiving the rents. I was obliged to come to a decision that they were entitled to do that; but is it reasonable or forbearing? I think it unreasonable and oppressive. Therefore, though they succeeded, yet, looking to the position of the parties, and considering the reasonable offer which was made by the Plaintiff and refused by the Defendants, and that but for the filing of the bill they would have sold the property, which was of considerable value, I think I cannot give them the costs. I do not think that I should go beyond the justice of the case if I were to make them pay costs; but that is not pressed. I think, therefore, that I give them all that they are entitled to. It is shewn that this property is a valuable property, because the debt was continually reduced. I very much regret to see the oppressive course of conduct which has been adopted by this building society. I am sorry to say this is not the first instance I have had of it, and it would have been much more consonant with my feelings if I had made them pay the costs of the suit, but after what I have said there will be no costs on either side.

(1) 5 D. M. & G. 728.

(2) 2 Ph. 341.

(3) 1 Jac. & W. 197.

his costs: *Detillin* v. *Gale* (1). This society was bound to know the amount due to them, and then the Plaintiff might have paid it, if he had only £517 to pay. He did offer to deposit the whole sum claimed. Besides, the question of costs is one of discretion, and here the Vice-Chancellor has exercised his discretion, so that no appeal ought to be allowed: *Taylor* v. *Dowlen* (2). *Norton* v. *Cooper* (3) is an exception to the general rule as to mortgagees. The conduct of the Defendants has been most oppressive, and there are many things in the case besides those which were mentioned by the Vice-Chancellor in his judgment.

Mr. *Cotton*, in reply.

LORD SELBORNE, L.C.:—The principles involved in this case are of very considerable importance to all mortgagees. It has been stated to us on this appeal that there are matters contained in the affidavits which, though not referred to by the Vice-Chancellor in his judgment, would be conclusive against the Defendants. These affidavits need not be read, but we wish to have them handed to us, so that we may form our own opinion upon them.

Dec. 9. LORD SELBORNE, L.C.:—

The appeal of the Defendants in this case is from the decree of the Vice-Chancellor *Malins*, who, on further consideration in a suit for the redemption of a mortgage vested in the Defendants as trustees for a building society, has wholly disallowed them their costs, both those down to the hearing of the cause and those of taking the account in Chambers under a decree made at the hearing; and he has decreed redemption on the terms of payment of principal and interest only. His Honour has further directed that if the Plaintiff should fully redeem, all further proceedings in this cause be stayed without costs.

This is a very unusual decree; and I entertain some doubt whether it is one which could, in all points, be justified under any conceivable state of circumstances. Even if it be assumed that mortgagees may so improperly conduct themselves by resisting

(1) 7 Ves. 583. (2) Law Rep. 4 Ch. 697.
(3) 5 D. M. & G. 728.

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the right to redeem, or by making unfounded claims, or causing vexatious delays and costs during the progress of the account, as to make it right to refuse them all costs of suit in case of redemption, still it does not follow that a Plaintiff, whose whole suit is founded upon his offer to redeem, and who, if he eventually fails to redeem, makes the whole proceedings from beginning to end useless and nugatory, could, in this latter event, be properly exonerated from costs.

The right of a mortgagee in a suit for redemption or foreclosure to his general costs of suit, unless he has forfeited them by some improper defence or other misconduct, is well established, and does not rest upon the exercise of that discretion of the Court which, in litigious causes, is generally not subject to review. The contract between mortgagor and mortgagee, as it is understood in this Court, makes the mortgage a security, not only for principal and interest, and such ordinary charges and expenses as are usually provided for by the instrument creating the security, but also for the costs properly incident to a suit for foreclosure or redemption. In like manner, the contract between the author of a trust and his trustees entitles the trustees, as between themselves and their *cestuis que trust*, to receive out of the trust estate all their proper costs incident to the execution of the trust.

These rights, resting substantially upon contract, can only be lost or curtailed by such inequitable conduct on the part of a mortgagee or trustee as may amount to a violation or culpable neglect of his duty under the contract. Any departure from these principles in the general course of the administration of justice in this Court would tend to destroy, or at least very materially to shake and impair, the security of mortgage transactions and the safety of trustees. In fact, such a departure, instead of being beneficial to those who may have occasion to borrow money on security, or to repose confidence as to property in their friends or neighbours, would, in the result, throw the former class of persons into the hands of those who indemnify themselves against extraordinary risks by extraordinary exactions, and would deprive the latter class of the assistance of all who cannot afford, or are not inclined, to bestow upon the affairs of other persons their money as well as their trouble and time.

A decree, therefore, in a redemption suit, which disallows the costs of the mortgagee, is of right appealable, and if appealed against, can only be supported by proof of special circumstances sufficient to justify such a departure from the ordinary course of the Court. That there may be such circumstances is undeniable; the question is whether they exist in this case.

This was a mortgage to a building society, of which the mortgagor was a member. The security extended to all fines payable under the rules of the society, and to all costs, charges, and expenses which might be incurred on account of the collection of rents, if, as happened in this case, the mortgagees should enter into possession; and it gave the mortgagees a power of sale capable of being exercised without previous notice. The mortgagees being in possession, the Plaintiff, in 1868, inquired what was claimed as due, with a view to redemption. Some correspondence followed, in the course of which the mortgagees sent to the mortgagor's solicitors certain accounts extracted from their books, both of the sums claimed by them as secured by the mortgage, and of their receipts from rents. This resulted in a balance of £736, alleged by them in March, 1868, to be still remaining due upon their security. It is not shewn, and I see no reason to suppose, that the accounts thus sent were either wilfully false or improperly kept in any material particular, nor that any fact which ought to have been communicated in that stage of the matter was withheld by the mortgagees from the knowledge of the mortgagor. But the mortgagor disputed the amount claimed; he objected on principle to various charges, which, on taking the account in the suit, were eventually established against him; and he contended that the rents and profits of the mortgaged property, if properly managed, would have been sufficient greatly to reduce the balance due. In this state of circumstances the society resolved to exercise, as was their right, the power of sale contained in their mortgage deed; and they gave to the Plaintiff notice of their intention so to do. The Plaintiff wrote, by his solicitors, to the secretary of the society, saying that he was ready to pay any amount which was really due; that the only question was as to the amount; that he was willing and offered to deposit the amount claimed by the society at some bank, or otherwise, as might be agreed upon; and that, unless he were

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assured that the resolution to sell would not be acted on, he should be under the necessity of at once filing a bill for an injunction. On the 19th of May the secretary answered this letter, inviting communication between the Plaintiff's solicitor and the solicitors of the society; but the Plaintiff, without any such communication, filed the present bill on the 25th of May. Nothing had been done in the meantime with a view to the intended sale, and on the 27th of May the Defendants' solicitor wrote that there had been no intention of pressing a sale at all. In June following an immediate decree was taken by consent for the proper accounts, together with an inquiry as to the amount due on the 25th of May, and a reservation of costs. It appeared, on taking the account in Chambers, that only £517 was due on the 25th of May, being less by a considerable sum than the amount which had been claimed. But this difference arose mainly, if not altogether, from the mortgagees being charged with an occupation rent for certain unoccupied parts of the premises, and with wilful default for rents not actually received, and being disallowed some part of their expenditure in respect of repairs. The Plaintiff, by four surcharges carried into Chambers, sought to debit the mortgagees with sums amounting altogether, as was stated to us, to £1227; and he objected unsuccessfully, both in Chambers and in Court, to the charges for fines and for commission made against him by the mortgagees in their account upon the footing of the mortgage deed.

These appear to be the whole facts material to the question whether the mortgagees ought in this case to have been disallowed their costs.

The reasons given by the Vice-Chancellor for refusing these costs appear to be that the mortgagees acted improperly in determining, before suit, to exercise their power of sale, and in insisting, after the decree, upon their strict right to charge fines and commission against the mortgagor. His Honour, while admitting the right to sell without any previous notice, expressed disapprobation of its exercise; and if it had appeared that, after the Plaintiff's offer to deposit the amount claimed, the suit had been rendered necessary by any attempt on the part of the mortgagees to force on a sale, we should ourselves have considered such an attempt improper, and in that state of circumstances we should probably not have

differed from the Vice-Chancellor in his mode of dealing with the costs of the suit down to the hearing. But we are unable to agree that there was anything improper in the mere resolution to sell, of which notice was given by the society to the Plaintiffs. The mortgagees, being unpaid, had a right to all their remedies for the realization of their security, of which this was one. It is manifest to us from the letters written on behalf of the society on the 19th and 27th of May, 1868, and further, from their prompt consent to an immediate decree for an account, that there was not then any attempt or intention on their part to force on a sale after and notwithstanding the Plaintiff's offer to deposit the money, or otherwise to act oppressively or vexatiously towards the Plaintiff. On the other hand, it is equally plain, from the nature of the questions raised by the Plaintiff upon the account, and from his instituting this suit after the letter of the 19th of May, without any communication in the interval with the Defendants' solicitors, that the suit would have been necessary under any circumstances, even if no notice of the intended sale had ever been given.

It is with regret, speaking for myself, that I find in the statement of the other part of His Honour's reasons, the expression of an unfavourable opinion, either of the conduct of building societies generally, or of this particular society, in their dealings with their members obtaining advances of money under their rules; for which opinion I am unable to discover a foundation in anything of which the Court could judicially take notice in this suit.

His Honour, while himself deciding that the society was entitled to charge those fines and commissions which were actually allowed in taking the account, appears to have considered that they ought to have been satisfied with less; and that these claims were unreasonable and excessive, and of such an oppressive character as to make it right, on that ground, to refuse those costs of taking the account, to which, so far as appears, he would otherwise have held the mortgagees entitled.

With unfeigned respect for His Honour, I am at a loss to see how a Court of Equity can be justified in imposing upon any mortgagees the penalty of a forfeiture of their costs, or in designating their conduct as "oppressive," merely because they have insisted on the performance of the contract between themselves and their mort-

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gagor, and have declined to waive any portion of the rights to which they have been adjudged to have been entitled. This, as it seems to me, is not equity, but is rather the assumption of a merely arbitrary discretion; and so far from finding anything to justify it in the circumstance that the mortgagees here are a building society, I should have thought that the very fact that the Defendants are trustees, and that the directors of the society are mere managers and agents for the members generally, would be a reason, if reason were necessary, why the contract should in this case be strictly acted upon, rather than that any censure should be passed upon these directors for declining to waive it.

It was, however, insisted by Mr. *Roberts* at the bar, that the Defendants' costs ought to be disallowed for other reasons alleged to be apparent on the accounts, and on the affidavits used in Chambers, to which the Vice-Chancellor himself did not in his judgment particularly advert. In consequence of this being strongly pressed upon us, we thought it right to have those affidavits handed in, and one of my learned brothers will make such observations as an examination of them has suggested to him. It is enough for me to say that we see no reason for disallowing any part of the mortgagees' costs, on the ground merely that the demand which they made before suit, has been found, after charging them with an occupation rent and rents not received, and disallowing certain parts of their expenditure, to be less than the sum actually due at the time of filing the bill.

This is a difference arising out of matters which might be, and which, as far as we can see, really were, honestly in controversy, and which would not appear by the books or accounts of the mortgagees themselves, however properly they may have been kept. There is no principle or authority that I am aware of for depriving a mortgagee of costs merely upon such a ground.

[His Lordship then mentioned the costs of an interlocutory application which had been made by the Plaintiff, and said that there was no good reason for the disallowance of those particular costs.]

On the whole, the decree appealed from must, in my judgment, be varied so far as it disallows the Appellants' costs in the suit, the whole of which, both before and after the decree, must, I think, be

allowed in the usual way; and as this is a case between mortgagor and mortgagee, the Appellants' costs of the appeal must also, in my opinion, be added to the security and paid, in case of redemption by the mortgagor. The deposit will be returned.

SIR W. M. JAMES, L.J.:—

I entirely concur in this opinion. In this case, as it appears to me, the Vice-Chancellor omitted to consider that, independently of the questions which might have arisen before the filing of the bill, the whole of these questions had been taken out of the sphere of litigation by the immediate consent of the Defendants, at the suggestion and request of the Plaintiff, to a decree for the accounts. From that moment it would have been wrong for the Defendants to have gone into any expense by rebutting the allegations on which the application for an injunction was based, or any other special allegation of misconduct in the suit. The Vice-Chancellor also, in my judgment, appears not to have sufficiently considered the fact that, with respect to the fines and with respect to the commission, which he appears to have thought unreasonable and improperly insisted upon by the directors, those fines and that commission were, in fact, the property of the shareholders of the society, of which the Plaintiff was himself a member; and I am of opinion that, if the directors had given those fines or had given that commission by way of present to the Plaintiff, they would, in all probability, have been exposing themselves to a very just suit on behalf of the other shareholders, just as much as they would have been if they had made a present of part of the principal and interest. I can draw no distinction whatever between the right of the society, on whose behalf the Defendants were merely trustees and managers, to the fines and commission, and their right to the principal and interest secured. In consequence of Mr. *Roberts* insisting that there was something on the face of the affidavits which were used in Chambers, to shew that the conduct of the directors was improper, I have read the affidavits through, and I am bound to say that, so far from shewing any impropriety of conduct on the part of the directors, they present a lamentable picture of wasteful litigation on the part of the Plaintiff himself. The Plaintiff was wrong-

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headed throughout. He seems to have very greatly over-estimated the gross rental of the houses, and to have greatly under-estimated the disbursements and charges which the possession of the houses entailed; and he therefore believed that not only nothing was due to the society, but a balance was due to himself. He was entirely wrong in his belief, and the issues raised in the course of the litigation in Chambers were really of a character which ought not to have been raised. [His Lordship then stated the charges made by the Plaintiff.] He did succeed to a small extent, that is to say, he succeeded in surcharging them to the extent of £200, nearly one-half of which was for the rent of one house, which was received during the course of the suit, and as to which there seems to have been no dispute. I am therefore satisfied that there was nothing in the affidavits to raise a case of misconduct on the part of the Defendants, and I think it right to add in their favour this, that amongst the things in Chambers I find that, on the 31st of August, 1868, they wrote this letter to him:—"Dear Sir,—In reply to your letter of the 25th inst., we beg to say, that although perfectly confident of the justice of their claim, the Defendants, to put an end to further litigation, say, if the Plaintiff will pay £550, and allow the Defendants to receive the rents up to Michaelmas, the Defendants will accept that sum and waive their right to costs against the Plaintiff." I am of opinion that that offer was at that time most fair and reasonable, and if he had accepted it, he would have saved himself the great amount of costs which have been incurred through his endeavour to raise so unsuccessfully as he has done the many issues to which I have referred.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

Solicitor for the Plaintiff: Mr. *H. Dinn.*

Solicitors for the Defendants: Messrs. *Wyatt, Hoskins, & Hooker.*

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1872
Nov. 15,16,18; Dec. 14.

[1870 V. 28.]

Executors and Trustees—Profits—Partners—Assets employed in Trade—Unauthorized Expenditure in improving the Estate—Just Allowances.

A testator was partner in a well-established and prosperous business under articles by which, on the death of any partner, his share was to be taken by the surviving partners at a price to be ascertained from the last stocktaking, and to be paid by instalments extending over two years, with interest at £5 per cent. per annum from his death. He appointed three executors, one of whom was one of his partners in the business, and another, some years after his death, became a partner; the third never was concerned in the business. The value of the testator's share was ascertained but not paid, the amount being allowed for some years to remain in the hands of the firm, who treated it in their books as a debt, and allowed interest on it at £5 per cent. per annum, with yearly rests. One of the testator's residuary legatees, upon becoming entitled to payment of her share, refused to accept payment on the above footing, and filed her bill against the executors claiming to be entitled to a share in the profits of the business arising from the use of the testator's capital. The money had been left in the hands of the firm with the knowledge of the testator's family, and all his residuary legatees, with the exception of the Plaintiff, approved of what had been done:—

Held (reversing the decision of *Bacon*, V.C.), that the Plaintiff was not entitled to any account of profits, the mere delay by executors in calling in a debt due to the testator from a firm of which some of the executors are members not giving his estate any right to share in the profits of the business.

The testator devised his real estate upon the common trusts for sale, making his real and personal estate a mixed fund. His trustees and executors were advised that a few acres of freehold land which belonged to him might be advantageously sold in lots for building purposes, and that to develop their value it was desirable to build a villa upon part of them. They accordingly built one at a cost of £1600 out of the testator's personal estate. This villa had ever since been let at £80 a year, most of the other land had been sold, and the evidence tended to shew that the outlay had benefited the estate. Vice-Chancellor *Bacon* having declared that the £1600 must be disallowed the trustees in passing their accounts:—

Held, on appeal, that as the trustees had, in the *bonâ fide* exercise of their judgment, expended this sum as the best means of improving the estate, they could, at most, only be disallowed the amount of loss (if any) occasioned to the estate by the expenditure.

THIS was an appeal by the Defendants, the executors of *Richard Vyse*, from a decree of Vice-Chancellor *Bacon*.

The testator, *Richard Vysé*, was the senior and principal partner

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in a very old and well-established business of merchants and straw hat manufacturers in *London*, *Luton*, *New York*, and *Italy*.

At the time of his death the partnership arrangements under certain articles of partnership dated the 17th day of September, 1853, were as follows:—

The partnership consisted of *Richard Vyse*, *Henry Vyse*, *John Reynolds*, and *Thomas Andrew Vyse*. The capital was in round numbers £137,675, of which the testator had £90,284, *Henry Vyse* £39,977, and *John Reynolds* £7414; *Thomas Andrew Vyse* having no capital. The partners were to have 5 per cent. interest on their capital, and the surplus profits were to be divided as follows: *Richard Vyse* six sixteenths, *Henry Vyse* five sixteenths, *John Reynolds* three sixteenths, *Thomas Andrew Vyse*, who had no capital, two sixteenths.

The testator had a power, which he did not exercise, of withdrawing a large portion of his capital without affecting the division of the profits between the partners. It was provided that in case of the death of any of the partners the surviving partners should take his share in the business at a sum to be ascertained as therein provided by means of the balance sheet made out at the last yearly stocktaking on the 30th of June, the sum so ascertained to be in full for the purchase of such share, and to be paid by four instalments at six, twelve, eighteen, and twenty-four months respectively after his death, with interest at £5 per cent. per annum from his death until payment, for which instalments promissory notes were to be given by the surviving partners.

The testator died on the 13th of July, 1855, leaving all his partners surviving, and leaving a will by which he appointed the Defendants *Thomas Foster*, his partner *Henry Vyse*, and *Edmund Waller Vyse*, his executors and trustees, and devised to them his real estate upon trust to sell it and apply the proceeds as part of his personal estate; and he bequeathed to them his personal estate upon trusts under which his nine surviving children ultimately became entitled to it in equal shares, the shares of daughters not becoming indefeasibly vested till they attained the age of twenty-five years. The Plaintiff, who was the youngest daughter, was in the eleventh year of her age at her father's death.

The testator left ten children surviving him, but one of the ten died in 1858, and his share became divisible among the others by virtue of a gift over contained in the will.

The balance sheet of the firm of *Vyse & Sons* up to the 30th day of June, 1855, on the footing of which the share of the said testator *Richard Vyse* in the said partnership at his death was ascertained under the provisions of the said partnership articles, was as follows:—

Liabilities.		Assets.
Richard Vyse . . .	£101,058 13 6	..
Henry Vyse . . .	38,475 6 7	..
Thomas A. Vyse, Jun. .	5,821 10 9	..
John Reynolds . .	13,904 15 11	..
William Barns and others	950 0 0	..
Allowance on book debts .	870 1 0	..
„ „ Bills . .	308 3 0	..
Debts owing . . .	33,880 17 1	..
Allowance on Mr. *Vyse's* account, *Ludgate Street*.	150 0 0	..
	£195,419 7 10	£202,295 4 5

The first four items being the amounts of capital standing to the credit of the partners respectively.

By the addition of interest and profits the sum of £101,058 13*s.* 6*d.* standing to the credit of the testator in the above balance sheet was made up to £107,601 2*s.* 6*d.*, which amount was payable to his estate according to the provisions of the articles. Out of this the sum of £90,000 was some time after the testator's death apportioned among his nine surviving children according to the trusts of the said will, making the sum of £9000 for each child, the apportionment being treated as made upon the testator's death. Subsequently, in 1861, the further sum of £11,700, being further part of the debt due from the firm, was in like manner apportioned among the nine children, making the sum of £1300 for each child; and in 1867 the further sum of £9000, being further part of the debt, was in like manner apportioned among the nine children, making the sum of £1000 for each child. After these apportionments had been made, the sum apportioned to each

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child was carried to the credit of such child in the accounts kept by *Henry Vyse*. These apportioned sums were not, however, at once drawn out, but were, to a considerable extent, allowed to remain in the hands of the firm.

The sums from time to time in the hands of the firm for the time being in respect of the estate of *Richard Vyse* were treated by the executors and the partners for the time being as a debt due to the executors from the firm bearing interest at the rate of £5 per cent. per annum, with yearly rests, and such interest was credited to the estate of the said testator by the firm on the amount of the debt for the time being due from the firm to the estate of the testator, and the debt was treated as wholly distinct from the capital of the firm.

The whole of the sums apportioned to the Plaintiff, as above mentioned, remained in the hands of the firm till the 9th of August, 1867, when the executors received the sum of £3173 5*s.*, part of her share, and invested it in the purchase of £1428 11*s.* 6*d.* Ten and a Half per Cent. Indian Stock; and on the 29th of January, 1868, they invested £7956 17*s.* 6*d.*, being a further part of her share, in the purchase of £8500 £3 per Centum Consolidated Bank Annuities. After these investments the sum of £3104 19*s.* 11*d.* was due from the firm on the 13th of July, 1869, in respect of the Plaintiff's share, the account being taken as follows: On each 13th of July interest at 5 per cent. was computed on the balance in the hands of the firm on the previous 13th of July, and carried to the Plaintiff's credit. She was debited with all sums drawn out by the executors for her use, with interest at £5 per cent. per annum from the times of their being drawn out, and a balance was struck. The balance of this account was the sum on which interest at £5 per cent. was computed for the next year.

The executors, by their answer, made the following statement as to the position of the assets at and for some years after the death of the testator:—

"The debts due to the said firm of *Vyse & Sons* at the death of the said testator could not have been collected for several years after his death, and, in fact, the debt of £120,340 7*s.* in the said balance sheet appearing to be due to the said firm from the business

carried on at *New York* was not and could not be got in until nearly ten years after the testator's death; and although there was a large debt due as aforesaid from the said firm to the estate of the said *Richard Vyse*, such debt was not money available for the purposes of trade. We admit that large profits have been made since the death of the said testator by the said firms of *Vyse & Sons* and *Vyse, Sons, & Co.* Such profits have been attributable to the credit and connection of the said firms, and to the reputation, skill, and ability of the partners for the time being therein. Except as herein appears, no sums of money belonging to the testator's estate have been used by the Defendants *Henry Vyse* and *Edmund Waller Vyse*, or either of them, in their or either of their said businesses; and, except as aforesaid, no profits have arisen from the employment of the sums of money in the Plaintiff's bill alleged to have been used by the said Defendants, or either of them, in their or either of their said businesses. We believe that the said firms of *Vyse & Sons* and *Vyse, Sons, & Co.*, from the death of the said testator, *Richard Vyse*, could, over the average of years, always have borrowed money at a less rate of interest than they were paying on the debt due from them to the estate of the said *Richard Vyse*, if they had desired to do so; but that they were willing to keep the said moneys in their hands for the benefit of the family of the said *Richard Vyse* as long as they could do so without loss. We, however, say, that in August, 1867, the partners in the said firm of *Vyse, Sons, & Co.* had a discussion as to the amount of money which was in the hands of the said firm for which they had no profitable use, and in consequence of this discussion the said sums of £3173 5*s.* and £7956 17*s.* 6*d.* were withdrawn from the said firm at the times aforesaid, and invested by us for the Plaintiff; and at or about the same time sums to a large amount were paid to, and invested for, others of the testator's children out of moneys withdrawn from the said firm."

It appeared that all the testator's children, except the Plaintiff, acquiesced in, approved, and ratified all that had been done in respect of their shares, and were paid their shares accordingly. The members of the family were in the habit of treating the firm as their bankers, and leaving money in their hands upon which they could draw, interest at £5 per cent. being allowed as above.

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The partnership, which, upon the decease of the testator in 1855, consisted, as above stated, of *Henry Vyse* the executor, *John Reynolds*, and *Thomas Andrew Vyse*, continued on the same footing till 1859, when *Edmund Waller Vyse*, who was a son of the testator and one of his executors, was admitted a partner; and at the same time a new partner, named *Thirkell*, was taken in. The whole capital was at this time in round numbers £118,200, divided as follows. *Henry Vyse*, £57,200; *John Reynolds*, £32,000; *Thomas Andrew Vyse*, £13,300; *Edmund Waller Vyse*, £14,700; *G. P. Thirkell*, £1000. And the surplus profits above 5 per cent. on the capital were made divisible as follows: *Henry Vyse*, ten thirtieths; *John Reynolds*, seven thirtieths; *Thomas Andrew Vyse*, six thirtieths; *Edmund Waller Vyse*, three and a half thirtieths; *Thirkell*, three and a half thirtieths.

This partnership continued until 1864, when a new partnership was formed. For the purposes of this new partnership the capital, property, and effects of the late co-partnership were valued at £188,550, which became the capital of the new firm, and was divided as follows: *Henry Vyse*, £97,750; *G. P. Thirkell*, £5850; *Reynolds*, £58,200; *Edmund Waller Vyse*, £21,750; *Howard Vyse*, £5000; *F. Thirkell*, nothing. And the surplus profits above 5 per cent. were made divisible as follows: *Henry Vyse*, five twentieths; *G. P. Thirkell*, four twentieths; *Reynolds*, three and a half twentieths; *Edmund Waller Vyse*, two and a half twentieths; *Howard Vyse*, two and a half twentieths; *Francis Thirkell*, two and a half twentieths.

By another arrangement made a few months later it was stipulated that *Thomas Andrew Vyse* should be reinstated as partner, the partners participating with him in a certain *New York* business. The arrangement was a complicated one, but resulting in the following division of profits: *Henry Vyse*, four twentieths; *G. P. Thirkell*, three and a half twentieths; *Thomas Andrew*, three and a half twentieths; *John Reynolds*, three twentieths; the other three, two twentieths each. This arrangement was determined in March, 1865, *Thomas Andrew* again retiring and taking his *New York* business with him.

In July, 1869, fresh arrangements were entered into by which *John Reynolds* retired, which need not be stated, as by that time

the share of the Plaintiff had been invested, except the above-mentioned balance amounting to a little more than £3000, which was ready to be paid to her, and was afterwards paid into Court in this suit.

The Plaintiff attained the age of twenty-five years in October, 1869. She declined to accept payment on the footing of the accounts above referred to, and in August, 1870, she filed her bill against the executors, alleging that a large portion of the testator's estate had been improperly retained in the business, and praying for an administration of the testator's estate, and for an account of all sums of money forming part of the estate which had been employed by *H. Vyse* and *Edmund Waller Vyse* in the business, and of all profits which had arisen from such employment, and that the Defendants might be declared jointly and severally liable to account for such profits, and might be decreed to pay to the Plaintiff at her option either so much of the profits as had accrued in respect of her share of the moneys so employed or compound interest at £5 per cent. on such share.

A minor point in the suit arose as follows: The testator was seised of a few acres of freehold land at *Luton*, where he resided. The trustees were advised that this might become valuable as building land, and that the best mode of developing it for that purpose would be to build a villa upon it. They accordingly built upon it a villa residence at the cost of £1600, which they paid out of the testator's personalty. It was admitted that the will, which only devised the realty on common trusts for sale, did not contain anything to authorize this expenditure. The villa had ever since been let at a rent of £80 per annum. The land was afterwards sold at prices averaging more than £700 per acre, with the exception of the villa and some plots containing in the whole about an acre, which remained on hand. The bill alleged this employment of the £1600 to be a breach of trust, and prayed that it might be declared such, and that the Defendants might be disallowed it in passing their accounts.

Vice-Chancellor *Bacon* made a decree (1) declaring that the

(1) 1872. May 23. Sir James Bacon, V.C., after stating the facts of the case, continued:— Upon these facts the Plaintiff's counsel have insisted that, the directions of the testator's will being ex-

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outlay of £1600 in building the villa was unauthorized, and ought not, as against the Plaintiff, to be allowed in the accounts, and

plicit, the Defendants having neglected to obey those directions, and having moreover employed and permitted the employment of a large portion of the estate in the business of the several partnerships, and large profits having been realized in such business, the Plaintiff is entitled, at her option, to demand payment of her share of the estate with compound interest, or to have a share of the profits which have been made by the employment of the estate; and they insist further that the Defendants are liable now to account for all the profits which have been so made, and, if she shall so choose, to make good to her the amount which, upon the taking the account, shall appear to be due in respect of her share. In support of this claim they refer to and rely upon the law of this Court as it is established by the cases of *Wedderburn* v. *Wedderburn* (2 Keen, 722; 4 My. & Cr. 41; 22 Beav. 84); *Brown* v. *De Tastet* (Jac. 284; 4 Russ. 126); *Heathcote* v. *Hulme* (1 Jac. & W. 122); *Docker* v. *Somes* (2 My. K. 655); *Macdonald* v. *Richardson* (1 Giff. 81); *Townend* v. *Townend* (1 Giff. 201); *Willett* v. *Blanford* (1 Hare, 253); *Bowles* v. *City of Toronto* (11 Moo. P. C. 463.). On the part of the Defendants it has been very strenuously argued that the facts of this case do not bring it within the rule which has been long established by the authorities referred to—a rule, it is said, so rigorous and severe that it ought never to be applied except in cases of gross and wilful breach of trust, and in which no other mode of doing justice can be resorted to. With this view the several authorities have been examined and commented upon in order to distinguish them from the case under discussion. This argument for the Defendants is rested principally upon the fact that the testator had by the partnership articles stipulated and agreed that, in the event of his death during the term, his interest in the concern should consist of and be represented by that sum of money to which his share of the partnership property and effects should appear to amount by the last general account which had been taken immediately preceding his death; that such sum of money should be secured in the manner, and payable by the instalments extending over two years, thereby provided; and therefore, that, at the most, it constituted a debt due from his partners. That the fact of one of his debtors being appointed one of his executors could not change the nature or character of the debt—that it was apparent, from the contract itself, that the testator's share in the partnership was to be the very means by which the business was to be continued, and that the ascertained amount of his share was to constitute a loan made by his direction to the surviving partners—and therefore that all that his representatives could claim was the payment of that debt in the manner contracted for. It was argued also that the only default which had been committed by the Defendants, the executors, was that they had not exacted payment of the debt at the end of the two years, and that this default had been amply repaired by the allowance to the estate of compound interest at 5 per cent. per annum from the testator's death.

Plausible as is this view of the case, and forcibly as it was argued, I am un-

directing an inquiry what part of the testator's estate had been from time to time since his death and was now employed by the

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able to adopt it. A long course of authorities has established a rule which, although it may lead to harsh consequences in partnership cases, is nevertheless one of such general policy that its enforcement has been decided to be a matter of necessity. It is true that if the only default of the executors had been the neglect to require payment of the debt due to the testator's estate, and if, in consequence, the debt had been lost, the liability of the executors would have been only to make good the loss with such interest as might have been made if it had been realized. But the present case extends much beyond that, for here, not only are no steps taken to call in the debt before, upon, or after the expiration of two years, but one of the executors continues to trade with the material capital in which the testator had a share. A few years afterwards another of the executors becomes a partner, and continues to carry on the same trade with the same material capital, and the third of the executors who, whether he did or did not know the particular circumstances connected with the partnership dealings, must be taken to have known his plain duty, is proved to have neglected that duty, and to have taken no step whatever to realize or secure the testator's estate. Unless, therefore, I could take upon me to depart from the rule I have adverted to, and to overrule the cases in which I find that rule unhesitatingly applied, I am compelled to hold that, for all the profits which have been made by the employment of the testator's estate in the trades carried on by the successive partnerships in which the Defendants *Henry Vyse* and *E. W. Vyse* have been engaged since the testator's death, the executors are personally answerable. And if there were no such rule, I am compelled to add that I should find it impossible to discover any principle of equity or justice by which I could permit any of the Defendants to retain those profits which have been made or have ensued in consequence of the neglect of their clear duty.

It was further suggested on behalf of the Defendants that the relief sought by the Plaintiff could not be afforded to her because the several persons other than the Defendants who are or have been partners are not parties to this suit. No objection on this head is raised by the answer, and although I should not on that account have disregarded it, since it is taken at the bar, I am of opinion that it cannot be maintained consistently with the decision in *Brown* v. *De Tastet*. Reference was made on this subject to the case of *Simpson* v. *Chapman* (4 D. M. & G. 154) before the Court of appeal; but I cannot think, regard being had as well to the circumstances of that case as to the true purport of the decision, that it affords any support to the objection. The real, I may say the only, subject of contention in that case was the supposed value of the good-will in a banking business in which the testator had been a partner, which had been carried on after his death, and into which his executor had been subsequently introduced as a partner. But it was clear that, so far from having any capital in the concern at his death, the testator was largely indebted to the partnership. The Court was of opinion that upon his death the surviving partners were under no obligation to discontinue the

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Defendants *H. Vyse* and *E. W. Vyse* in the business, and what profits had been derived by means of such employment; and de-

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business, but were entitled to act thenceforth as bankers without or with any fresh partner; and although it is observed in the judgment that the question of good-will, if it had arisen, could not be conclusively adjudicated upon in the absence of the continuing partners, that observation was not necessary to the determination of the questions raised upon the appeal, since it was determined that no part of the testator's estate had been employed in the business which was carried on after his death. In another case also referred to, of *Macdonald* v. *Richardson* (1 Giff. 81), in which the Vice-Chancellor Sir *John Stuart* overruled the objection that after-taken partners were not parties to a suit seeking an account of profits made by the testator's surviving partner in a business in which they had been jointly engaged, the Vice-Chancellor seems to have thought that the decision in *Simpson* v. *Chapman* was somewhat at variance with other authorities. I think, however, that upon examination of what was there in fact decided, no such variance is to be found; and without relying upon my own recollection of that case, I should think it highly improbable that the then existing authorities were not referred to in the argument; but however this may have been, it is impossible to believe that the Lords Justices were not well acquainted with the general established law applicable to the case before them, or that they had forgotten, whether cited to them or not, the well-known decisions of Lord *Eldon*, Sir *William Grant*, and Lord *Cottenham*.

With much better reason should the Defendants' counsel refer to the facts alleged by the Defendants as to their conduct and motives. It seems clear that the Defendant *Henry Vyse* had kept regular and punctual accounts of the testator's estate, and of the shares of each of his children, and that he enjoyed and continues to enjoy the confidence of the testator's widow, and of his children, other than the Plaintiff, all of whom had ample opportunities of becoming acquainted with all the particulars relating to the estate; that he had allotted to the separate account of each of them £11,300 at three several times, in 1855, in 1861, and in 1867; that he had invested for the Plaintiff the sums and retained the balance before mentioned; that he had duly accounted for interest and compound interest upon these sums; and that all the testator's children (with the exception of the Plaintiff) were and are satisfied with these several dealings with the estate. If these reasons could prevail, the Defendants would stand acquitted of the demands which the Plaintiff now makes against them; but it is obvious that her rights cannot be affected by any arrangement which her brothers and sisters may think fit to adopt, nor by the manner in which or the circumstances under which the Defendants may have acted.

I have no reason to doubt that by the manner in which the estate of the testator has been dealt with the Plaintiff's fortune, as it is now stated by the Defendants to exist, including the compound interest, amounts to several thousands of pounds more than she would have been possessed of if the Defendants had realized the whole of the estate and had invested it in public funds, which is all they were bound to

(1) 5 Jur. N. S. 9

claring that the Defendants were to be charged with such profits and interest thereon at £5 per cent. per annum from the times when they were respectively made; and directing an inquiry as to the amount of the Plaintiff's share in the residuary estate, having regard to the declarations.

The Defendants appealed from the declaration as to the £1600, the inquiry as to employment of the testator's personal estate in the trade and the profits made by it, and the declaration as to their liability for profits.

The *Solicitor-General* (Sir *G. Jessel*), and Mr. *Amphlett*, Q.C. (Mr. *Rowcliffe* with them), for the Appellants:—

This decree makes those executors, who were partners, personally liable for the profits made by other persons as well as themselves—makes an executor who was a partner during part of the time liable for profits all along, and the executor who was not a partner and got no profits, liable for profits. Such a decree cannot be supported. The surviving partners were entitled and bound to buy the testator's share at a price to be ascertained in a certain way, and it was so ascertained. The value then became a debt. If the executors had been strangers, it would have been a pure case of a

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do or which she could have required. Nevertheless, I cannot for that reason reject the claim she makes to have her share of the profits which have been made by the employment of the testator's estate in the business which has been carried on since his death, because the law which I am bound to administer has declared that such are her rights.

I must, therefore, declare that she is entitled to a decree for the general administration of the testator's real and personal estate, with the usual accounts and inquiries, accompanied by a declaration that an outlay of £1600 in building a villa on part of the estate, which I have not found it necessary to mention more particularly, was unauthorized, and ought not, as against the Plaintiff, to be charged against the estate. There must be an inquiry as to what part of the testator's estate has been from time to time since his death, and is now, employed by the Defendants *Henry Vyse* and *E. W. Vyse* in the several businesses carried on by them as in the pleadings mentioned, and what gains and profits have been derived by means of such employment, with a declaration that the Defendants are to be charged with such profits and interest thereon at 5 per cent. per annum from the respective times when such profits were made; and an inquiry as to the amount of the Plaintiff's share in the testator's residuary estate, having regard to such declarations, reserving the further consideration of the cause.

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large simple contract debt due to them from the firm; and the fact that one of the executors was a partner does not make it any the less a debt in equity. The case where the executors and the partners are the same set of persons is different. There the executors have got the money, and they are trading with it. Here the executors never did get the money; it remained due from the firm to them. At all events, the most that can be done is to make those of the executors who received profits refund the profits which they respectively received. Then the direction to charge interest on profits is an unheard of thing. The profits do not belong to the *cestui que trust* till he elects to take them; so there cannot be a charge of interest. Profits are also given by this decree during the period for which the moneys were by the articles to remain in the business. It is true that promissory notes were not given as provided by the articles; but to give them would have been an idle form, as the fact of one of the makers being one of the payees would have made them useless at law. We say, then, that the Plaintiff has no claim to profits, and that interest at £5 per cent. with annual rests was the outside of what she could claim. Again, supposing she was entitled to profits, we say the result is the same. The only profits she could claim would be profits arising from the use of her money. Now, the profits of a business arise from capital, good-will, and the skill and exertions of the partners, and it is very hard to say how much of them is attributable to any sum of money brought in. Here the partners by their articles settle that £5 per cent. per annum is due to capital; for each partner has that amount allowed on his capital, and the rest of the profits is divided in shares bearing no relation to the capitals of the partners: *Wedderburn* v. *Wedderburn* (1). The principle of giving profits is, that there is a breach of trust to which the partners are parties: *Simpson* v. *Chapman* (2); and this cannot be worked out in a suit to which the other partners are not parties. None of the authorities go anything near the length of this decree: *Docker* v. *Somes* (3); *Lindley* on Partnership (4); *Palmer* v. *Mitchell* (5); *Brown* v. *De Tastet* (6); *Cook* v. *Colling-*

(1) 22 Beav. 84. 2 Jur. N.S. 674.
(2) 4 D. M. & G. 154.
(3) 2 My. & K. 655.
(4) Page 833.
(5) 2 My. & K. 672, n.
(6) Jac. 284.

ridge (1); *Heathcote* v. *Hulme* (2); *Wedderburn* v. *Wedderburn* (3); *Simpson* v. *Chapman* (4); *Townend* v. *Townend* (5); *Macdonald* v. *Richardson* (6). It is shewn by *Stroud* v. *Gwyer* (7) that a trader improperly borrowing money from trustees does not account for profits like a trustee, and in *Chambers* v. *Howell* (8) a similar principle is laid down. In *Willett* v. *Blanford* (9), which is relied on against us for giving both interest and profits, there is not a word on the subject in the judgment, and the inquiries were without prejudice. *Crawshay* v. *Collins* (10), supports our contention, and so does *Jones* v. *Foxall* (11).

Then, as to the villa, we say that the land on which the villa stands will now sell for £1600 more with the villa than without it and that the other land has sold better for its having been built. If a trustee without authority spends money in attempting an improvement of the estate, and it is not benefited, he must bear the loss; but if the estate is made more valuable, it is against all justice that the *cestui que trust* should take the benefit, and allow the trustee nothing.

Mr. *Kay*, Q.C., and Mr. *Lindley*, Q.C. (Mr. *Romer* with them), for the Respondent:—

We say that the executors must make good the fund with all its accretions, whether they have received them or not.

[The LORD JUSTICE JAMES:—This does not seem to me a case of accretion, but of mere personal demand.]

The executors ought not to let the money remain in the hands of a firm without bargaining to have the profits.

[The LORD JUSTICE JAMES:—Do you say that would be so if no executor was a member of the firm?]

No.

(1) Jac. 607.
(2) 1 Jac. & W. 122.
(3) 22 Beav. 84; 4 My. & Cr. 41.
(4) 4 D. M. & G. 154.
(5) 1 Giff. 201.
(6) Ibid. 81.
(7) 28 Beav. 130.
(8) 11 Ibid. 6.
(9) 1 Hare, 253.
(10) 15 Ves. 218; 1 Jac. & W. 267; 2 Russ. 325.
(11) 15 Beav. 388.

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[The LORD JUSTICE JAMES:—On your principle I do not see why not.]

Stroud v. *Gwyer* (1) establishes that distinction. When no executor is in the business, it is a mere case of improper investment, not of trading with the assets. The Appellants first contend that £5 per cent. was the amount of profits attributable to capital. The articles gave a preference to the capital to that extent, but there is no reason for saying that £5 per cent. was the whole amount of the profit attributable to capital. In every case where the *cestui que trust* is entitled to compound interest at £5 per cent., he has an option to take the profits: *Jones* v. *Foxall* (2); *Brown* v. *De Tastet* (3).

[The LORD JUSTICE JAMES:—In that case no account had been taken, and the deceased partner's share had not been ascertained. The partnership, in fact, went on.]

The decree in that case goes the whole length of this, and it made one partner liable for the profits made by his co-partners: *Heathcote* v. *Hulme* (4) lays down the same principle. If an executor embarks money in trade, and profits are made by it, he cannot excuse himself by saying that he has allowed other persons to receive part of them: *Bowes* v. *City of Toronto* (5) supports our contention.

[The *Solicitor-General*:—The money there had actually come to the hands of the person who was charged with it. *Crawshay* v. *Collins* (6) shews that the *cestui que trust* has an option, and *Wedderburn* v. *Wedderburn* (7) shews the nature of the option. *Jones* v. *Foxall* agrees with this.]

[The LORD JUSTICE JAMES:—According to all the authorities you have so far referred to, the *cestui que trust* may sanction the investment or repudiate it; but if he sanctions it he must take it as he finds it, subject to all the terms on which the executor made it.]

In *Macdonald* v. *Richardson* (8) an executor was made liable

(1) 28 Beav. 130.
(2) 15 Ibid. 388.
(3) Jac. 284.
(4) 1 Jac. & W. 122.
(5) 11 Moo. P. C. 463.
(6) 15 Ves. 218.
(7) 4 My. & Cr. 41, 44.
(8) 1 Giff. 81.

for profits which he had not received. If I am limited to the shares of the executors who were partners, at all events I am entitled to an account to shew what they amounted to: *Docker* v. *Somes* (1). Then, as to interest on profits, *Crawshay* v. *Collins* (2) and *Willett* v. *Blanford* (3) are in our favour. The liability of persons who knowingly receive trust-money is joint and several: *Ex parte Heaton* (4); *Ex parte Barnewell* (5); *Flockton* v. *Bunning* (6).

(1) 2 My. & K. 655.
(2) 15 Ves. 230, n.
(3) 1 Hare, 253.
(4) Buck. 386.
(5) 6 D. M. & G. 795, 801.
(6) FLOCKTON *v.* BUNNING.
[1864 F. 89.]

W. FLOCKTON died in 1853, having by will given his real and his residuary personal estate to his wife and *Lloyd* upon the common trusts for conversion and investment, and to hold the fund upon trust to pay half the income to his wife for her life, and as to the whole fund (subject to the above life interest in a moiety) upon trust for such of his children as should attain twenty-one, equally. He appointed his wife and *Lloyd* executors. Mrs. *Flockton* alone proved the will. *Lloyd* renounced and disclaimed. The testator left thirteen children, of whom the Plaintiffs were six.

The testator had for some years before his decease carried on business as a turpentine and tar distiller in partnership with his brother, who died in 1850. At the testator's death the business was in course of being wound up and the assets sold and realized. It was finally wound up a few months after the death of the testator, and his share of the proceeds was received by Mrs. *Flockton*.

The testator and his family had been long engaged in the trade, and Mrs. *Flockton* believed that it would be for the good of herself and children to carry it on, and take advantage of the connection formed by her husband and his brother. She accordingly entered into an arrangement for a partnership with a Mr. *Hughes* and the Defendant *Bunning*. Articles of partnership dated the 1st of January, 1854, were entered into, by which Mr. *Hughes*, who was already carrying on the business on a considerable scale, admitted Mrs. *Flockton* into partnership. The capital of *Hughes* being £23,000, Mrs. *Flockton* was to bring in £4000, and to receive a share of profits proportional to her share of the capital, and *Bunning*, who brought in no capital, was to receive one-third of the profits. Mrs. *Flockton* was not to attend to the business; *Hughes* was to attend to it as much as he pleased, and *Bunning* was to be the working partner. Mrs. *Flockton* brought into this business £3400 of the testator's assets.

On the 31st of December, 1856, this partnership was dissolved by consent, *Hughes* retiring from the business, and a new partnership was formed between Mrs. *Flockton*, *Bunning*, and *James Roy*. *Roy* died in 1861, and Mrs. *Flockton* and *Bunning* continued the business in partnership, having purchased the share of *Roy* from his executrix, *Hannah Roy*. The arrangements were completed in February, 1862, and *Hughes* having been advised that he was liable to the testator's residuary legatees for the £3400 which Mrs.

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Then we say that no allowance ought to be made for the expenditure in building the villa, which was a mere unauthorized

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Flockton had brought in out of the assets, it was agreed that she should invest in consols a sum of £606, and also £500 a year as an indemnity fund in the joint names of herself, *Hughes*, and *Bunning*; and a deed dated the 28th of February, 1862, declaring trusts of the fund, was executed, to which some of the testator's children, Mrs. *Flockton*, *Bunning*, *Hannah Roy*, and *Hughes*, were parties.

In July, 1862, *Grindley* became a partner, bringing in £5000 and paying £1000 a piece to Mrs. *Flockton* and *Bunning*. The articles of partnership entered into on this occasion contained a clause providing that if Mrs. *Flockton's* share of the profits should at any time not be sufficient to make the investments required by the deed of the 28th of February, 1862, the deficiency should be made up out of her share of the capital.

In August, 1864, *Bunning* and *Grindley*, under a power in the articles, determined the partnership as regarded Mrs. *Flockton*, for breach by her of the stipulations contained in them, and gave her notice of their intention to take to her share upon the terms of the articles. This enabled them to take her share upon paying for it a price ascertained by a valuation in manner mentioned in the articles.

Mrs. *Flockton*, not long afterwards, became bankrupt.

The bill was filed by six infant children of the testator against *Bunning*, *Grindley*, Mrs. *Flockton*, several of the testator's adult children, an incumbrancer to whom Mrs. *Flockton* had made a mortgage of her share in the partnership, some other incumbrancers of hers, and her assignee in bankruptcy; and prayed for the execution of the trusts of the testator's will; for an account of the dealings of the partners with the partnership assets since the last account; for inquiries as to the shares of the partners in the capital of the business; that the share of Mrs. *Flockton* might be ascertained, and how far it represented the testator's assets; and that her share in the partnership, so far as it had accrued from or represented the assets and trust estate of the testator, might be declared assets subject to the trusts of his will.

Mr. *Bacon*, Q.C., and Mr. *Herbert Smith*, for the Plaintiffs.

Mr. *Kenyon*, Q.C., and Mr. *Gill*, for Mrs. *Flockton*.

Mr. *C. T. Simpson*, for *Bunning* and *Grindley*.

Mr. *Karslake*, Q.C., and Mr. *Swanston*, for Mrs. *Flockton's* assignee.

Mr. *Dickinson*, Q.C., Mr. *Langworthy*, Mr. *Bagshawe*, and Mr. *H. F. Shebbeare*, for incumbrancers.

SIR JOHN STUART, V.C., made a decree directing accounts of the testator's estate, and declaring that Mrs. *Flockton*, *Bunning*, and *Grindley*, were bound to restore and make good to the Plaintiffs such part of the assets of the testator belonging to the Plaintiffs as had been employed by the Defendants in trade, together with all profits made by such employment, or with interest at the rate of £5 per centum per annum upon what had been so employed; directing an inquiry what parts of the testator's assets had been employed in the successive partnerships, and what

speculation. A trustee is not at liberty to improve the *cestui que trust* out of the property.

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profits had been made by such employment; an inquiry whether it was for the benefit of the Plaintiffs to elect to take interest at £5 per cent. per annum upon such parts belonging to the Plaintiffs of the testator's estate as had been employed in trade as aforesaid, or to take the profits which had been made by such employment, with a declaration that Mrs. *Flockton*, as executrix, was entitled to a lien upon the partnership property for what might be found to be the amount of the testator's assets employed in the trade and the profits derived therefrom.

Separate appeals were presented by Mrs. *Flockton's* assignee, and by *Bunning* and *Grindley*.

1868. June 26.

SIR W. PAGE WOOD, L.J.:—

This case having been thoroughly sifted in the Court below, where it took a long time in argument, is brought here in a much more simple form, and, as presented to us on appeal, becomes a very plain case. The first appeal was that of the assignee of the executrix, of which we have already disposed. We have now to deal with the appeal of *Bunning* and *Grindley*, who contend that they ought not to be made liable in any way for the amount of the testator's assets, which have confessedly to some extent been embarked in the trade in which they are engaged as partners. At first it was suggested that *Grindley*, at all events, came into the business in 1862 without any knowledge of the arrangements as to the testator's assets, and ought not to be held to have concurred in any breach of trust; but when the partnership deed was brought before our attention, *Grindley's* knowledge of the transaction was made perfectly clear, for it contains a precise statement that this lady wishes to indemnify her partners against the consequences of the money which was embarked, or was intended to be embarked, in the present partnership having been withdrawn from the testator's assets for the purpose of being so embarked.

Then the simple case we have before us is this: two persons engaged in trade being desirous of having a partner with capital which can be supplied from trust funds, say to that person: "Join us and embark the trust funds which are put under your care in our business; make those trust funds part of our capital, and then we will join you, otherwise we will not; and that being so, we must have an indemnity from you, because we know what we are doing; we know that we are liable, and must be liable, for the trust fund which we have taken and made use of jointly with you as part of our capital; and therefore, as between you and us, you must indemnify us." If, therefore, there ever can be a clear case fixing persons with the legal consequences of dealing with trust funds, this is that case. The case of embarking assets in a new trade is a much worse case than that of continuing the assets of a deceased partner in a trade, for there is generally great inconvenience in suddenly withdrawing them from the business, and the retaining them too long may be morally justifiable, or, at all events, excusable. But I see no justification or excuse for taking what you know to be trust property and putting it into your business as part of your capital. What, then, are the consequences fol-

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The LORD JUSTICE JAMES:—My understanding of the law is, that where a trustee has spent money on the trust property in an unlowing from that act? The consequences, I apprehend, must be these. The partners make themselves co-owners of the fund, and use it as co-partners. In such a state of things they are just in the same position as an original trustee. Of the cases cited, *Travis* v. *Milne* (9 Hare, 141) was more to the purpose than any other. The Vice-Chancellor there makes a distinction between a fund advanced by way of loan and a fund mixed up with the consequences and liabilities of trade. In the one case the firm are borrowing money, their liability as to which may be probably more restricted than their liability as to trust money which they appropriate as part of their capital; but in the case before us there was a clear appropriation of the trust fund by all the three partners. I cannot, therefore, feel any difficulty in saying that the case is one to which *Travis* v. *Milne* is applicable, and that it is brought to the ordinary case of trustees employing a trust fund, and being answerable for the use they make of it. The decree, therefore, is substantially right, though it requires to be varied as to some matters of form, which will not affect the costs of the appeals.

SIR C. J. SELWYN, L.J.:—

So far as the appeal of the Defendants *Bunning* and *Grindley* is concerned, there are two material facts necessary to be established, and besides them there appears to be no substantial question at all. The first of those facts is that some portion of the estate was employed in trade in breach of the trusts of the will; and the second fact is that the breach of trust was known to the partners at the time the partnership of these three was entered into. Now, having regard to the deed which has been entered into, the recitals in the deed, the operative part of the deed, the evidence given on behalf of this lady herself and her assignees, and on the part of the other party, it seems impossible to doubt that some portion of the estate was so employed, and that most distinct notice of that employment, and of its being a breach of trust, was brought home to those parties.

There remains the question whether, when so fixed with notice of the breach of trust, they are liable or not. Upon that I called the attention of Mr. *Greene* and Mr. *Lindley* to the very clear distinction which is drawn in Mr. *Lindley's* valuable book between the case where partners improperly allow a sum of money to continue in breach of trust in the business, and the case where the executors distinctly lend part of the money employed in the business to the surviving partners. Neither of those learned counsel—both of whom would have done it if it were possible to do it—could shew that that distinction so drawn by Mr. *Lindley* in his book is not a very clear and sound distinction; and if so, the question is, to which of those two classes does this case belong? It is quite clear that it is a case of allowing the property to remain in breach of trust in the business, and not the case of a mere loan. Feeling that, Mr. *Lindley* very ingeniously suggested another distinction; he said that all the cases of which *Travis* v. *Milne* is an example are cases of surviving partners, and that there is a distinction between the case of surviving partners and a case like the present,

authorized way, the rule is to give him, at his own expense, an inquiry whether the trust estate has been to any and what extent benefited. He cannot on that footing obtain more than what is just.

[*Stepney* v. *Biddulph* (1) was referred to.]

The *Solicitor-General*, in reply :—

This is not a case of trading with assets, but a case of loan. The money was properly in the business, and the only departure

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where two gentlemen came in who are not parties to the original breach of trust. That distinction appears to me to be nothing more than a distinction between retaining property in breach of trust and acquiring property in breach of trust, with notice of the breach of trust at the time of its being so acquired. If there could be a distinction, one would think it was rather worse to acquire the property in breach of trust than merely to retain it, because in retaining it the person might have said: "I was acting under some necessary obligation. It was not possible to do otherwise than I did." But where a person acquires the property, and acquires it with notice of the breach of trust, it is impossible to say he is not liable.

There remains only the question we have heard argued so often, as to the limited liability of the Plaintiffs and their share of the interest in the estate. That seems to be contrary to the whole principle upon which this Court acts in making decrees for the administration of an estate. The Court does not allow the estate of a testator to be torn into pieces by a multiplicity of decrees, but it makes one decree, and provides for the rights of all the persons who, when the accounts shall have been taken, shall be found to have an interest in the estate of the testator. It would not allow one of these children to obtain one decree, and the other twelve children to obtain twelve more decrees, but it proceeds in one suit for the administration of the whole estate. I am of opinion that the Defendants *Grindley* and *Cooper* are liable to the estate, and that they are so liable *in solido*.

The declaration, as varied, was as follows:—

"Declare that Defendants, Mrs. *Flockton*, *Bunning*, and *Grindley*, are bound to make good to the testator's estate such parts of the assets of the testator as have been employed by the said Defendants in trade, together with all profits made by such employment, or for interest at the rate of £5 per cent. per annum upon what has been so employed." The second inquiry was altered into an inquiry whether it was for the benefit of the persons interested in the testator's estate to elect to take interest or profits on so much of the testator's estate as had been employed in the trade.

Solicitors: Messrs. *Rickards & Walker*; Messrs. *Linklaters, Hackwood, & Addison*; Messrs. *Drake & Son*; Messrs. *Abbott, Jenkins, & Abbott*; Messrs. *Slee, Middleton, & Ovans*.

(1) 13 W. R. 576.

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from the strict line of the executor's duty was delaying to call it in. It is impossible to attribute profits at all to this loan. The firm could have borrowed the money from strangers at a lower rate. It cannot be looked upon as part of the capital; it was dealt with in the books of the firm as borrowed money.

Dec. 14. SIR W. M. JAMES, L.J., after stating the facts of the case, continued:—

On the main question, whether, under these circumstances, the Plaintiff is entitled to participate in the profits made by these successive firms, a very long list of cases was cited, and each elaborately commented on. It is not, in our opinion, necessary to refer to the class of authorities (of which *Crawshay* v. *Collins* (1) and *Brown* v. *De Tastet* (2) are leading cases), as to the consequences of continuing a partnership business after the death or bankruptcy of a partner where the business in which the estate of the dead or bankrupt partner was embarked has not been wound up or effectually and properly wound up.

This case is really not a case of partnership at all. By the partnership deed the testator had effectually sold all his share in the partnership property, and immediately on and after his death the only relation between his executors and the surviving partners was that of creditor and debtor, in no respect differing from the relation which would have subsisted if he had sold the business or any other property in his lifetime to perfect strangers, and had then died before the purchase-money was payable.

The case, therefore, resolves itself into a case of executors or trustees committing (at least technically) a breach of trust by allowing trust money due and payable to remain outstanding on the personal security of persons engaged in trade, one of the executors at first, and afterwards two of them, being engaged in such trade as partners, and having the use of the money so left in their hands.

On this subject there have been several cases which have been collected and stated with great care and clearness in Sir *Edward Vaughan Williams*' book on Executors. The actual results in

(1) 15 Ves. 218. (2) Jac. 284.

these cases differ, but they all afford examples and illustrations of these general principles. If an executor commits a breach of trust, he and all those who are accomplices with him in that breach of trust are all and each of them bound to make good the trust funds and interest. If an executor or trustee makes profit by an improper dealing with the assets or the trust fund, that profit he must give up to the trust. If that improper dealing consists in embarking or investing the trust money in business, he must account for the profits made by him by such employment in such business; or at the option of the *cestui que trust*, or if it does not appear, or cannot be made to appear, what profits are attributable to such employment, he must account for trade interest, that is to say, interest at 5 per cent. In this case the successive partnerships have charged themselves in their own accounts with interest at 5 per cent., and with annual rests, and the sum due on that footing has been paid. And the questions, therefore, are, whether the Plaintiff is entitled to anything, and if anything, to what and from whom, in respect of the surplus profits due to capital, and how are such surplus profits to be ascertained?

In the first place, it cannot be, and is not, denied that there was a clear breach of trust in not calling in and investing the money. It is as little to be doubted that the not calling in the money was at least at the outset an immense boon to the trading firm. In the state of the partnership assets as stated by the Defendants themselves, the withdrawal of so large a sum as £100,000 in two years must have greatly embarrassed or crippled the business, probably been its ruin. It must at the same time be borne in mind that the testator must have well known the state of the partnership assets at the time of his death. By appointing one of his debtors one of his executors he rendered it impossible strictly and literally to carry out the terms of the bargain. There could have been no such thing as a valid promissory note by the executor and his partners to himself and his co-executors, and the debt was extinguished at law. It is reasonable to assume that the testator, in so appointing the debtor executor, and joining with him in the executorship his own son, one of the residuary legatees, intended that they should not break up the business by a peremptory demand of the debt the moment it became due, and he could

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not, at all events, have intended to deprive them of the power of doing what any reasonable creditor would do under such circumstances, give the debtors a reasonable time and reasonable indulgence while getting in the assets, the position of which was as much his act as theirs, or to have imposed on them the duty of doing the only thing which it was open to them to do, of immediately filing a bill or bills in Chancery, which would have led to the immediate destruction of the business, a very valuable ancestral family property.

It is further to be borne in mind that the firm appear to have been the bankers not only of the partners, but for different members of the *Vyse* family, receiving money from them on deposit, and paying or allowing 5 per cent. interest with annual rests. They appear to have been the bankers of the partners, and to have in like manner acted as bankers for the executorship or trust estate of the testator.

The testator's property, with the exception of his villa and a few acres of freehold land near *Luton*, and his furniture, &c.—all his available property for immediate purposes—exclusively consisted at his death of the debt due from his former partners, and out of this were paid his debts, funeral and testamentary expenses, probate and legacy duty. There was an annuity of £300 for the widow, under the will, and there was an annuity of £900 a year payable to the testator's father. In the strict performance of their duty, the executors ought to have set apart in Consols or other like securities funds to meet both these annuities. But the annuitants were willing to receive, and did receive (as to the widow, up to the year 1867, and as to the father, up to his death), the annuities from the estate without requiring any investment. Under these circumstances, and not deeming it necessary to make the investments for the annuities, which would have absorbed nearly £40,000, *Henry Vyse*, who was really the sole acting executor, considered that as much as £90,000 could be treated as available for division among the nine surviving residuary legatees as from the testator's death, and made out the accounts accordingly, apportioning and crediting the Plaintiff to and with £10,000 and interest at 5 per cent. as from that date, and she was afterwards credited with further sums as her share.

All the other residuary legatees have, as before stated, assented to, approved, and ratified what was done with their shares, so that as far as they are concerned everything must be considered lawfully and rightfully done.

The question then is reduced and confined to one of improperly leaving outstanding, on the security of the firms, the Plaintiff's own share in the estate. She can be in no better and in no worse position than if she were the sole *cestui que trust* and the executors had in their hands so much trust money belonging to her. Beyond all question, what was done was immensely for her benefit. From the first she had an income of £500 a year, whereas, if the trusts had been strictly carried out, she would not have had for several years anything like half that income. Still, however, she may be entitled to say that she is not to be limited to her £500 a year if her capital improperly employed produced more. Assuming her to be right in this, what would be the extent of her right as to participation in the profits of the business? She could not, of course, claim to participate in any more than the proportion which her fund, say £10,000, £11,000, or £12,000, bore to the whole aggregate capital in the business, including in such aggregate the other nine shares which her co-*cestuis que trust* allowed to remain in the business, and also including any other like capital deposited by other persons therein at interest. But it was pointed out by Vice-Chancellor *Wigram*, in the case of *Willett* v. *Blanford* (1), and his judgment was afterwards repeated and approved of by the Lords Justices, that there was no rule for apportioning the profits according to the respective amounts of the capital, but that the division would be affected by considerations of the source of the profit, the nature of the business, and the other circumstances of the case. It is obvious that it must be so, for it would be easy to suggest a number of instances in which the profit of a business has no ascertainable reference to the capital—*e.g.*, solicitors, factors, brokers, or, as was the case before the Lords Justices, bankers. Indeed, in almost every case where the business consists of buying and selling, the difference between prosperity and ruin mainly depends on the skill, industry, and care of the dealers; no doubt also greatly on their credit and repu-

(1) 1 Hare, 253.

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tation, and the possession of ready money to take advantage of favourable opportunities and to enable them to bide their time in unfavourable states of the market, and also greatly on the established goodwill and connection of the house.

In this case, we know from the testator's own arrangements, and from the several arrangements made after his death in the ordinary course of business, and certainly with no eye to the present dispute, that the normal fruit of the capital was 5 per cent. interest with annual rests, and that the surplus profits above that were not apportioned in any ascertainable ratio to the respective quotas of capital. For instance, in the testator's own partnership, two sixteenths were appropriated to a partner, *Thomas Andrew*, without capital, an additional sixteenth to a partner, *John Reynolds*, with £7000 capital, three additional sixteenths to *Henry Vyse* with £40,000 capital, and four additional sixteenths to the deceased with £90,000 capital. The reasonable explanation of this is to be found in the fact that the last three partners had been respectively engaged as partners in a previous firm with *Thomas H. Vyse*, the founder and head of the firm, who had relinquished his share in the property, capital, and effects of the partnership to his two sons equally, so that the three were in unequal shares the owners of the business itself, its goodwill and connection.

It was natural and reasonable therefore that, wholly irrespective of the capitals (which were expressly treated as debts bearing interest), the partners' shares in the surplus profits should be treated and dealt with with respect to their respective standing and position in the firm, the new working partner getting two sixteenths, his next senior, who brought in his knowledge and experience and his share in the goodwill and connection, getting three sixteenths, and the other two, who had their own previous shares and the share of their father in the business, goodwill, and connection, dividing the residue, but so as between themselves to give a slight advantage of one sixteenth to the senior and head of the firm. The same absence of direct relation between shares of profits and shares of capital is to be found in all the subsequent arrangements, but most strikingly of all in the arrangement of 1864, when the shares of the capital and the profits were as fol-

lows: £97,750, five twentieths; £5850, four twentieths; £58,000, three and a half twentieths; £21,000, two and a half twentieths; £5000, two and a half twentieths; nil, two and a half twentieths.

In the face of these facts, and bearing in mind that after the first few years of a career such as that which is indicated by the successive deeds of partnership, there never could have been the slightest difficulty in paying out the Plaintiff's fund, it would be very difficult to ascertain what proportion of the profits of the business is attributable to the use in the business of that fund.

But it is necessary to consider another aspect of the matter. It was pointed out by Lord *Cranworth*, in *Attorney-General* v. *Alford* (1), that this Court has no jurisdiction in this class of cases to punish an executor for misconduct by making him account for more than that which he actually received, or which it presumes he did receive, or ought to have received. This Court is not a Court of penal jurisdiction. It compels restitution of property unconscientiously withheld; it gives full compensation for any loss or damage through failure of some equitable duty; but it has no power of punishing any one. In fact, it is not by way of punishment that the Court ever charges a trustee with more than he actually received, or ought to have received, and the appropriate interest thereon. It is simply on the ground that the Court finds that he actually made more, constituting moneys in his hands "had and received to the use" of the *cestui que trust*. A trustee, for instance, directly lending money to his firm is answerable for such money with full interest to the uttermost farthing; but to make him answerable for all the profits made of such money by all the firm would be simply a punishment —a punishment arbitrary and most unreasonable in this, that its severity would be in the inverse ratio of the gravity of the offence. A man squandering trust money with deliberate dishonesty in profligate extravagance would be answerable for it with 4 per cent. interest; a man lending it (at good interest) to a large, solvent, and prudent, well-established firm, of which he was a partner, would be punished by a fine equal to all the profits made thereby by all his partners. Accordingly, the Master of the Rolls, in *Jones* v. *Foxall* (2), held that the partner could only be liable for his own

(1) 4 D. M. & G. 843.

(2) 15 Beav. 388.

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one-third of the profits of the business in which the trust moneys were; and in another more recent case, *Stroud* v. *Gwyer* (1), he held, that where the money was lent to a firm having notice of the breach of trust there was no ground for asking for the profits made. We entirely concur in these decisions, and are satisfied that no account of profits could, under any circumstances, be directed against the Defendant *Foster*, who was simply negligent, doing nothing, and that as against the other executors each could only be properly charged with that share of the profits attributable to the Plaintiff's capital which actually reached his hands.

And here another consideration intervenes. It has been distinctly laid down that a plaintiff cannot claim both interest and profits in respect of the money employed in trade, but must elect between them. And it might be a grave question whether the Plaintiff must not either adopt or repudiate the terms on which the successive partnerships were willing to hold her money. If she repudiates the arrangement, it might be considered that she would have to elect between interest and that share only of the profits made in respect of her capital which actually came into the hands of her trustees, as appears to have been held in *Jones* v. *Foxall* (2). The application, however, of that rule as to election between interest and profits to the case of an actual loan by a trustee in breach of trust to himself and others, would, we think, require very full consideration before the Court came to a final decision on it. And of course, if the Plaintiff is entitled to any election at all, she would have a right, at all events, to have such an inquiry and accounts as would enable her to determine her election. We cannot, therefore, dispose of this case merely by reference to the peculiar circumstances we have pointed out, and which would seem to render it very problematical whether any very great amount of benefit, if any benefit, would accrue to the Plaintiff from pursuing an investigation into the profits made. We are, therefore, obliged to consider and determine whether she has a right to such an investigation. We are not able to concur with the Vice-Chancellor in thinking that this case is governed by any of the familiar cases to which he has referred. We have found no case at all similar to it. It is not the case of a trustee committing a direct and positive

(1) 28 Beav. 130. (2) 15 Beav. 388.

breach of trust by selling out or calling in trust moneys for the purpose of embarking them, or by actually embarking trust moneys in his hands, in any trade or speculation. It is merely the case of a body of executors not calling in from a body of traders, there being a common member of both bodies, that which was a legal debt to the testator, and which was, by the operation of the will, converted into an equitable debt, but still a debt to his estate.

Is the mere fact of the union of the three characters—debtor, executor, and trader—in the same person sufficient to entitle the estate to an investigation into the trader's own business because there has been some delay or great delay in paying off the debt? We have found no case in which this has been laid down, even in the case of a sole executor, sole debtor, sole trader. There have been hundreds, probably thousands, of cases in which traders have been executors, and in which, on taking their accounts, balances, and large balances, have been found due from them; but in no case, so far as we are aware, has it ever been held, that where there has been no active breach of trust in the getting in or selling out trust assets, but where there has been a mere balance on the account of receipts—legitimate receipts—and payments, the omission to invest the balance has made the executor liable to account for the profits of his own trade. But this case is far stronger than the case we have suggested; and if the rule as to profits were to apply to it, it would be difficult, if not impossible, to exclude from its application cases where it would shock the common feelings of mankind.

If executors were to deposit money with a bank in which one of them was a shareholder or partner, and leave it there for too long a time, it would certainly be a very startling thing if an inquiry was therefore to be made into the profits of the bank, and still more startling if the deposit had been made by the testator himself, and there had been simply delay in calling it in. We are unable to distinguish on principle that case from this. In fact, the firm were bankers allowing 5 per cent. interest on the deposits. That which was a debt at the death of the testator continued exactly the same debt throughout, available for the purposes of the estate, and was in fact as ready when called for for the payment of the debts and legacies and of the residuary legatees

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as if it had been at the *London and Westminster Bank*. There was always an executor not in the firm who could have called in the money. If there had been any concerted breach of trust, any fraudulent or improper intention—if there had been any deception or concealment, the case would have been very different. But the fact that this money was in the hands of the firm was known to all the family. The Plaintiff became of age four years before she filed her bill, and if she did not know (which we think not very probable), she had nothing to do but to ask, where her fortune was, and she might then have called on her trustees to act. And the other surrounding circumstances, so far from being unfavourable, are in the highest degree favourable to the trustees. The debtors were a solvent and most prosperous firm; the money of the Plaintiff was left outstanding, just as the trustees left their own accumulated savings to an immense amount, on the same security and the same terms; and we are satisfied that the trustees acted in the most perfect good faith and in the well warranted belief that, in omitting to call in the Plaintiff's money, they were doing what she, if she were of full age, would have only been too glad that they should do.

We think, therefore, that the decree of the Vice-Chancellor must be varied in so far as it directs an account of profits and payment thereof. We are also of opinion that the Vice-Chancellor's decree should be varied in another respect. He has directed that a sum of £1600, part of the testator's personal estate, laid out in erecting a villa on part of his real estate directed to be sold, should be wholly disallowed in their accounts. This sum was laid out by the trustees *bonâ fide*, under advice, as a means of facilitating the sale and increasing the value of the land near *Luton* as building ground. The house so built has been let for £80 a year, and the rest of the land, with the exception of a minute portion, has been sold and realized £3456, and the villa itself is saleable. As the real and personal estate constituted one fund, we think it neither reasonable nor just to fix the trustees with a sum, part of the estate, *bonâ fide* laid out on other part of the estate in the exercise of their judgment as the best means of increasing the value of the whole. If they were mistaken in this, which does by no means appear, the utmost they could be

fairly chargeable with would be the loss, if any, occasioned by the mistake in judgment. The Plaintiff's share in that loss must be so minute as not to justify the expense of any litigious inquiry in Chambers as to it. If the Plaintiff prefers it, the trustees, being willing, may be ordered, as between them and her, to take the villa themselves, as at the price of £1600 and the value of the site as unbuilt on, as to which an affidavit may be produced to us. There can be no substantial question as to this, as the prices realized for the adjoining plots are known. These matters being disposed of, and the other residuary legatees being content with what has been done, the further prosecution of the suit ought to be unnecessary. But in form the Plaintiff is entitled, if so advised, to have a common decree for the usual accounts of the estate, with a direction to ascertain her share of the net residue, the Defendants to be charged with 5 per cent. interest on the amount from time to time in the hands of the successive partnership firms, and to be allowed like interest on all payments properly made to or for her; and such account to be taken with annual rests.

If there is to be further litigation, the further consideration and costs must continue to be adjourned. But if the matter rests, as it ought to rest, here, we will allow the matter to be again mentioned to us, and dispose of the costs.

Solicitors: Messrs. *Fox & Robinson;* Messrs. *Gregory, Rowcliffes, & Rawle.*

L. C.
and L. JJ.
1873
Jan. 30.

GIACOMETTI *v.* PRODGERS.

[1871 G. 51.]

Wife's Equity to a Settlement—Sufficient Maintenance—Marital Rights.

On a marriage in 1862, the parties having no property, no settlement was made; but the husband, at the wife's request, gave up an appointment producing more than £300 a year. In the same year the wife's mother settled funds producing about £1000 a year on the wife for life, for her separate use, with remainder to the children, giving the husband £200 a year for life after the death of his wife; and shortly afterwards she gave the wife a further income of above £700 a year for her separate use. The wife allowed the husband £100 a year till 1865, when they ceased to live together. In December, 1870, he obtained a decree for restitution of conjugal rights, and a separation deed was thereupon executed by which she agreed to give him an annuity of £300 a year, and to maintain their two children while with her, his rights as to her unsettled property not being affected. At this time the wife had saved about £6000 out of her separate income. It appeared that the husband was not to blame in the disputes. A sum of £6000 having devolved upon the wife under the intestacy of a relation:—

Held (affirming the decree of *Malins*, V.C.), that the wife was not entitled to any settlement out of this sum.

THIS was an appeal by the Plaintiff, Mrs. *Giacometti*, from a decision of Vice-Chancellor *Malins*.

The Plaintiff, who was the daughter of a wealthy lady, but had no property of her own, intermarried in *London*, on the 15th of February, 1862, with the Defendant *Giacometti*, who also had no property; but, at his wife's request, gave up an appointment in one of the Austrian *Lloyd's* ships bringing him in between £300 and £400 a year. No settlement was made. On the 9th of November, 1862, the wife's mother settled funds, producing about £1000 a year, upon trust to the Plaintiff for life, for her separate use, and after her decease for her children, the husband taking nothing but £200 a year for life after the death of his wife. In December, 1862, the mother appointed to the wife, for her separate use, a life interest in a fund producing more than £700 a year.

The Plaintiff did not allow her husband to interfere with her income, but until 1865 allowed him £100 a year. In 1865 they separated, and had never since lived together. There were two

children of the marriage, who were entirely supported by the Plaintiff. Some time after this the husband instituted a suit for the restitution of conjugal rights, and in December, 1870, obtained a decree. To avoid the decree being enforced, the Plaintiff, by a deed of separation of the 9th of February, 1871, agreed to pay him £300 a year during their joint lives, and if he survived her, £100 a year during the remainder of his life, and to provide for the maintenance and education of the children while left with her. It was provided by the deed that nothing contained in it should affect any right of the husband in respect of the money to which she was entitled as one of the next of kin of *Laura Blades*, or in respect of any other property to which she might become entitled.

At the time of this agreement the Plaintiff had saved out of her separate income about £6000, which she charged with the payment of the annuity to the husband.

It appeared from the evidence of the Plaintiff's own brothers that the Plaintiff was the person in fault in the disagreements between her and her husband.

The Plaintiff filed her bill in this suit to enforce her equity to a settlement out of £6000, to which she had become entitled as one of the next of kin of *Laura Blades*. Vice-Chancellor *Malins* dismissed the bill with costs (1).

Mr. *Karslake*, Q.C., and Mr. *Willis*, for the Appellant, distinguished the case from *Spicer* v. *Spicer* (2), *Aguilar* v. *Aguilar* (3), and *In re Erskine's Trusts* (4), and contended that the wife was entitled to a settlement unless the husband had made a settlement upon her: *Macqueen's* Husband and Wife (5).

Mr. *Glasse*, Q.C., and Mr. *Shebbeare*, for the husband, were not called upon.

LORD SELBORNE, L.C.:—

It has been very rightly admitted by Mr. *Karslake* that these are cases eminently of discretion—a discretion to be exercised upon judicial principles which have reference to the law on which the

(1) Law Rep. 14 Eq. 253.
(2) 24 Beav. 365.
(3) 5 Madd. 414.
(4) 1 K. & J. 302.
(5) 2nd Ed. p. 89.

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rights of the parties are founded. By law the husband is entitled to his wife's personal estate not settled to her separate use. On the other hand, by law he is under the obligation of discharging the duty, or at least of being willing to discharge the duty, of maintaining her and her children. In this particular case the husband was a poor gentleman, a foreigner, an officer in the public service of his country, dependent at the time of his marriage upon his professional income. The wife, though not herself at that time a rich lady, was the daughter of a very rich mother. The husband made no settlement on his wife, and he was not in a position in which it was possible for him to do so—that the wife well knew—but it is admitted that at the instance of the wife he gave up his whole means of living. In that state of things, within a year of the marriage the wife's rich mother settled on her, with remainder to her children (subject to a reversionary life annuity of £200 a year to the husband), the sum of £33,333 consols—in substance £1000 a year; and shortly afterwards in the same year she gave the wife, under a power, a life interest in about £26,000 consols. The lady, therefore, is admitted to have, subject to such concessions as she has since made in her husband's favour, a present life income of, in round numbers, £1700 a year.

The children, who have no equity except through their mother, have settled upon them £1000 a year at all events; and in addition to what I have mentioned the wife, finding her fortune more than ample for all her purposes hitherto, has saved out of it a sum of more than £6000, and there is nothing to lead to the conclusion that further saving may not hereafter go on. It appears that the husband and wife did not live happily together. I do not go into the merits or demerits on either side, only it seems due to the husband to observe that the Vice-Chancellor, who examined the evidence on the subject, and whose statement as to the effect of the evidence is not challenged as inaccurate, considered (and it appears that even the wife's nearest relatives were of opinion) that no blame was to be cast on him. The husband was willing and desirous to live with his wife, and took proceedings for restitution of conjugal rights. He obtained a decree for that purpose, and would have enforced it but for an agreement of separation, the effect of which was to make the wife's savings a security to the

husband for an income which, taking into account what he would have in reversion under the mother's settlement, would be £300 a year during his life, the wife maintaining her children as long as he chose to leave them with her, but he being under no obligation to continue to do so, and not renouncing his paternal rights; and this instrument, deliberately executed by the wife in order that she might purchase the right of living apart from her husband and be released from the decree for restitution, contains an express agreement that the provision thereby made for the husband shall not in anywise restrict or abridge any right, title, or claim of the husband in respect of the fund which is now in controversy. Now that fund is £6000. The Vice-Chancellor, in the exercise of his discretion, has thought that under these circumstances the principle laid down by Sir *John Leach* in *Aguilar* v. *Aguilar* (1), and followed in *Spicer* v. *Spicer* (2) and *Re Erskine's Trusts* (3), applies. Sir *John Leach* said, in *Aguilar* v. *Aguilar*, that no part of the fund there in controversy (though I think the husband became insolvent) was to be settled on the wife, "because she had an ample separate provision for maintenance secured to her by settlement, as well as further separate provision under the will of a relation," adding that the principle upon which this Court gave such a provision out of property of this description against the husband when he deserted the wife (which this husband has not done), and against his general assignee in case of bankruptcy or insolvency (events which in this case have not happened), was, that the law, when it gave the wife's property to the husband, imposed upon him the obligation of maintaining her, and if he failed in that obligation, either by the desertion of his wife or by his inability to assist in her support, this Court would fasten that obligation upon the property itself; but that this principle did not apply where the wife had secured to her a competent separate maintenance. Here the wife has secured to her much more than a competent separate maintenance, and the husband is placed by the effect of his marriage in a worse position, with respect to his maintenance, than he otherwise would be, and it is at the instance of his wife that he is not in possession of his marital rights, which were ordered to be restored to him, and the restoration of which to him would practically give

(1) 5 Madd. 414. (2) 24 Beav. 365. (3) 1 K. & J. 302.

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him the benefit of her income, even though settled to her separate use without power of anticipation.

I am of opinion that, under these circumstances, the Vice-Chancellor wisely and properly exercised his discretion by dismissing the bill.

SIR W. M. JAMES, L.J.:—

I am of the same opinion. The bill, in my judgment, was from the first a hopeless bill, and the appeal is an idle appeal which has caused an unjustifiable waste of the public time.

SIR G. MELLISH, L.J., concurred.

Solicitors: Dr. *Zimmerman;* Messrs. *Gray, Johnston, & Mounsey.*

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HARRISON *v.* HARRISON.

[1868 H. 233.]

Administration—Marshalling—Scotch Descended Estates—Lex loci rei sitæ—Costs.

A testator domiciled in *England* died possessed of personal estate and also of real estates in *Scotland.* His will purported to deal with the Scotch real estates, but was inoperative to pass them, and they descended to the Scotch heir. A suit having been instituted for the administration of the testator's estate against the executors, one of whom was the Scotch heir, he elected to take the descended estates in opposition to the will, and gave up the legacy which had been bequeathed to him by the will:—

Held, first, that the liability of the Scotch real estates to the payment of debts, as between the heir and the pecuniary legatees, must be determined by the law of *Scotland*, and not by the law of the country where the testator's estate was being administered:

Secondly, that as the law of *Scotland* threw the general debts primarily on the personal estate, and did not permit them to fall, directly or indirectly, on the real estate until the personal estate was exhausted, there could be no marshalling in the English Court against the Scotch heir in favour of the pecuniary legatees:

Thirdly, that no part of the general costs of the suit could be thrown on the Scotch estates; and that the heir was entitled to his costs out of the personal estate except the extra costs occasioned by his election.

Decision of the Master of the Rolls reversed.

Semble, that if the real estate had been situate in *England*, the costs of the suit, which, under the circumstances, would have been confined to the administration of the personal estate, ought not to have been thrown on the real estate.

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THIS was an appeal from a decision of the Master of the Rolls.

W. Harrison, who was domiciled in *England*, by his will, dated the 13th of February, 1868, after directing the payment of his debts, funeral and testamentary expenses, and making divers pecuniary and specific bequests, and devising certain freehold estates in *England*, devised to his son *William Harrison* his estate called *Gullielands*, in the county of *Dumfries*, in *Scotland*, and also the sum of £2000. He also gave other estates in *Scotland* and pecuniary legacies to his son *James Harrison* and his daughter *Margaret Harrison*, the Plaintiff, and an estate called *Heckegirth*, in *Scotland*, to his trustees upon the trusts therein declared for the benefit of his daughter *Amelia Irving* and her family. And he gave and devised all the residue of his real and personal estate to his wife and children equally, as tenants in common. The testator appointed the Plaintiff, his two sons, and the Defendant *C. E. Edwards*, his trustees and executors.

The testator died on the 14th of March, 1868, leaving four children, of whom the Defendant *W. Harrison* was his eldest son and heir-at-law. *Margaret Harrison*, the widow, died on the 30th of March, 1868. The bill was filed for the administration of the real and personal estate of the testator. In the course of the suit *W. Harrison* became aware of the fact, of which he was previously ignorant, that the will, having come into operation previously to the commencement of the *Titles to Land Consolidation Act* (*Scotland*) (31 & 32 Vict. c. 101), was ineffectual to pass real estate in *Scotland*. He accordingly claimed all the Scotch real estates of his father, as heir-at-law. The Master of the Rolls held that it was competent to him to elect to take the Scotch estates in opposition to the will, although he had previously received his legacy of £2000, which he was accordingly ordered to refund. His Lordship also directed that the legacy repaid by the heir-at-law should be applied in compensation of the persons disappointed by the heir's election, and that as no part of the personal estate was undisposed of, the testator's debts, funeral and testamentary expenses, and the costs

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of the suit, should be primarily paid out of the descended Scotch estates (1).

From this decision the Defendant *W. Harrison* appealed.

1872. Dec. 5. The appeal came on to be heard before the Lord Chancellor and the Lords Justices.

Mr. *Millar*, and Mr. *J. T. Anderson*, for the Appellant:—

If this had been English real estate the Court would not have made it liable to the costs, for it is *dehors* the will, although the Court may make it liable to debts, because it is by law already subject to debts. *Stringer* v. *Harper* (2) illustrates this. In *Row* v. *Row* (3) an opinion is intimated that there is a jurisdiction in the case of a trust which does not exist when the legal estate descends. But whatever may be the rule as to English estates descended the Court can have no power to charge the Scotch estates with debts or costs: *Drummond* v. *Drummond* (4); *Elliott* v. *Lord Minto* (5); *Carron Iron Company* v. *Maclaren* (6). The heir is liable in the Scotch tribunals for his application of the real estate, and there is no evidence that the Scotch Courts would allow payment of general debts or costs of an English Chancery suit out of the Scotch realty.

[They also referred to *Davies* v. *Topp* (7) and *Haslewood* v. *Pope* (8).]

Mr. *Anderson*, Q.C., and Mr. *Graham Hastings*, for *James Harrison* and the trustees of Mrs. *Irving*:—

The legacy which is brought back must go to satisfy the disap-

(1) 1872. March 4. THE MASTER OF THE ROLLS, in giving judgment, said that the rule on which he had for many years acted as to the distribution of assets was as follows:—In payment of debts the personal estate undisposed of was first applicable, then the real estate specifically devised for payment of debts, then the real estate descended, then the residuary real and personal estate devised and bequeathed by the will, then the pecuniary legacies, and then the real and personal estate specifically devised and bequeathed *pro ratâ*. The costs of the suit, in his opinion, were payable out of the assets in the same order.

(2) 26 Beav. 585.
(3) Law Rep. 7 Eq. 414.
(4) 6 Bro. P. C. 601.
(5) 6 Madd. 16.
(6) 5 H. L. C. 416.
(7) 1 Bro. C. C. 524.
(8) 3 P. Wms. 322.

pointed devisees. If the real estate had been English the order of liability to debts would be that laid down in *Jarman* on Wills (1); *Seton* on Decrees (2); and it is reasonable that the costs should follow the same rule as the debts: *Row* v. *Row* (3).

The equity of marshalling is not confined to creditors; if they have been paid out of a fund applicable to legacies, the legatees can go against the fund out of which they ought to have been paid: *Williams* on Executors (4). Then the fact that this is Scotch estate makes no difference. Foreign real estate is treated as assets to pay debts: *Williams* on Executors (5); *Noell* v. *Robinson* (6). The case of *Trotter* v. *Trotter* (7) shews that Scotch law has no application except in determining whether the will passes the Scotch estates. The suit was a proper administration suit, and the costs are the first charge on the personal estate.

Mr. *Fry*, Q.C., and Mr. *Waller*, for the Plaintiff.

Mr. *Roxburgh*, Q.C., Mr. *Southgate*, Q.C., Mr. *Fischer*, Q.C., and Mr. *Forster* for other parties.

LORD SELBORNE, L.C.:—

We are clearly of opinion that it is necessary to ascertain the law of *Scotland* as applicable to the questions raised in this case. On that point we are not really at variance with any opinion expressed by the Master of the Rolls, because his Lordship's attention was not called to that view of the question, the case being argued before him as if the real estate had been English.

We feel, however, bound to say that, taking the order of the Master of the Rolls as referring only to English descended estates, and putting out of consideration the particular costs connected with the exercise by the heir of his election, it does not appear to us to be a true result either of principle or of the English authorities that the costs of the general administration of the personal estate would have been thrown on the real estate in favour of legatees, upon the principle of marshalling.

(1) 3rd Ed. vol. ii. p. 588.
(2) 3rd Ed. p. 317.
(3) Law Rep. 7 Eq. 414.
(4) 6th Ed. vol. ii. p. 1582.
(5) 6th Ed. p. 1539.
(6) 2 Ventr. 358.
(7) 3 Wils. & Sh. 407.

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But as this is not a case of descended English estate it is not possible to determine the question until we have information concerning the law of *Scotland* as bearing on the subject. In our judgment all questions as to the burdens and liabilities of real estate situate in a foreign country, in the absence of any trust or personal contract (which might make a difference), depend simply upon the law of the country where the real estate exists. Here there is no question of trust or personal contract at all. It must depend therefore upon the *lex loci rei sitæ*, and upon nothing else.

Then the sole question is what is the form of inquiry that ought to be directed, because we think that if it should turn out that by the *lex loci rei sitæ* Scotch real estate under the control and power of the heir-at-law, who is properly a party before the Court, is liable to be applied in payment of debts in the administration of the general estate according to the proper equities, those equities ought to be worked out in this suit. The matters to be inquired into in substance are these; first, whether by the law of *Scotland* the Scotch descended heritable estate is liable to the payment of any, and which, of the debts of this testator; and, if it be so, whether by that law it is liable primarily or in exoneration of the personal estate, having regard to the fact that the pecuniary legatees will be wholly or partly unpaid if it be not so applied.

SIR W. M. JAMES, L.J., and SIR G. MELLISH, L.J., concurred.

A case was accordingly submitted for the opinion of the Lord Advocate (Mr. *George Young*) and Mr. *A. B. Shand*, and their opinions, verified by affidavit, were read at the further hearing of the appeal. The opinion of the Lord Advocate was as follows:—

1. According to the law of *Scotland*, the whole property of a party deceased, heritable as well as moveable, is liable for his debts, including funeral expenses. But in a question between the heir and the executor the heritable estate is primarily liable for heritable debts—that is, debts heritably secured—and the personal estate for personal debts; so that either paying in the first instance debts for which he is not primarily liable is entitled to ultimate relief against the other. The heritable estate is not primarily

liable for personal debts, and is not liable at all for testamentary expenses; and the executor paying personal debts has no claim for relief against the heir, unless he has paid in excess of the whole personal estate under the administration. In no case can he claim relief from the heir of testamentary expenses.

2. By the law of *Scotland* all personal debts must be paid out of the personal estate before all legacies, and a deficiency to answer legacies cannot be claimed, directly or indirectly, from the heir, and must be met by an abatement from the legacies. I give this answer without reference to the Act of 1868, which has altered the law in some respects, but does not apply to the present case.

Mr. *A. B. Shand's* opinion was to the same purport.

1873. Feb. 17. On this day the further hearing of the appeal took place before the Lord Chancellor and Lord Justice *Mellish*.

Mr. *Millar*, and Mr. *J. T. Anderson*, for the Appellant:—

The opinions of two eminent Scotch lawyers, which have not been disputed by the other side, shew that by the law of *Scotland* the descended real estate is not primarily liable to the debts of the testator, and can only be applied in their payment if the personal estate is insufficient. Therefore by no process of marshalling can it be made liable for the benefit of the legatees, whether pecuniary or specific. The case must be governed by the *lex loci rei sitæ*, otherwise the effect would be, that this Court would be creating a charge upon the real estate to which by the law of the country it is not subject. With respect to the costs, the Scotch estates are entirely beyond the scope of the English administration, and ought not to bear any of the costs of the suit.

Mr. *Anderson*, Q.C., and Mr. *Graham Hastings*, for the Defendant *James Harrison* and the trustees of Mrs. *Irving*:—

The opinions of the Lord Advocate and Mr. *Shand* correctly represent the Scotch law in the case of a testator domiciled in *Scotland*, and whose assets are being administered in *Scotland*. But here the administration is taking place in *England*, and the rights of the parties must be determined by the law of the

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country where the *concursus creditorum et legatorum* is: *Story's* Conflict of Laws (1); *Balfour* v. *Scott* (2); *Williams* on Executors (3). With respect to the costs, the heir was a necessary party to the suit in that capacity: and the Court has jurisdiction to make him pay costs. The testator included the Scotch estate in his will, and it is therefore equitable that it should bear its share, at least, of the cost of interpreting and executing the will.

Mr. *Fry*, Q.C., and Mr. *Waller*, for the Plaintiffs.

Mr. *Roxburgh*, Q.C., Mr. *Southgate*, Q.C., Mr. *Fischer*, Q.C., and Mr. *Forster*, for other parties.

LORD SELBORNE, L.C.:—

I am not sorry that we have heard some further argument upon the question; but what we have now heard has confirmed us in the opinion which we previously expressed.

The doctrine of marshalling as applied in favour of legatees against heirs-at-law taking descended real estates in *England* is part of the *lex loci* of *England* affecting those real estates, and no question of conflict of law can arise under those circumstances. It is a wholly different thing when persons who have an interest in the personal estate only, endeavour indirectly to establish in their own favour, or for their own relief, a burthen upon real estate situate in another country, which, by the law of that country, would not be administered so as to give them what they ask. I think, upon the evidence before us, it is perfectly clear that although this testator was domiciled in *England*, yet if *Scotland* had been the forum of administration, the Scotch real estate would not have been liable in relief of these legatees. I use the expression "liable in relief" advisedly, because without saying that it makes really any difference whether the creditors have been actually paid or unpaid, there being a fund in Court belonging to the personal estate applicable to their payment, yet, as a matter of fact, I understand that in this case the rights of creditors are altogether out of the question. They have been paid, and paid out of a fund which by the law both of *England* and

(1) 6th Ed. § 528. (2) 3 Paton's Sc. App. C. 300.
(3) 6th Ed. p. 1401.

Scotland is liable to their payment in priority to the rights of these legatees. The legatees ask that by virtue of the English doctrine of equity applicable to the administration of English real estates descended when personal legatees would be disappointed by the payment of creditors out of their fund, these legatees may be declared entitled to acquire the rights of creditors against the Scotch real estate. It is clear that in *Scotland* they would have no such right, and to me it seems equally clear that unless they have such a right in *Scotland* the law of *England* cannot give it to them. It is admitted, as I understand, that the burthen of liability to debts, so far as relates to real estate, can only be created by the *lex loci rei sitæ;* but it is suggested that the burthen may be laid on real estate on which it is not imposed by the *lex loci rei sitæ* by an indirect equity in favour of the legatees, because the creditors who have been paid might have pursued their own rights against the real estate without waiting, in the first instance, to see whether there was personal estate or not. It seems quite impossible that this can be correct, because, in the first place, as against the real estate in *Scotland* the Courts of *England* have no jurisdiction at all. Any jurisdiction which they can exercise as to the real estate in *Scotland* can only be through the medium of some personal equity attaching to the owner in *Scotland* of that real estate, who, in this case, is the Scotch heir. What is that personal equity? There is no fiduciary relation. What right have these legatees, upon the footing of personal equity, to say that the heir shall not enjoy the Scotch real estate as the law of *Scotland* gives it to him, or that any burthen shall directly or indirectly be thrown upon that real estate in their favour, which would not be imposed by the law of *Scotland?* It seems to me quite clear that this Court cannot found any such equity upon the accident of this heir-at-law being before it as a party to the suit. The equity must be founded upon some higher principle. The fallacy which pervaded the whole of Mr. *Anderson's* argument was this, that he assumed that the Scotch estate was properly brought into this Court as the forum of administration. But without first shewing what this Court has to do with respect to the Scotch real estate, and why it ought to be done, the proposition is not made out. There are, in point of fact,

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no debts to be paid out of the Scotch real estate; there are no trusts to be executed as to the Scotch real estate; there is no contract to be enforced as to the Scotch real estate; and unless this point is settled in Mr. *Anderson's* favour, that the indirect burthen is to be thrown upon the real estate in *Scotland* in favour of these legatees, which is the very matter of controversy, it is not here in the proper forum of administration. Therefore, for these reasons, it appears to me we must discharge so much of the order of the Master of the Rolls as relates to the payment of debts out of this Scotch real estate.

Then comes the question of the costs of the suit. Generally speaking, the proposition might be safely laid down that if the heir of a Scotch real estate is brought before the Court, and it turns out that the Court has nothing to do with the real estate in *Scotland*, and has nothing to do with the heir in any other character, not only no part of the costs can be thrown on that Scotch real estate, but the heir will be entitled to his costs out of the personal estate, for the sake of which he is brought here; and, so far as the conditions which I have stated are applicable to this case, I think the result should follow that the Scotch real estate should be exonerated from the costs, and the heir should have his costs. But those conditions are not applicable here without exception. The heir was also an executor, and although he may not have had his attention drawn to the state of the law and the state of the facts, yet we must impute to an executor, for the purpose, at all events, of dealing with the costs, the knowledge of the duty which he has to discharge. He, without the least impropriety of intention or conduct, received out of this estate £2000 as a legacy, which it turns out he was not entitled to receive unless he elected to give up the Scotch real estate which he elected to retain. Out of that state of things some inquiries arose, and some expense was incurred, and the question is, whether the expense of those inquiries which related to that question of election, so far as the expense has not been already provided for, ought to be thrown, in favour of the heir, upon the general personal estate? We think it ought not. We think that the heir should bear his own costs of the inquiry as to the subject of election and incident thereto, but that in other respects he

should have his costs out of the personal estate like the other parties to the suit.

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SIR G. MELLISH, L.J.:—

I am of the same opinion.

Solicitors for the Plaintiff: Messrs. *Deane & Chubb.*
Solicitors for the Defendants: Messrs. *Combe & Wainwright;* Messrs. *Emmet & Son.*

JERVIS *v.* BERRIDGE.

[1872 J. 63.]

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Jan. 30, 31; *Feb.* 18.

Statute of Frauds—Written Agreement with Terms omitted—Rescinding Agreement—Offer in Bill.

The Plaintiffs agreed to purchase an estate from the *L. Society*, and to pay a deposit on the signing of the contract. Before it had been signed the Plaintiffs verbally agreed with *B.* to make it over to him on certain terms. In order to enable *B.* to deal with the *L. Society*, the Plaintiffs signed and gave to him a memorandum, making over the contract to him in consideration of his paying to the *L. Society* the deposit, and engaging to pay a certain sum to the Plaintiffs; the other terms of the bargain between the Plaintiffs and *B.*, which were in favour of the Plaintiffs, being at *B.*'s request omitted from the memorandum. On the same day the contract between the Plaintiffs and the *L. Society* was signed, and the part signed by the *L. Society* was given to *B.*, who paid the deposit. *B.* afterwards repudiated all the stipulations in favour of the Plaintiffs which had not been inserted in the memorandum. The Plaintiffs then filed their bill against *B.* and the *L. Society*, asking to have the memorandum between *B.* and the Plaintiffs cancelled, and for a conveyance from the society on payment of what was due to them.

Held (affirming the decision of *Malins*, V.C.), that a demurrer by *B.* was not sustainable on the merits, for that the memorandum was only ancillary to the verbal agreement between the Plaintiffs and *B.*, and any use of it by *B.* for a purpose inconsistent with that agreement was fraudulent:

Held, further, that if the Plaintiffs could have maintained a bill for specific performance of the parol agreement between them and *B.*, on the ground that it had been in part performed—as to which *quære*—they were not bound to do so; but that, as *B.* had repudiated that agreement, they were entitled to fall back on their original rights under the agreement with the *L. Society:*

Held, further (differing from *Malins*, V.C.), that the bill was not demurrable for want of an offer to repay to *B.* what he had paid to the society.

THIS was an appeal by the Defendant *Berridge* from an order of Vice-Chancellor *Malins* overruling a demurrer.

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The substance of the bill, which was filed against *Berridge* and the *Law Life Assurance Society*, was as follows:—

In the latter part of 1871 the Plaintiffs negotiated with the *Law Life Assurance Society* for the purchase of the *Martin* and *O'Malley* estates in *Galway* and *Mayo*, which the society, who had been mortgagees of them, had purchased on a sale under the *Encumbered Estates Act*. An agreement was come to for the sale to the Plaintiffs at the price of £230,000, of which £10 per cent. was to be paid to the vendors on signing the contract, the form of which was agreed upon. During the negotiation the Plaintiffs incurred considerable expense in surveys, and entered into contracts for the purchase of various small properties which lay interspersed with the estates. The Plaintiffs required an advance of money to enable them to pay the deposit, and in November, 1871, the Defendant *Berridge* agreed to lend them £27,000 for two months, for which he was to receive a bonus of £5000.

On the 15th of November, 1871, the solicitors of the society wrote to the Plaintiffs that unless the contract was signed and the deposit paid within seven days the negotiation must be considered to be at an end.

The Plaintiffs communicated the purport of this letter to *Berridge*, with a view of hastening him in the advance of the money, but he, seeing that the Plaintiffs were in a difficulty, resolved to avail himself of it to secure for himself a share in the speculation, and first asked to have one-third, then, this having been acceded to, he asked for two-thirds. Par. 17 stated that ultimately, on the 17th of November, when it was too late for the Plaintiffs to apply for an advance elsewhere, he informed them that he would have no partnership, but would purchase the whole for himself. To induce the Plaintiffs to agree to this he offered the following terms: that he would pay the Plaintiffs £2000; that he would pay all the liabilities which the Plaintiffs had incurred with engineers, contractors, solicitors, and others, in connection with the estate; that with reference to the smaller purchases made by the Plaintiffs, he would take over all or such of the contracts as the Plaintiffs might wish, and relieve the Plaintiffs from all liability in respect of the contracts so taken over; that the management of the estates should remain in the hands of the

Plaintiff *Jervis* at a minimum salary of £1000 per annum, with a suitable residence on the property; and that *Jervis* should, in addition, be entitled to receive a share of the profit to arise from the undertaking, the amount of such share to be left to *Berridge*. Par. 18 stated that the Plaintiffs, having no choice, consented to these terms, and *Jervis* suggested to *Berridge* that a formal agreement should be drawn up for carrying out the arrangement. *Berridge* replied that it was unnecessary to consult a solicitor, and that he would draw up a short memorandum of agreement himself.

Par. 19. "In order that the Defendant *R. Berridge* might go to the directors of the Defendant society, and cause his name to be substituted as purchaser of the estates for the names of the Plaintiffs, he required a memorandum transferring the benefit of the contract to him. It was unnecessary for this purpose that the other terms of the said agreement between the Plaintiffs and the Defendant *R. Berridge* should be stated in the memorandum, and the Defendant *Berridge* was anxious that they should not appear on the memorandum which he intended to take to the directors. Accordingly, on or about the 18th of November, 1871, the Defendant *R. Berridge* produced to the Plaintiffs a short form of memorandum, which the Plaintiffs have since discovered that he had caused to be prepared by his solicitors, and at his request the Plaintiffs, who had no legal advice or assistance, signed the same."

Par. 20 set out the memorandum thus signed, which was a simple transfer to *Berridge* of the agreement with the society in consideration of *Berridge* paying to the society the deposit of £23,000, and agreeing to pay the Plaintiffs £2000 on the completion of the purchase. The Plaintiffs at the same time signed and gave to *Berridge* a contract for purchase of the estates by them from the society according to the form which had been agreed upon between the Plaintiffs and the society.

21. "It was well understood and recognised by the Defendant *R. Berridge*, when he requested the Plaintiffs to sign the said memorandum (as the fact was), that the same did not in fact contain the whole of the agreement between the parties, and in fact the other terms of the said agreement were referred to at the very interview between the Plaintiffs and the said Defendant at

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which the said memorandum was signed, and the Plaintiffs signed the same in order to assist the Defendant *R. Berridge* in dealing with the Defendant society, and in the full confidence and on the faith that he would perform on his part and carry into effect the other terms of the said agreement which were omitted from the said memorandum."

Berridge, on the 20th of November, 1871, paid the £23,000 to the society, handed over to them the contract signed by the Plaintiffs, and received a contract signed on behalf of the society.

The bill then proceeded to allege that *Berridge* repudiated those terms of the agreement which had not been reduced into writing, and to state various instances in which he had refused to comply with them.

On the 17th of January, 1872, the Plaintiffs sent to the society a formal notice not to convey to *Berridge*, as the Plaintiffs were about to file a bill against him in reference to the purchase.

The bill alleged that it was contrary to equity that *Berridge* should obtain the entire benefit of the Plaintiffs' contract with the society, and at the same time be allowed to repudiate the terms upon the faith of which the Plaintiffs signed the memorandum and transferred the contract to him, and that, inasmuch as *Berridge* fraudulently refused to perform the other terms of the agreement, and the same could not therefore be carried out in its integrity, the memorandum ought to be delivered up to be cancelled.

The original bill, filed on the 10th of June, 1872, prayed (1) that it might be declared that, under the circumstances, the Plaintiffs were not bound by the memorandum, and that *Berridge* was not entitled to the benefit thereof, and that it might be delivered up to be be cancelled; (2) that in the meantime the society, their trustees and agents, might be restrained from conveying or otherwise dealing with the estates.

On the 22nd of June, 1872, the purchase was completed and the estates conveyed to *Berridge*, who on the same day re-conveyed them to the society by way of mortgage. The bill was amended by stating this fact, and it prayed 1, that it might be declared that, under the circumstances, the Plaintiffs were not bound by the memorandum of agreement, and *Berridge* was not entitled to the benefit thereof, and that it might be delivered up to be cancelled;

2, that it might be declared that the society were trustees, for the Plaintiffs, of the estates agreed to be sold by them to the Plaintiffs, and that, upon payment by the Plaintiffs to the society of what was due to the society under the contract between them and the Plaintiffs, the society might be ordered to convey the estates to the Plaintiffs free from the mortgage, and that *Berridge* might be ordered to join in the conveyance for the purpose of releasing all his right or title (if any) in the premises; 3, that in the meantime the society, their trustees and agents, and *Berridge* and his agents, might be restrained from conveying, mortgaging, or otherwise dealing with the estates, or any part thereof.

To this amended bill *Berridge* put in a general demurrer for want of equity, which was overruled, with costs, by Vice-Chancellor *Malins*, who at the same time stated that the bill was defective in containing no offer to repay to *Berridge* what he had paid to the society; and that, if the demurrer had been on that ground alone, he should have allowed it with leave to amend. *Berridge* appealed.

Immediately after the demurrer had been overruled the Plaintiffs amended their bill, by inserting a statement that they had always been, and still were, ready and willing to repay *Berridge* the £23,000, and thereby offered to repay the same; and that they had always been willing to perform the agreement with *Berridge* in its integrity, but that *Berridge* had by his conduct rendered its performance impossible.

The *Solicitor-General* (Sir *G. Jessel*), and Mr. *Freeling*, for the Appellant:—

We demur on two grounds: on the merits and on the defect of the bill in containing no submission to pay. On the merits, we say that the *Statute of Frauds* is a bar to relief, for the Court cannot give a Plaintiff relief on the ground of parol agreements varying a written agreement: *Lord Irnham* v. *Child* (1); *Lord Portmore* v. *Morris* (2). Where there are parol terms varying the agreement in writing, relief can only be given on the ground of part performance, fraud, or mistake. A parol term which has been omitted from the written agreement may be set up by way of defence, but

(1) 1 Bro. C. C. 92. (2) 2 Bro. C. C. 218.

(a) WN (1873) 194.

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cannot be used by a Plaintiff: *Martin* v. *Pycroft* (1). There was no fraud here; the written agreement was used only for the purpose for which it was given. It may be that *Berridge* was afterwards advised that he was not bound to carry into effect the parol terms, but that is not fraud: *Wood* v. *Midgley* (2). If the Plaintiff is entitled to any relief here it must be by way of specific performance, on the ground that there was an agreement partly performed, though not wholly reduced into writing: *Clifford* v. *Turrell* (3); but he cannot have that relief on the present bill, which prays to have the agreement rescinded. Then, in form, the bill is demurrable for want of an offer to pay: *Godbolt* v. *Watts* (4); *Mason* v. *Gardiner* (5); *Whitmore* v. *Francis* (6); *Toulmin* v. *Reid* (7); *Langton* v. *Waite* (8).

[Mr. *Glasse*, Q.C., referred to *Clarke* v. *Tipping* (9), *Barker* v. *Walters* (10), and *Colombian Government* v. *Rothschild* (11).]

Mr. *Glasse*, Q.C., Mr. *Davey*, and Mr. *Daw*, appeared for the Respondent, but the Court adjourned the case to consider whether they should be called on.

Feb. 17. LORD SELBORNE, L.C., delivered the judgment of the Court:—

The argument for the demurrer in this case was rested on two grounds: 1. That on the merits the Plaintiffs had not stated facts entitling them to any relief; 2. That they had not, by their bill, offered to repay to the demurring Defendant certain sums paid by him to the *Law Life Society*, which they will be bound to repay if they succeed in obtaining the relief asked for.

The latter of these objections has ceased to be of practical importance in this case since the order of the Vice-Chancellor overruling the demurrer, because the bill has been re-amended and

(1) 2 D. M. & G. 785, 795.
(2) 5 Ibid. 41.
(3) 1 Y. & C. Ch. 138.
(4) 2 Anstr. 543.
(5) 4 Bro. C. C. 436.
(6) 8 Price, 616.
(7) 14 Beav. 499.
(8) Law Rep. 4 Ch. 402.
(9) 4 Beav. 588.
(10) 8 Ibid. 92.
(11) 1 Sim. 103.

now makes this offer, which was before omitted; and if the objection were valid, liberty to amend would, as of course, have been given. But the point is one of importance to the general practice of the Court, and as it has been insisted upon before us (probably as affecting costs) we think it right to decide it.

Upon principle there appears to be no good reason why a Plaintiff in equity, suing upon equitable grounds, should be required to offer, on the face of his bill, to submit to those terms which the Court, at the hearing, may think it right to impose as the price of any relief to which he may be entitled. Such an offer, if made, might be rendered nugatory at, or at any time before, the hearing, by the Plaintiff dismissing his own bill; and, if it were not made, the power and duty of the Court to make the relief, if any, which it might grant at the hearing, conditional upon proper terms, would be exactly the same. For this purpose no submission on the part of the Plaintiff is necessary, and, if it were, it might properly be implied, if from no other part of the bill, from the ordinary prayer for general relief; which must at least mean that the Plaintiff is desirous that everything which is necessary for the purposes of the relief which he expressly prays, may be done. A contrary view would be attended with many difficulties. In some cases a Plaintiff may not correctly foresee the terms which the Court may think it equitable to impose upon him; in others, those terms may themselves form the whole, or part, of the matters in controversy between the parties. It would be strange if a bill were demurrable for not offering those terms, the right of the Defendant to which it might expressly (though erroneously) controvert without being demurrable.

The Solicitor-General did indeed suggest, as a reason for the rule for which he contended, that it would enable a Defendant to stop a suit before the hearing, by offering the Plaintiff all that he asked upon the terms which justice might require. But there are many cases (as *e. g.* where a bill prays that the rights of all parties, under instruments of doubtful construction or effect, may be ascertained and declared) in which it would be impossible for a Defendant to stop a suit by offering to submit to a decree in the very terms of the prayer; and it is by no means evident why, if the relief asked were so certainly and necessarily conditional upon particular terms,

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as must be assumed by a demurrer to the bill for not offering those terms, the right of a Defendant to stop the suit by an offer, on those terms, of the whole relief prayed, should be less effectual than in any other case in which the Defendant might offer substantially the whole relief which the Plaintiff might be able to obtain by bringing his suit to a hearing, though not in the precise words of the prayer. If the question of terms is one which ought to be determined at the hearing, and not upon a motion to stay proceedings, I should say, upon the same principle, that it is one which ought not to be determined upon demurrer.

The authorities appear to me to be consistent with this view. I confess I was surprised to hear the argument that, in such a case as the present, an offer, upon the face of the bill, to repay the moneys expended by the demurring Defendant, was necessary; my impression, during many years of practice at the Bar, having always been to the contrary. In that impression, as to what is, at least, the modern practice of the Court, I am confirmed by several of the authorities which were mentioned at the Bar, particularly by those referred to by Mr. *Glasse* at the close of the argument. There are, indeed, certain cases where a Defendant has incurred forfeitures or penalties, or where the controversy relates to usurious or other unlawful transactions, in which the whole *locus standi in curiâ* of the Plaintiff is dependent on an election, which must be declared by the bill, to forego legal rights for the sake of equitable remedies. There are other cases, as of suits by mortgagors against mortgagees, in which the Plaintiff has no right to sue the Defendant at all, except for the purpose of redemption; and if he does not, expressly or in substance, offer (or rather ask) to redeem, he is not *rectus in curiâ*. All these cases stand on principles of their own, and furnish no rule when those principles do not apply.

The technical objection, therefore, must, in my opinion, be overruled. The argument upon the merits of the present bill remains to be considered.

The object of the bill, as amended, is to obtain specific performance of a contract in writing between the Plaintiffs and the *Law Life Assurance Society*, signed between those parties on the 18th of November, 1871, for the sale by the society to the Plaintiffs of certain valuable estates in *Ireland*, and to prevent the demurring

Defendant *Berridge* from having the benefit of that contract under an instrument of the same date, signed by the Plaintiffs, and purporting to be a transfer thereof. This is the substance of the relief prayed for.

The main averments of fact, upon which the Plaintiffs' case rests, are those contained in the 17th and four following paragraphs of the amended bill. [His Lordship here stated the substance of those paragraphs.]

According to the view which I take of the effect of these statements, the only real agreement between the Plaintiffs and the demurring Defendant alleged by the bill is the verbal one mentioned in paragraph 17; and the written document signed by the Plaintiffs and purporting to be a transfer was not (as in *Lord Irnham* v. *Child* (1), *Martin* v. *Pycroft* (2), and other cases of that class) a contract valid and operative between the parties, but omitting (designedly or otherwise) some particular term which had been verbally agreed upon; but was a mere piece of machinery obtained by the demurring Defendant from the Plaintiffs, as subsidiary to and for the purposes of the verbal and only real agreement, under circumstances which would make the use of it for any purpose inconsistent with that agreement dishonest and fraudulent. In this state of things, there being a valid contract in writing between the *Law Life Society* and the Plaintiffs, the performance of which is sought to be intercepted by the demurring Defendant by reason of this instrument, though he had, many months before the filing of the original bill, repudiated and refused to perform the verbal agreement, on the faith of which (according to these statements) that document was given—the only question is, whether, if all these statements prove to be true, the Plaintiffs will be entitled at the hearing to the relief which they ask, or to any part of it? I have no doubt whatever that they will, upon proper terms, be so entitled, if the Defendants do not, by answer or otherwise, displace this case.

The Solicitor-General argued that the bill was an attempt either to enforce a verbal contract contrary to the *Statute of Frauds*, or to vary, in the Plaintiffs' favour, the effect of a written contract by the introduction of terms agreed upon by parol and designedly

(1) 1 Bro. C. C. 92. (2) 2 D. M. & G. 785.

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omitted from the writing. In my view of the bill, it asks neither of these things. It certainly does not ask for specific performance of the verbal agreement which has been repudiated by the Defendant. It does not seek to enforce any hybrid agreement, compounded of the written instrument and some terms omitted therefrom; but it asks the Court to say that, under the circumstances alleged, the written instrument does not constitute such a binding contract between the Plaintiffs and the Defendant *Berridge* as can be allowed to be set up in equity by *Berridge*, to prevent the performance, in the Plaintiffs' favour, of the contract between themselves and the *Law Life Society*. To the question so raised the *Statute of Frauds* (which is a weapon of defence, not offence, and which does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intention of the parties) is wholly irrelevant.

Mr. *Freeling*, on the other head, argued (citing *Clifford* v. *Turrell* (1), before Vice-Chancellor *Knight Bruce*) that the signature of the written document in this case might operate as a part performance of the parol agreement, so as to entitle the Plaintiffs to specific performance of the entire parol agreement against the Defendant *Berridge*, and that the Plaintiffs, not asking for such relief, had mistaken their remedy. I do not think it necessary to decide whether the Plaintiffs could, on the ground thus suggested, have successfully sought specific performance of the parol agreement; but I am of opinion that, considering the repudiation of that agreement by the Defendant *Berridge*, and the lapse of time after that repudiation before the original bill was filed, they were certainly not bound to do so; and that they were entitled (acquiescing in the view that the parol agreement could not be enforced) to fall back upon their original rights, under the contract between themselves and the *Law Life Society*.

It is scarcely necessary to add, that the conveyance of the purchased estate by the *Law Life Society* to *Berridge*, after the original bill was filed (to which they were both Defendants), can make no difference in this case. Whatever *Berridge* takes by that conveyance, he takes subject to all the equities which the Plaintiffs had against the *Law Life Society*. He stands so far, for the purpose of

(1) 1 Y. & C. Ch. 138.

the subsequent proceedings, in their shoes; and his own proper case against the Plaintiffs cannot be made better or worse by reason of that conveyance.

The appeal must be dismissed with costs.

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Solicitors: Messrs. *Hunter, Gwatkin, & Hunter;* Messrs. *Syms & Son.*

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Production of Documents—Privileged Documents—Affidavit.

A Plaintiff will not be compelled to produce muniments of title which he swears do not, to the best of his knowledge, information, and belief, contain anything impeaching his case, or supporting or material to the case of the Defendant.

Bolton v. *Corporation of Liverpool* (1) considered.

A Plaintiff will not be compelled to produce confidential correspondence between himself or his predecessors in title and their respective solicitors with respect to questions connected with matters in dispute in the suit, although made before any litigation was in contemplation.

Pearse v. *Pearse* (2) and *Lawrence* v. *Campbell* (3) approved.

Order of the Master of the Rolls affirmed.

THE bill in this suit was filed by a commoner on *Dartford Heath* against the lord of the manor of *Dartford*, in order to establish certain rights of common claimed by the Plaintiff and the other commoners.

The Plaintiff, on the application of the Defendant, made an affidavit as to the documents in his possession, not claiming privilege as to any of them. The Plaintiff afterwards amended his bill, and the Defendant then obtained an order for production. The Plaintiff thereupon, on the 30th of May, 1872, filed an affidavit stating that he had in his possession or power the documents relating to the matters in question in the suit set forth in the two schedules thereto, and that he objected to produce the documents set forth in the second schedule for the following reasons:—First, as to the documents in the first part of the schedule, because they were the

(1) 1 My. & K. 88. (2) 1 De G. & Sm. 12.

(3) 4 Drew. 485.

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muniments of his title to the several properties owned by him in the parishes in *Kent* therein mentioned; and did not, as he believed, contain anything material to the Defendant's case. Secondly, as to the documents in the second part of the schedule, because they were in their nature privileged. The schedule described these documents as "Correspondence between the Plaintiff and his predecessors in title on the one hand, and his and their solicitors from time to time on the other;" and also correspondence and documents passing or obtained during the progress of or in immediate contemplation of this suit.

The first part of the second schedule included most of the documents specified in the schedule to the former affidavit, and also a great number of other documents. The second part gave no specific list of documents.

The Plaintiff, on the 22nd of November, filed a further affidavit stating that since his former affidavit was sworn, he had been advised that four of the documents specified in the first part of the second schedule might possibly be material to the case of the Defendant, and the Plaintiff submitted to produce the same; but as to the remaining documents set forth in the first part of the second schedule, they related exclusively to his title, and to the best of his knowledge, information, and belief, did not contain anything impeaching his case, or forming or supporting the Defendant's title or the Defendant's case, and were not in any manner material to the case of the Defendant as to any matter in dispute between the Plaintiff and the Defendant in this suit; and he objected to produce those documents. He further stated that by the description "Correspondence between the Plaintiff and his predecessors in title on the one hand, and his and their solicitors from time to time on the other," he had meant correspondence between himself and his family solicitors and his present solicitors in this cause, written in contemplation or in the course of this suit, or with reference to the subject matter in dispute, and letters between his mother and her solicitors with reference to questions connected with the matters in dispute in this cause, and that all the documents included under this description were of a private and confidential nature; and he objected to produce them because from their nature they were privileged.

The Defendant then took out a summons for the production of the documents as to which protection was claimed. The Master of the Rolls, on the 11th of December, dismissed the summons with costs.

The Defendant appealed.

Mr. *Fry*, Q.C., and Mr. *C. Hall*, for the Appellant:—

We say that the affidavits are unsatisfactory, and are insufficient to protect these documents. In the first place, the Plaintiff speaks only as to his knowledge, information, and belief; and that was in *Combe* v. *Corporation of London* (1) held to be insufficient. It is clear that the Plaintiff has not examined those documents, and he does not say that he has been advised by any person who has done so: *Attorney-General* v. *Corporation of London* (2); *Boyd* v. *Petrie* (3). It is consistent with this affidavit that no one has examined these deeds. The words in *Peile* v. *Stoddart* (4) were stronger. There is no cross-examination on these affidavits, and those who make them ought to be bound to use no doubtful expressions.

[The LORD CHANCELLOR:—Can a man in such a case say more than according to his knowledge, information, and belief?]

Then as to the correspondence; that which passed before the bill was filed must be produced: *Paddon* v. *Winch* (5). There is no pretence for protecting that of the predecessors of the Plaintiff: *Hawkins* v. *Gathercole* (6).

Mr. *Joshua Williams*, Q.C., and Mr. *Whately*, for the Plaintiff:—

It is absurd to suppose that a gentleman is to read through all these documents and profess to understand them. The Defendant refused to take the affidavit of the solicitors. How can a man in such a case speak to more than his knowledge, information, and belief?

(1) 1 Y. & C. Ch. 631; on app. 10 Jur. 57.
(2) 2 Mac. & G. 247.
(3) 17 W. R. 903; W N (1869) 181.
(4) 1 Mac. & G. 192.
(5) Law Rep. 9 Eq. 666.
(6) 1 Sim. (N.S.) 150.

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Mr. *Fry*, in reply, cited several of the cases referred to in the judgment of the Lord Chancellor.

LORD SELBORNE, L.C.:—

The questions which have been argued in this case were, as I thought, long since covered by authority, and it has been with some surprise that I have heard them revived. Of course I do not mean to say that upon the terms of particular affidavits questions of this sort may not always be liable to arise; but I should have thought that the principles which govern them were by this time well understood, and less liable to be brought into controversy than from the course of the argument appears to be the case.

Taking the first point, which relates to the title-deeds, it is said that the Plaintiff, who is here in the situation in which a Defendant ordinarily is, having to make discovery, has not sufficiently brought himself within that protection against the production of title-deeds which is given by the Court.

Now we have nothing to do with the question whether that protection is or is not based on sound principles, but only with the question whether it ought to be extended to the documents in this case. There might perhaps be great reason for holding that if a man comes into Court as a Plaintiff, attacking somebody else, he ought to be bound to disclose everything on which he relies for the purpose of his attack. But that undoubtedly is not the present rule of the Court; and the sole question here is, whether the Plaintiff has, by the terms of this affidavit, sufficiently claimed the protection which the rules of the Court give when it is properly claimed.

Now in this case, as far as I can judge, there is certainly no indication whatever of an intention on the part of the Plaintiff to fence with the Court, or to evade giving the discovery which is due from him. So far from that, I find that this further affidavit appears to have been in a great measure made for the purpose of correcting any error which the latitude of the expressions of the former affidavit might possibly have covered. [His Lordship then stated the substance of the affidavits.] In my judgment the Plaintiff has not only said everything needful to entitle him to

protection, but he has said it with a plainness of expression beyond that which has been required from Defendants in some of the cases. In *Bolton* v. *Corporation of Liverpool* (1), Lord Cottenham, affirming a decision of the Vice-Chancellor (2), refused production of documents upon a statement much less complete than that in this case. The very argument which we have heard here to-day was urged, and is thus dealt with by Lord Cottenham (3):—"The Plaintiff here does not claim anything positively or affirmatively under the documents in question. He only defends himself against the claims of the corporation, and suggests that the documents evidencing their title may aid his defence. How? By proving his title he says. But how can those documents prove his title? Only by disclosing some defect in that of the corporation. The description of the documents is, that they rebut or negative the Plaintiff's title: they are the corporation's title, and not his, and they are only his negatively, by failing to prove that of the corporation. He rests on the right which he has, in common with all mankind, to be exempt from dues and customs; and he says, 'Prove me liable, if you can.' The corporation have certain documents which they say, prove this liability. He cannot call for these documents, merely because they may, upon inspection, be found not to prove his liability, and so to help him and hurt his adversary, whose title they are." The position of the parties was there reversed, and some of Lord Cottenham's expressions relate to that fact, but I apprehend that the principle is the same.

However, I should be very sorry to be understood to mean that it would be safe for any one to content himself with saying what was said there, which was simply that the documents related to his own title. There can be no doubt that, according to the present practice of the Court, a party is expected to go further, and at least to say negatively that the documents do not prove or tend to prove the title of his adversary.

Here the only question is, whether that may, with regard to title-deeds of this description, be competently done by saying that to the best of his knowledge, information, and belief, they do not. No authority whatever has been produced to shew that

(1) 1 My. & K. 88. (2) 3 Sim. 467. (3) 1 My. & K. 92.

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it ever has been held or laid down that a man may not protect himself by putting the negative portion of his statement in that form. I find that in *Adams* v. *Fisher* (1) the form of the denial of the relevancy of the documents to the Plaintiff's case was exactly the same as in this case. The Defendant denied, according to the best of his knowledge, remembrance, information, or belief, and it does not seem to have occurred to Lord *Cottenham*, or to any one else, that that was insufficient. In *Peile* v. *Stoddart* (2), belief upon advice, and no more, was held to be sufficient, and my judgment certainly is, that unless there were, as in the case of *Combe* v. *Corporation of London* (3), something which qualified this statement, or shewed substantial insufficiency on the face of the affidavit, an affidavit such as this is sufficient to entitle a party to the protection which he asks.

I now pass to the other branch of the argument. The first of these affidavits mentioned certain correspondence described as being a correspondence between the Plaintiff and his predecessors in title, and their respective solicitors, which, according to reasonable intendment, I think means in their character of solicitors. With, as it appears to me, a scrupulous spirit and purpose, this second affidavit corrects a merely verbal inaccuracy in the description of the correspondence in the first affidavit.

The only question is, whether the Plaintiff has sufficiently claimed protection for these confidential letters (he says expressly that they were of a confidential nature) which passed between himself and his mother and their respective solicitors with reference to the subject matter in dispute, and with reference to the questions connected with the matters in dispute.

I think that if this question had arisen in the days of Lord *Cottenham*, it would have better justified the prolonged argument than at the present time. There can be no doubt that the law of the Court as to this class of cases did not at once reach a broad and reasonable footing, but reached it by successive steps, founded upon that respect for principle which usually leads the Court aright. The law has now attained to a footing which made me a little surprised to hear the matter re-opened now. The cases of

(1) 3 My. & Cr. 526. (2) 1 Mac. & G. 192.
(3) 1 Y. & C. Ch. 631, 651; on app. 10 Jur. 57.

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Bolton v. *Corporation of Liverpool* (1) and *Hughes* v. *Biddulph* (2) were supposed to have laid down a narrower rule, namely, that the communications must have been in anticipation of the particular litigation. But I cannot see that anything was there said tending to the establishment of the narrower rule, though reference was made to some earlier cases, supposed to be authorities for the doctrine that cases laid before counsel for their opinions must be produced, though the opinions might not be. There is, however, no doubt that in those cases, and in some others of about the same date, the doctrine of protection was expressed in terms which, though not deciding the point, had a tendency to narrow the doctrine very much in the way in which the argument offered to us to day would tend to narrow it. But they were followed by a case before Lord *Cottenham* himself, in which, though he had no occasion to give a larger extension to the doctrine, yet he stated the principle in a manner which would plainly justify such extension. I mean the case of *Nias* v. *Northern and Eastern Railway Company* (3), where Lord *Cottenham*, referring to *Bolton* v. *Corporation of Liverpool*, stated what he considered to be the true principle on which that case proceeded. Lord *Cottenham* there said: "The true principle on which that case proceeds is, that parties are to be at liberty to communicate with their professional advisers with respect to matters which become the subject of litigation, without restriction, and without the liability of being afterwards called upon to produce or discover what they shall so have communicated. Whether a bill is or is not actually filed at the time, is to my mind a matter of perfect indifference. It is not pretended that a solicitor can be compelled to answer as to what his client told him with reference to an expected contest; and can it make any difference in principle, whether what passes between them is communicated by word of mouth or in the form of a case stated for advice?" Then followed *Herring* v. *Clobery* (4), in which Lord *Lyndhurst* stated the principle in terms which were repeated by Lord Justice *Knight Bruce* in the case of *Pearse* v. *Pearse* (5). Then followed *Lord Walsingham* v. *Goodricke* (6), and it is evident

(1) 1 My. & K. 88.
(2) 4 Russ. 190.
(3) 3 My. & Cr. 355, 357.
(4) 1 Ph. 91.
(5) 1 De G. & Sm. 12.
(6) 3 Hare, 122.

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that the very learned and accurate Judge, Sir *James Wigram*, who decided it, felt himself embarrassed by the conflicting state of *dicta*, and perhaps authority, which he found in existence, and, yielding to what he thought was the preponderance of authority, he limited the protection much more than he would have done if he had proceeded on what was his view of the sound principle. That case, therefore, without any disrespect to the learned Judge who decided it, may well be regarded as one which will not bind, unless subsequent authorities are found to have failed equally to emancipate the Court from the supposed fetters of earlier *dicta*, or earlier cases. But in *Pearse* v. *Pearse* (1) a great stride was made towards the emancipation of the Court from any limits inconsistent with the just extension and application of the principle. The Vice-Chancellor *Knight Bruce*, in one of the ablest judgments of one of the ablest Judges who ever sat in this Court, examined the case of *Radcliffe* v. *Fursman* (2), and said that the notion that the House of Lords had established any such principle of limitation was really ill-founded; and what is more important, he practically overruled the distinction by what he did in that case.

It is said that in *Manser* v. *Dix* (3) the Vice-Chancellor *Wood* did not go the whole length of *Pearse* v. *Pearse*. I confess I do not perceive any ground for supposing that he differed from anything that was said in *Pearse* v. *Pearse*. But there is a later authority by that most accurate and learned Judge, Sir *R. T. Kindersley*—*Lawrence* v. *Campbell* (4)—which contains a statement of the Vice-Chancellor's view of the principle and also of the rule which in 1859 had come to be well settled and established in this Court on the foundation of that principle. He says: "It is not now necessary, as it formerly was, for the purpose of obtaining production, that the communications should be made either during or relating to an actual or even to an expected litigation. It is sufficient if they pass as professional communications in a professional capacity." I can only say that I entirely agree with the views both of the principle and of its proper extension taken in these later authorities. It seems to me that, according to the fair in-

(1) 1 De G. & Sm. 12.
(2) 2 Bro. P. C. 514.
(3) 1 K. & J. 451.
(4) 4 Drew. 485, 490.

terpretation and construction of the language of this affidavit, it is sufficient to bring the present case within them.

The decision of the Master of the Rolls is, therefore, correct on both points, and this appeal motion must be dismissed with costs.

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SIR G. MELLISH, L.J. :—

I am of the same opinion.

Solicitors for the Plaintiff: Messrs. *Horne & Hunter.*
Solicitors for the Defendant: Messrs. *Carlisle & Ordell.*

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[1872 K. 55.]

Demurrer—Bill to restrain Action at Law—Good Defence at Law.

In a bill filed to restrain an action at law the statements were as follows :—In the voluntary winding-up of a joint-stock company a sum of £500 was awarded to the Defendant as compensation for his loss of salary as secretary of the company. The Defendant was at that time indebted to the company in a larger sum than £500, and the Plaintiff, who was the liquidator of the company, accordingly wrote to the Defendant informing him of the award, and asking him to pay the balance due from him after setting off the £500 so awarded. The Defendant brought an action against the Plaintiff, seeking to make him personally liable for the sum of £500, as money had and received to the Defendant's use. The bill prayed a declaration that the Defendant was not entitled to the payment of the £500 without settling the debt due from him to the company, and that the action might be restrained. The Defendant demurred for want of equity :—

Held (reversing the decision of *Malins*, V.C.), that as the bill disclosed a good defence at law to the Defendant's action there was no ground for relief in equity, and the demurrer was allowed.

THIS was an appeal from a decision of Vice-Chancellor *Malins*, overruling a demurrer to the bill which was filed by *Charles Fitch Kemp*, an accountant, against *Stephen Tucker*.

The bill made the following allegations :—By an agreement entered into between the *London, Birmingham, and South Staffordshire Bank* and the *European Bank*, on the 13th of February,

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1865, the *Birmingham Bank* agreed to transfer its business to the *European Bank* upon certain terms therein mentioned, including a provision that the *Birmingham Bank* was to be wound up voluntarily; that the Plaintiff was to be the official liquidator, and the assets were to be got in under the liquidation and applied to the purposes specified in the agreement, one of which was to the following effect: "That £6000 be paid to the directors of the *Birmingham Bank*, to be applied by them in payment of such compensation to such officers of the company as they may think proper, and otherwise towards the expenses of and incident to the arrangement."

By a special resolution, passed by the shareholders of the *Birmingham Bank* in March, 1865, it was resolved that the agreement for transfer of their business to the *European Bank* should be adopted, and that the *Birmingham Bank* should be wound up voluntarily, and the Plaintiff was appointed liquidator.

The Defendant was, at the date of this agreement, secretary of the *Birmingham Bank*, and in the month of October, 1865, the directors awarded the sum of £500 as the sum payable by the *Birmingham Bank* to the Defendant for his services as secretary, and as compensation for the loss of his situation.

Had the Defendant not been indebted to the bank, the Plaintiff, as liquidator of the bank, would have paid him out of the assets of the bank the sum of £500 so awarded, but it appeared that the Defendant was indebted to the bank, upon his account with the bank, in the sum of £1543 8*s.* 2*d.*, and in consequence the Plaintiff wrote to the Defendant, on the 26th of October, 1865, the following letter:—

"Dear Sir,—The committee of directors of the *London, Birmingham, and South Staffordshire Bank*, after mature consideration, have decided on awarding you the sum of £500 in settlement of any claim you may have in respect of salary and compensation. This matter being now arranged, I beg to enclose the account of the bank against you, shewing a balance due by you of £1543 8*s.* 2*d.*, against which the bank holds cash and shares of the estimated value of £750. The last two shares have not been transferred. I shall therefore be obliged if you will sign the enclosed transfer and return it to me. It will now be convenient that you should make

some proposition for the payment of the balance, and I shall be glad to hear from you on this subject without delay.

"Yours faithfully,

"*C. F. Kemp*, Liquidator."

No part of the balance of £1543 8*s.* 2*d.* had been paid by the Defendant, nor did he take any steps to recover the £500 until the commencement of the action after mentioned.

The sum of £500 so awarded to the Defendant was intended by the directors to be paid by the Plaintiff only as liquidator of the bank, and the Plaintiff had no right or authority to pay such sum except subject to the payment by the Defendant of the money due by him to the bank. The Defendant, however, alleged that the Plaintiff was bound to pay over the £500 to him out of the moneys held by the Plaintiff as liquidator, irrespective of any money owing by the Defendant to the bank, and he had commenced an action in the Court of Exchequer against the Plaintiff personally to recover the said sum and interest.

The writ was issued by the Defendant in this action on the 25th of October, 1871, but no further proceedings therein were taken by him until the 24th of October, 1872, when he delivered the declaration. In the action the Defendant claimed against the Plaintiff for money had and received to the use of the Defendant, but the Plaintiff in no sense received any such money, except so far as he had assets in his hands or under his control belonging to the bank as liquidator, out of which the £500 would have been payable to the Defendant, subject to a set-off in respect of the moneys due from the Defendant to the bank, and such last-mentioned moneys being in fact in excess of the sum awarded to the Defendant nothing was payable to him.

On the 17th of June, 1872, the *Birmingham Bank* and the Plaintiff presented a Petition to this Court, praying that the winding-up might be continued subject to the supervision of the Court, and the Petition was still pending.

The bill alleged that any claim which the Defendant had against the bank, or the Plaintiff as liquidator, ought to be made in the winding-up and not otherwise, and that the Defendant had no claim against the Plaintiff personally, but only in his character of

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liquidator. The bill prayed a declaration that the Defendant was not entitled to the £500 awarded as compensation to him, except subject to the payment by him of all moneys due and owing by him to the bank, and that the Defendant might be restrained from further prosecuting the action commenced against the Plaintiff to recover the sum awarded as compensation to him, and from commencing any other action against the Plaintiff for the like purpose.

To this bill the Defendant put in a general demurrer for want of equity. The Vice-Chancellor overruled the demurrer (1).

Mr. *Hemming*, for the Appellant:—

If the statements in the bill are correct, and the Plaintiff received the money in his official capacity as liquidator only, the

(1) 1873. Jan. 13. W.N. (1873) 2.

SIR R. MALINS, V.C., after shortly stating the allegations in the bill, continued:—

Under these circumstances the Defendant, being in possession of that letter of October, 1865, brings an action on the 24th of October, 1871, one day within the six years, at which period he would have been barred by the statute, and then takes no further step in the action for another year, that is, till the 24th of October, 1872, when he delivers his declaration claiming against *Kemp* as for money had and received to the use of the Defendant. A course more unbecoming could not be conceived by any man than bringing this action, endeavouring to fix a personal liability upon *Kemp*, when he was acting only in his public capacity as an officer of the company. He is not sued as liquidator, but to make him personally liable.

It is clear, on this demurrer, that I cannot disregard the circumstance which is stated in the bill, that a petition for continuing the winding-up under supervision has been presented. If, therefore, *Tucker* thinks fit to go on with his action, I could restrain him from proceeding with it against *Kemp* as a public officer.

His proper course was to have filed an affidavit and put forth such excuses as he might think fit; but instead of that he files a demurrer, and his counsel admits that the object of the action is to make *Kemp* liable for what he was not personally liable for. I admit that where there is an action commenced at law, and there is a good defence at law, it is not right to stop the action; but here, where I see that *Kemp* has been acting in his official capacity, it is not justifiable that he should be sued personally. If he had been sued in his official capacity there might have been some ground for the action; but *Tucker* does not do that. It appears to me to be a clear case for allowing the set-off to be made of the £500 against the debt due to the bank, and it is as clear a case for overruling the demurrer as can possibly be. I shall shew my sense of the impropriety of the course taken by the Defendant in overruling the demurrer with costs, as I consider it a dishonest proceeding on the part of *Tucker*.

Plaintiff has a good defence at law, which he can raise on the plea of non assumpsit, and he has no ground for asking this Court to stop the action. The more groundless the action is the less reason is there for removing it from the jurisdiction, of a Court of Law which is perfectly competent to do justice.

Mr. *Glasse*, Q.C., and Mr. *Maidlow*, for the Plaintiff:—

The Plaintiff is desirous of pleading a set-off, and we cannot do that in the action, because the action is against him personally, and the debt from *Tucker* is due to the company. The company is now in liquidation, and the rights of the parties can be better determined in the winding-up than in an action at law.

LORD SELBORNE, L.C.:—

The bill in this case seeks to restrain an action at law, which according to the statements in the bill is frivolous and groundless. I feel bound to say the bill seems to me equally groundless. Either there was a personal liability in the Defendant at law or there was not. The bill says there was not; if so, the Plaintiff has a perfectly good defence at law, and he has no reason to come to this Court. Whatever other reasons the Plaintiff may have for bringing the matter before a Court of Equity we can only attend to those which are stated in the bill. The demurrer must be allowed.

SIR G. MELLISH, L.J.:—

I am of the same opinion. The Vice-Chancellor appears to have been unduly afraid that the Court of Law would not do justice in this matter. If the facts are correctly stated in the bill, there is no doubt that a Court of Law is fully competent to deal with the case, and will do full justice to the parties.

Solicitors for the Defendant: Messrs. *Bell & Crowder.*
Solicitors for the Plaintiff: Messrs. *Taylor, Mason, & Taylor.*

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Feb. 21;
March 14.

Ex parte CRISPIN. *In re* CRISPIN.

Bankruptcy—Alien Non-trader—Jurisdiction—Act of Bankruptcy—Defeating and Delaying Creditors—Bankruptcy Act, 1869, *s.* 6.

An alien non-trader domiciled abroad, who contracts debts in *England*, is liable to be made a bankrupt under the *Bankruptcy Act*, 1869, if he commits an act of bankruptcy in *England*, although he may have left *England* before the petition for adjudication is presented. But he cannot be made a bankrupt upon an alleged act of bankruptcy committed abroad.

A non-trader, a subject of, and domiciled in, *Portugal*, contracted a debt in *England*, where he was temporarily resident. The creditor served him while in *England* with a writ issuing out of the Court of Exchequer. The alien entered an appearance to the writ, and left *England* for *Portugal* the next day, alleging as his reason for doing so that he had been disappointed of some money which he expected, and could not pay his way in *England*. He afterwards said that he had left *England* in consequence of being served with the writ:—

Held, that there was no sufficient evidence that he left *England* in order to defeat and delay his creditors, and that no act of bankruptcy had been committed.

Although, in the case of a domiciled Englishman, the fact of his leaving *England* after service of a writ and so escaping a debtor's summons would afford a strong presumption that he intended to defeat and delay his creditors, yet the same presumption does not apply to a foreigner who is returning to his own country.

THIS was an appeal from an order of Mr. Registrar *Hazlitt*, sitting for the Chief Judge in Bankruptcy, by which the Appellant, *Francesco Jose Cortes Crispin*, was adjudicated bankrupt.

The Appellant was a Portuguese subject, and had his domicil in *Portugal*. He had for several years been prosecuting a suit in the Court of Chancery in *England*, against Dr. *Cumano* and others, in which he sought to recover a sum of about £50,000 consols, which was part of his father's estate, and during those years he had several times come to *England* and resided there for some months at a time. He borrowed large sums of money on the security of his expectations, partly in *Portugal* and partly in *England*; and, among others, he borrowed £236 14*s.* 6*d.* from the petitioning creditor, *Jose Carlos Mandel Ferreira*. Of this sum £100 was advanced in *Lisbon*, and the rest in various small sums in *London*, in the year 1868. On each occasion the Appellant

signed a memorandum in the Portuguese language. One of these when translated was as follows:—

"I received from my most excellent friend, the most excellent Señhor *J. C. M. Ferreira*, the sum of £50 sterling, which the same most excellent friend had the goodness to lend me on this occasion for expenses of my suit in *London*, which I received to repay to him as soon as I shall be able, and may have received the fortune of my father, Señhor *Henrique Crispin*, whether I may receive it in *London* or in *Portugal*, and which sum shall earn its competent interest until its reimbursement; and in case of my default, for any unexpected circumstance, my heirs are to pay the same. And for having received the said sum I passed the present receipt this day. *London*, January 13, 1868."

The others were in a similar form.

In November, 1871, the Appellant came to *England*, and brought with him a deed of compromise which had been entered into in *Portugal* between him and Dr. *Cumano*, and which had been approved by the Portuguese Court at *Faro*, under which he was to receive £40,591 10*s.* 2*d.* The Appellant claimed that this sum should be at once paid to him by Dr. *Cumano* out of the sum of consols, but Dr. *Cumano* insisted that a sufficient sum in consols to pay the £40,591 10*s.* 2*d.* should be transferred into the Court of Chancery, on the ground that the claims of certain persons in *Portugal* had not been got rid of by the compromise, and that creditors of the Appellant, to the amount of £25,000, had given notice to him that they had claims on the fund.

On the 29th of November, 1871, the petitioning creditor sued out a writ in the Court of Exchequer against the Appellant, to recover the money which he had lent to him, which writ was served on the Appellant on the 13th of February, 1872, at an hotel in *Glasshouse Street*, where he was staying. On the next day the Appellant left *London* for the continent, and went *viâ Madrid* to *Portugal*, and had never since returned to *England*.

The petition for adjudication was presented on the 9th of March, 1872, and was served on the Appellant in *Lisbon*. After several adjournments he was adjudicated bankrupt on the 11th of December following.

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On the question of the object of the Appellant in leaving *England* immediately after the writ had been served on him, the most material evidence consisted of declarations by the Appellant to his landlady, Mrs. *Salles*, and to *Henrique Carlos Ferreira*, the brother of the petitioning creditor. To the former he stated that his reason for going was that he had no money to pay his expenses, and that the only thing he feared was that he could not pay his way. But the brother of the Petitioner stated that he met the Appellant at *Madrid* on his way to *Portugal*, and that he then said that he had left *London* in consequence of being served with the writ.

Mr. *De Gex*, Q.C., and Mr. *Brough*, for the Appellant :—

The Court had no jurisdiction to adjudicate the Appellant a bankrupt. He is a Portuguese subject, domiciled in *Portugal*, never had a place of business in *England*, and had left *England* before the Petition was presented. The word "debtor" in the *Bankruptcy Act*, 1869, must have some limitation. It must mean one who is in some sense an English subject. If a foreigner is domiciled in *England*, or has a place of business here, he would be subject to the English law of bankruptcy. He must be subject to English law at the time when the proceedings in bankruptcy are commenced. There is no authority to shew that a foreigner who comes to *England* for a temporary purpose and contracts a debt here, and then returns to his own country, can be made a bankrupt in *England*, and be compelled to distribute his property according to our laws. It would be an undue interference with the laws of other countries: *Story's* Conflict of Laws (1); *Cookney* v. *Anderson* (2). Although that case was overruled by *Drummond* v. *Drummond* (3), the principle on which it was decided was not disputed. *Ex parte O'Loghlen* (4) illustrates the same principle.

In the second place, there was no act of bankruptcy. The Appellant appeared to the writ when it was served on him, and the creditor might have pursued his remedy against his property in this country. His object in leaving the country was not to defeat his creditors; the reason is stated in the affidavit of his

(1) Sect. 539.
(2) 1 D. J. & S. 365.
(3) Law Rep. 2 Ch. 32.
(4) Ibid. 6 Ch. 406.

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landlady—namely, that he could not live here without getting into debt. It would be very hard on a foreigner, temporarily resident in *England*, if his return to his own country, and continued residence there, were to be considered to be acts of bankruptcy.

In the third place, there was no debt. The receipts shew that the money was borrowed on the terms of its repayment being postponed till the money in Chancery was realized. There must be a present debt in order to support a petition in bankruptcy: *Ex parte Sturt* (1).

Mr. *Roxburgh*, Q.C., and Mr. *Bagley*, for the trustee:—

Previously to the *Bankruptcy Act* of 1869, foreigners who were traders were expressly made subject to the bankrupt laws: *Bankrupt Law Consolidation Act*, 1849, s. 277; and it made no difference that they resided abroad, provided the debt was contracted in this country: *Allen* v. *Cannon* (2); *Ex parte Smith* (3); *Alexander* v. *Vaughan* (4); *Williams* v. *Nunn* (5). It is reasonable that foreigners should be subject to the bankrupt laws. They are amenable to the ordinary process for recovering a debt, and their goods in *England* may be seized. Bankruptcy is only another method of doing the same thing, so as to divide the property equitably among the creditors; there can be no difference in principle between the two processes. It is clear that the *Bankruptcy Act*, 1869, contemplates foreigners being subject to it. The 6th section speaks of the debtor making an assignment "in *England* or elsewhere" of his property. Therefore, if a Portuguese subject, being in *Portugal*, assigns property in *England*, it is an act of bankruptcy.

In the present case the bankrupt was actually in *England*, and amenable to our laws, when the act of bankruptcy was committed. It is immaterial that he was abroad when the Petition was presented, for the bankruptcy commences with the act of bankruptcy. Supposing that a debtor's summons had been served on him, and he had then left *England*, would it be contended that he could not have been made bankrupt on that debtor's summons?

(1) Law Rep. 13 Eq. 309.
(2) 4 B. & A. 418.
(3) Cited in Cowp. 402.
(4) Cowp. 398.
(5) 1 Taunt. 270.

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It is clear that in this case an act of bankruptcy was committed. His own admission to the brother of the petitioning creditor shews that he left *England* to defeat his creditors. The fund in the Court of Chancery could not be got out without the assistance of the Appellant, which he refused to give. Consequently, the creditor could not get any satisfaction by enforcing the writ at common law; but if the Appellant had been made bankrupt, his trustee would have been able to get possession of the fund for the benefit of the creditors. The Appellant attempted to defeat this object by leaving the country, so that a debtor's summons could not be served on him; and his continued residence abroad has been with a similar intent. The debt of the petitioning creditor was sufficient. The receipts were acknowledgments of a present debt with a security on the property when realized.

Mr. *De Gex*, in reply.

March 14. SIR G. MELLISH, L.J., delivered the judgment of the Court as follows:—

This was an appeal from an order of Mr. Registrar *Hazlitt*, by which the Appellant, *Francesco Jose Cortes Crispin*, was adjudicated a bankrupt. Three objections were made to the order of adjudication. 1. That the Court of Bankruptcy had no jurisdiction to adjudicate the Appellant a bankrupt. 2. That there was no sufficient proof of an act of bankruptcy. 3. That there was no sufficient proof of the petitioning creditor's debt. [His Lordship then stated the facts narrated above, and continued:—] It was contended by the Respondent that the Appellant was purposely delaying applying to the Court of Chancery for the money in order to defeat his creditors; but we do not think this charge is proved by the evidence. Two acts of bankruptcy were relied on: first, that the Appellant departed out of *England* with intent to defeat and delay his creditors; the other, that being out of *England*, he remained out of *England* with the like intent.

The first question to be considered is, had the Court jurisdiction to adjudicate the Appellant a bankrupt? And this depends upon

the question whether a foreigner, who is not a trader, and who comes to *England* for a temporary purpose, and who quits *England* before a petition in bankruptcy is presented against him, can be adjudicated a bankrupt, either upon an act of bankruptcy alleged to have been committed while he was in *England*, or upon an act of bankruptcy alleged to have been committed after he had left *England*. It is obvious that some limitation must be put on the general words "creditor" and "debtor" in the 6th section of the *Bankruptcy Act*, 1869. They cannot apply to every creditor and every debter throughout the world. It was argued on the part of the Appellant that the word "debtor" must be confined to debtors subject to the laws of *England*, and that as the Appellant was a foreigner, and had left *England* before a petition was presented against him, he had ceased to be subject to the laws of *England*, and no petition could be presented against him. We agree that the word "debtor" must be construed to mean "debtor properly subject to the laws of *England*;" but we are of opinion that it is the act of bankruptcy, and not the petition, which gives jurisdiction to the Court of Bankruptcy, and that if a foreigner comes to *England*, and contracts debts in *England*, and commits an act of bankruptcy in *England*, he thereby gives the Court of Bankruptcy jurisdiction over him. The title of the trustee relates back to the act of bankruptcy, and by the act of bankruptcy the property of the debtor is transferred to the trustee, provided a petition is presented in due time; and we see no good reason why this consequence should not follow in the case of a foreigner who has contracted debts in *England*, and commits an act of bankruptcy in *England*, and who is subject to the laws of *England* while he is here.

We also think that this conclusion is supported by the authorities. These appear to establish that if a foreign trader trades in *England*, and commits an act of bankruptcy in *England*, he is subject to the bankrupt laws, and that it makes no difference that he is not a resident trader in *England*, or that his principal place of business is elsewhere, and that he may be made bankrupt upon an act of bankruptcy which consists in departing from *England* with intent to defeat and delay his creditors. We are of opinion, however, that a foreigner, not domiciled in *England*, and not

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carrying on trade in *England*, who quits *England* without having committed an act of bankruptcy, cannot be made a bankrupt upon an alleged act of bankruptcy committed out of *England*. We think that the Legislature cannot have intended to enact that if a foreigner who is not subject to the laws of *England* does something in his own country which may be perfectly lawful and innocent by the laws of that country, the effect should be that his property should be vested in a trustee in *England* for the benefit of his creditors.

Then we think that a consideration of the particular acts which are made acts of bankruptcy when committed out of *England* will confirm this conclusion. The first is, "that the debtor has, in *England* or elsewhere, made a conveyance or assignment of his property to a trustee for the benefit of his creditors generally." This seems clearly intended to relate to a conveyance which is to operate according to English law, which a conveyance executed by a domiciled Englishman, although out of *England*, may do; but a conveyance executed by a domiciled foreigner in his own country must necessarily operate according to the foreign law, and we think it was never intended that such a conveyance should be an act of bankruptcy. The second is, "that the debtor has in *England* or elsewhere made a fraudulent conveyance, &c., of his property or any part thereof." This clearly means, and has always been interpreted as meaning, fraudulent by the law of *England*, and therefore cannot properly apply to a conveyance which is executed in, and is to operate according to the law of, a foreign country. The third is the one now in question. "That the debtor, with intent to defeat or delay his creditors, has, being out of *England*, remained out of *England*." We think these words imply that the person who remains out of *England*, has his home or place of business in *England*, and cannot reasonably be held to apply to the case of a foreigner remaining in his own home.

The next question to be determined is whether there was sufficient evidence that the Appellant committed an act of bankruptcy by departing from *England* with intent to defeat or delay his creditors. There are two witnesses who give evidence of statements by the Appellant which may be material to be considered in determining with what intent he left *England*. The first is

Mrs. *Salles*, who was his landlady at 13, *Glasshouse Street*. She says: "He was in the hotel. He made a communication to me before he left; he said that he was expecting a letter from a solicitor of a Dr. *Cumano* to pay him some money, but as he had not sent it he could not stop any longer. The reason he gave for going away was that he had no money to pay his expenses. The only thing, he said, he feared was, he could not pay his way." The second was a brother of the petitioning creditor, who met him at *Madrid* whilst he was on his way to *Portugal*. He says, speaking of the Appellant, "He told me that he had been served with a writ at the suit of my brother, and that in consequence of his being served with the writ he left *London*." We see no reason to doubt the truth of the statement made by the Appellant to his landlady, that he was obliged to leave *England* because he had no funds left to enable him to live in *England*, and we do not think that the statement he is said to have made to the petitioning creditor's brother is necessarily inconsistent with it, because it may well be that the fact of being served with a writ by one of his creditors convinced him that it was impossible that he could go on living in *England* on borrowed money. The Appellant, therefore, had a most justifiable cause for leaving *England*.

But it is argued that nevertheless his leaving *England* must have had the effect of defeating or delaying his creditors, and was, therefore, an act of bankruptcy, and it is desirable to consider in what respect his leaving *England* had the effect of defeating or delaying his creditors. The petitioning creditor had served him with a writ, and an appearance was entered to that writ, and there is no evidence that the petitioning creditor would be delayed in obtaining judgment and issuing execution in the action in the absence of the Appellant. If the Appellant had gone away after he knew a writ was issued, to avoid service, the case might have been different.

It was argued, however, that if the Appellant had remained in *England* he might have been served with a debtor's summons and made a bankrupt; and it is necessary, therefore, to consider whether the Appellant was bound to remain in *England* in order that the petitioning creditor or his other creditors might have an opportunity of making him a bankrupt. If a domiciled English-

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man, who is being pressed by his creditors, and has been served with a writ, were to leave *England*, and so to escape being served with a debtor's summons, there would be strong evidence that he intended to defeat or delay his creditors, because *England* is the proper, if not the only place for him to be made a bankrupt in, and if he cannot pay his debts he has no right to avoid being made a bankrupt there. But we do not think the same reasoning applies to a foreigner who has come to *England* for a temporary purpose and leaves *England* to return to his own home. He can be followed to his own country, and his own country may be the most convenient place for the distribution of his property among his creditors. We must assume that there is a proper law in *Portugal* for distributing a debtor's property among his creditors, and we have no means of knowing whether it is more or less dilatory than the law of *England*.

On the whole, we are of opinion that there is no sufficient evidence that the Appellant has committed an act of bankruptcy in *England*, and that he cannot be made bankrupt for an act of bankruptcy committed out of *England*. Therefore the order of adjudication must be reversed, and the Appellant must have his costs of resisting the adjudication in the Court below from the petitioning creditor.

Solicitor for the Appellant: Mr. *E. Saxton*.
Solicitors for the Respondent: Messrs. *Keighley & Bevan*.

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L. JJ.

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Statute of Limitations—3 & 4 *Will.* 4, *c.* 27, *s.* 26—*Concealed Fraud*—*Purchaser for Value*—*Legal Title*—*Suit in Equity.*

Dec. 17, 21.

1873.

Jan. 11, 18.

The Plaintiff, by his bill, stated to the following effect: That an estate being limited to the Plaintiff's father for life, remainder to his first and other sons successively in tail, the father in 1797 intermarried with a woman who had been his mistress, and had just borne him a son; that after the marriage the parents agreed to pass off the son as legitimate, and he was always recognised as such; that the Plaintiff, who was born ten years afterwards, was the eldest—but was brought up in the belief that he was the second—legitimate son; that when the illegitimate son came of age he was informed by the father that he was illegitimate, and with that knowledge joined the father in suffering a recovery to bar the entail; that on the marriage of the illegitimate son in 1823, he and the father made an ante-nuptial settlement of the estates, which was negotiated by the wife's father, as her agent, and on her behalf, with full knowledge that the husband was illegitimate; that the father died in 1832, upon which the illegitimate son entered into possession, and remained so till his death in 1842, ever since which time his eldest son had been in possession; that the Plaintiff had never until 1866 believed or suspected, or had any reason to believe or suspect, that his elder brother was illegitimate; and the bill prayed for a declaration that the Plaintiff was entitled to the estates, and that the Defendants, who claimed under the settlement of 1823, might be ordered to give up possession to him. The Defendants demurred:—

Held, that a Court of Equity had jurisdiction:

Held, that the designedly bringing up the Plaintiff in the belief that he was the second legitimate son was a case of concealed fraud within the meaning of the *Statute of Limitations* (3 & 4 Will. 4, c. 27, s. 26), and that time did not begin to run against the Plaintiff's right to sue in equity until the time when he might first, with reasonable diligence, have discovered the fraud:

Held, further, that a purchaser for value who, though not having any personal notice of the fraud, contracts through an agent who knows of the fraud, cannot protect himself under the saving in sect. 26 as a "*bonâ fide* purchaser for value who at the time of the purchase did not know and had no reason to believe that any such fraud had been committed," and that therefore the persons claiming under the settlement of 1823 could not sustain this defence:

Held, therefore (affirming the decision of *Malins*, V.C.), that the demurrers must be overruled.

Whether a defence of purchase for value under sect. 26 can be raised by demurrer, and whether it must not be by plea or answer supported by the Defendant's oath, *quære*.

THESE were appeals from orders of Vice-Chancellor *Malins* overruling demurrers.

L C at hearing one bill was dismissed

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The following is an outline of the statements of the bill:—

That by the will of Sir *Lionel W. Fletcher*, who died in 1786, certain estates were limited to trustees for a term of 500 years, and, subject thereto, to *Frederick Fletcher Vane* for life, with remainder to trustees during his life to preserve contingent remainders, with remainder to the first and other sons of *Frederick F. Vane* (afterwards Sir *F. F. Vane*) successively in tail male, with divers remainders over. The trusts of the term were to raise money to make good any deficiency of his personal estate to answer the purposes therein mentioned.

That the term of 500 years was still a subsisting term; that new trustees thereof had from time to time been appointed, and that the trusts thereof had not been fully performed.

That on the 9th of March, 1797, Sir *Frederick F. Vane* intermarried with *Hannah Bowerbank*; that previously to the marriage he had cohabited with her, and had by her three illegitimate children. The first was *Hannah*, born on the 22nd of August, 1794, and the second, *Walter*, born on the 9th of July, 1795.

That in January, 1797, *Hannah Bowerbank* was again pregnant. Sir *Frederick F. Vane* had repeatedly promised to marry her, and before the birth of the third child she threatened that if he did not he should never see her or the children again. On the following day he informed her that he had got the licence, and that they were to be married next morning. This sudden announcement produced a premature confinement in the course of the day, and she was delivered of a child, who was baptized *Francis Fletcher Vane*. The marriage took place on the 9th of March, 1797, as soon as she had recovered from her confinement.

That on the 16th of April, 1797, *Francis F. Vane* was baptized at *St. George's, Queen's Square, Bloomsbury*, and that the entry in the register as now standing stated him to have been born on the 29th of March, 1797, but that it was evident, from the colour of the ink and other circumstances, that the entry had been tampered with, and that the words and figures "born 29 March, 1797," had been added some time after the original entry.

That after the birth of *Francis F. Vane* the medical attendants stated their opinion that Lady *Vane* would never have another child born alive, which opinion was communicated to Sir *Frederick F. Vane* and Lady *Vane*.

That Sir *Frederick F. Vane* determined to bring up *Francis F. Vane* as his legitimate son, and, with a view to this, got the words "born 29 March, 1797," inserted in the baptismal register.

That in 1801 Sir *Frederick F. Vane* and Lady *Vane* went to reside at *Armathwaite Hall*, in the parish of *Bassenthwaite*, in *Cumberland*, and Sir *Frederick F. Vane* continued to reside there till his death; that *Francis F. Vane* was a good deal abroad up to his attaining twenty-one, but when in *England* resided principally at *Armathwaite Hall*, and after he attained twenty-one continued to reside there till his marriage; that Sir *Frederick F. Vane* and Lady *Vane* were visited by their neighbours, and *Francis F. Vane* was introduced by Sir *Frederick F. Vane* and spoken of and treated by him as his legitimate son and heir-apparent, and continued to be so spoken of and treated as long as Sir *Frederick F. Vane* lived.

After the removal to *Armathwaite Hall* Sir *Frederick F. Vane* and Lady *Vane* had two other children, a daughter, born on the 18th of March, 1802, and the Plaintiff, born on the 10th of May, 1807.

That *Francis F. Vane* attained twenty-one in 1818, and his father thereupon informed him that he was illegitimate; that shortly afterwards Sir *Frederick F. Vane* and *Francis F. Vane*, as first tenant in tail, suffered recoveries of the devised estates to enure to such uses as the father and son should jointly appoint, and in default to the uses therein mentioned. Considerable portions of the estates were subsequently sold for paying debts of Sir *Frederick F. Vane*.

On the 10th of April, 1823, *Francis F. Vane* intermarried with *Diana Olivia Beauclerk*, and before the marriage a settlement was made of the unsold estates to the use of *Francis F. Vane* for life, with remainder to trustees during his life, to preserve contingent remainders, with remainder to the use that Lady *Diana Olivia Vane* might receive a rent-charge during her life, and, subject thereto, to the use of trustees for a term of years to secure the rent-charge, with remainder to trustees for a term for raising portions for younger children, and, subject as above, to the use of the first and other sons of the marriage successively in tail male.

The bill charged that *Francis F. Vane* was at and prior to the suffering of the recoveries well aware that he was illegitimate, and

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he concurred in the recoveries, and in limiting the devised estates to such uses as he and Sir *Frederick F. Vane* should appoint, and in the settlement of April, 1823, with the full knowledge that he was illegitimate, and with the fraudulent intention of depriving the Plaintiff of his right to the estates.

Par. 30. "The Plaintiff also charges that the fact that the said *Francis F. Vane* was illegitimate was well known to the said *C. G. Beauclerk*, the father of the Defendant *Diana Olivia Vane*, for some time before the marriage of the said *Francis F. Vane* and *D. O. Vane*, and that the said *C. G. Beauclerk* negotiated the terms of the said settlement of the 8th of April, 1823, as the agent and on behalf of his daughter, the said *D. O. Vane*, with full knowledge that the said *F. F. Vane* was illegitimate, and had no interest in the devised estates."

Par. 31. "The Plaintiff charges that the recoveries so suffered as aforesaid, and the limitation of the said estates to such uses as the said Sir *Frederick F. Vane* and *Francis F. Vane* should jointly appoint, and the said settlement of the 8th of April, 1823, were fraudulent and absolutely void, and of no effect except so far (if at all) as the same may have affected the life estate of the said Sir *Frederick F. Vane* in the said estates under the will hereinbefore stated; and that the Defendant, *D. O. Vane*, had, through the said *C. G. Beauclerk* or otherwise, full notice prior to the said marriage and the execution of the said settlement, that the said *Francis F. Vane* was illegitimate, and that the said settlement was fraudulent and void so far as it affected to deal with or settle any interest in the said devised estates or any part thereof other than the life estate therein of the said Sir *Frederick F. Vane*."

That after the marriage *Francis F. Vane* entered into possession of the estates comprised in the settlement of the 8th of April, 1823; and, on Sir *Frederick F. Vane's* death in February, 1832, assumed the title of Sir *Francis F. Vane*, Bart., and continued in possession of the estates.

That *Francis F. Vane* had issue by *D. O. Vane* three children, of whom *Henry Ralph Vane* was the eldest.

That *Francis F. Vane* died in February, 1842, and on his death *Henry Ralph Vane* entered into possession of the estates, and had ever since continued in such possession.

In 1871 *Henry R. Vane* intermarried with the Defendant *Margaret Vane*, and previously to the marriage executed divers deeds by which he purported to bar his estate tail and re-settle the estates.

That Lady *Vane*, formerly *Hannah Bowerbank*, died in December, 1866.

Par. 43. "The said Lady *Vane*, during her lifetime, made divers true and particular statements to various persons, detailing the facts and circumstances connected with her marriage and the birth of her several children, as well those born after as those born before her marriage; and the said Lady *Vane* also, from time to time, made divers statements to various persons which were not intelligible to persons who were not acquainted with the facts and circumstances aforesaid; and the said facts and circumstances were well known to divers persons, as well from the statements made by the said Lady *Vane* as from other sources, and in particular the said facts and circumstances were well known to the Defendant *D. O. Vane*, and her father, *C. G. Beauclerk*, before her marriage with the said *Francis F. Vane*, and to the Defendants *Henry Ralph Vane* and *Margaret* his wife before their marriage."

That in October, 1866, the Plaintiff, who was on a visit with his wife to the Defendant *D. O. Vane*, was informed by his wife that she had just had a conversation with the Defendant *D. O. Vane*, to the effect stated in the bill, the material point of which was that *D. O. Vane* stated *Francis F. Vane* to have been born just after the marriage of his parents; and in November, 1866, the Plaintiff's wife informed him that Lady *Vane* had confessed to her that *Francis F. Vane* was born before her marriage.

Par. 46. "Until the communication stated in the last preceding paragraph was made to the Plaintiff, he had never heard, either directly or indirectly, or had any reason to believe or suspect, and did not believe or suspect, that the said *Francis F. Vane* was illegitimate. The facts that the said *Francis F. Vane* was illegitimate, and that the Plaintiff was the eldest legitimate son of the said Sir *Frederick F. Vane*, and was so entitled, as aforesaid, to the said devised estates, were concealed from the Plaintiff by the fraudulent contrivances of the said Sir *Frederick F. Vane* and *Francis F. Vane* hereinbefore stated, and were only discovered by the Plaintiff from

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inquiries made by him after, and in consequence of, the communications so made to him as stated in the last preceding paragraph."

The bill, which was filed against Sir *Henry Ralph Vane* and his wife, and Lady *Diana Olivia Vane*, and other persons claiming under the settlement of 1823, prayed for a declaration that the Plaintiff was entitled to the devised estates as tenant in tail male in possession, subject to the term of 500 years and the trusts thereof, and that the Defendants might be ordered to deliver up possession to the Plaintiffs, and for an account of rents.

Sir *Henry Ralph Vane* and his wife, and Lady *Diana Olivia Vane* and other parties claiming under the settlement of 1823, demurred to the bill. Vice-Chancellor *Malins* having overruled the demurrers (1), these appeals were presented.

(1) 1872. Nov. 5. WMB72/9

SIR R. MALINS, V.C.:—

The right of the Plaintiff to the possession of these estates on the allegations in this bill accrued in 1832, that is more than forty years before the filing of the bill; and as he was under no disability he would be barred in 1852 by the *Statute of Limitations* (3 & 4 Will. 4, c. 27), unless he can bring himself within the protection of the 26th section of the statute. The only question, therefore, I have now to decide is, whether he brings himself within that section. In order to do so he first must shew that there has been a fraud, and a concealed fraud.

Has there, then, been a fraud? A more direct, more positive fraud than is alleged in this bill can hardly be conceived. The bill alleges that the father, knowing that *Francis* was illegitimate, and had no title either to the baronetcy or the estates, held him out to the world and to the Plaintiff as the eldest legitimate son, and, as heir to the baronetcy, heir to the estates. Now, taking these allegations, as for the present purpose they must be taken, to be true, the father and mother, by palming off an illegitimate son as the eldest legitimate son, have defrauded the Plaintiff of that inheritance to which he was entitled. The bill further states that *Francis* attained his majority in 1818, and that his father then informed him that he was illegitimate. That seems an act of honesty on the part of the father which is utterly irreconcilable with his subsequent conduct as stated in the bill, because the bill goes on to state that in 1823 he joined this son, whom he had told of his illegitimacy in 1818, in suffering a recovery, stating on the face of the deed that *Francis* was his eldest legitimate son, and he joined with him in imposing on the purchasers of the estates which were sold, by giving them a totally bad title, because from 1832 to 1852 the Plaintiff could have turned the purchasers out of possession if he had discovered what his title was. This incomprehensible inconsistency is followed by another improbable transaction, viz., that in the same year 1823 a marriage was negotiated between the son *Francis* (who was then twenty-six years of age) and *Lady Diana Beauclerk*. The marriage took place, and a settlement was executed, by which

Sir *R. Baggallay*, Q.C., and Mr. *Pearson*, Q.C. (Mr. *Marten* with them), for the Appellants:—

We contend that this case is not within the 26th section of

Francis, the illegitimate son, was made tenant for life, with remainder to their sons successively in tail; and there is this extraordinary allegation, which I say again I am bound to take as true for this particular purpose, though I verily believe it will turn out not to be true in fact, that this lady and her father knew that she was about to marry an illegitimate son, whose brother, the only legitimate son, was then sixteen years of age, and, according to all human probability, would discover his title upon coming of age, and would turn them out of possession of the estates as soon as the father died. The thing is utterly incredible. However the bill states it to be so, and however incredible it is I must take it to be the fact. The father continued the fraud, for it was a fraud he was committing every hour of his life. It was not necessary for him to say in words to the present Plaintiff: "Francis is your elder brother, your legitimate brother, born after your mother and I married;" it was unnecessary for him to say that in words, because his conduct said it; he held him out as his eldest legitimate son, his heir-apparent, the successor to the title and to the estates under the will of his own father; therefore I say that that fraud which he was committing on the Plaintiff he continued every hour and minute of his life, and he died in the perpetration of that fraud. The mother was concurring in this, and not only the mother, but the son *Francis*, who, as I have already stated, was told of these facts in 1818. He, by concealing it from his brother, was also guilty of fraud.

The next point is, was it a concealed fraud? I decided in the case of *Chetham* v. *Hoare* (Law Rep. 9 Eq. 571), that this section of the statute has such extensive application, and is so calculated in many instances to disturb the possession of property which everybody believes to be finally settled, that it is necessary, in the interest of society, that it should receive the strictest possible construction. That I entirely adhere to, and I intend to apply that principle in the present case. Now, was this concealed fraud? The bill alleges, in the 45th paragraph, how the fact of *Francis Fletcher Vane's* illegitimacy was discovered. Then the bill states:—[His Honour read the 46th paragraph]. Then the last three lines of the bill state "that the Plaintiff has been hitherto kept out of possession and deprived of the said estates by a concealed fraud, which was not discovered, and could not with reasonable diligence have been discovered, by him before the year 1866."

Now, therefore, considering, first, that the fraud had been committed, that the facts were concealed by the father, the mother, and the brother, from the time of its being committed down to 1866, when it was discovered, I come to the conclusion, on the second point, that it was a concealed fraud. I do not know that, whatever "concealed fraud" is, it can be better stated than in the passage read from the judgment of Sir *Richard Kindersley* in *Petre* v. *Petre* (1 Drew. p. 397):—[His Honour read the passage.] *Sturgis* v. *Morse* (24 Beav. 541) also bears out that interpretation of the statute. That was a case where an insolvent designedly omitted from his schedule a reversion in fee to which

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3 & 4 Will. 4, c. 27. The title of the Plaintiff is a purely legal title; if he had taken proceedings within twenty years after the death of Sir *Frederick* they could only have been proceedings at

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he was entitled in certain property. It fell into possession shortly afterwards, and he took possession. He became bankrupt, and his assignees under the bankruptcy had possession of it, and after much more than twenty years had elapsed the assignee in insolvency filed a bill to recover it. The Master of the Rolls decided that there was a concealed fraud, which entitled the assignee in insolvency to recover. I am therefore of opinion that, according to the allegations of this bill, there was a fraud, and that it was a concealed fraud.

So far the case cannot admit of doubt, but the real stress of the argument turns on this, that the time begins to run from the time when the concealed fraud "shall, or with reasonable diligence might, have been first known or discovered." Certainly, from the allegations in the bill, I must come to the conclusion that the Plaintiff did not know of the fraud until 1866; but he must shew that he is coming here within twenty years from the time when it could have been discovered by reasonable diligence. Now, it has been argued that the Plaintiff might, by due diligence, have discovered these facts much more than twenty years ago. A good deal depends on circumstances. Is it the duty of a man to interrogate his father and mother as to the period of his birth? If the father and mother by their daily conduct are holding out an elder brother as the heir to the title and to the estates, is it any want of diligence on the part of a younger son not to inquire when his father and mother were married. Is it any part of the duty of a son to suppose that his father and mother may be cheating him, and palming off an illegitimate child in the place of himself, who is legitimate? I say it is contrary to all usage of society, contrary to decency and propriety, that any son should for a moment allow himself to suppose that his father and mother could so treat him. I cannot think that there was any want of due diligence in his not inquiring at what precise date his father and mother were married, or when his brother was born, inasmuch as the father and mother, by every syllable they uttered, and by their everyday conduct, were holding him out as their heir-apparent, as their legitimate son, and the Plaintiff was entitled to believe them in that statement. But then it is said there were illegitimate children, and although, as appears to have been felt by the learned counsel in support of the demurrer, a son would not in general be called on to make such an inquiry of his father and mother, yet, when it is known that some members of the family are legitimate and some illegitimate, there would not be so much impropriety in the son saying to the father and mother, "Which of my brothers and sisters were born before, and which after, your marriage? I know I was born ten years after marriage, because I know the date of your marriage; but when was *Francis*, my brother, born?" I confess, if I could come to the conclusion on the allegations in this bill that the Plaintiff did know that his father and mother had had legitimate and also illegitimate children, it would greatly alter the state of things, and that which it would be, in my opinion, a gross impropriety

law, and lapse of time cannot make the case one for a Court of Equity. We say that the section only applies where the estate has been acquired by means of a fraud so as to make a suit in

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to ask under one state of things would not be so in another state of things. But I cannot collect from the allegations in this bill that the Plaintiff ever knew before 1866 that his father and mother had any child born before their marriage, and I firmly believe, from the allegations in this bill, that he was under the impression that his father and mother were married at a proper period, long before any child was born, and believed every member of the family to be legitimate. Under these circumstances, I cannot think there was any want of due diligence on his part in not making inquiries on that subject. Then, as to the entry in the parish register, I think that, from the allegations of the bill, it is plain that he had never seen this entry, nor had anybody on his behalf until after 1866. Therefore I am unable to discover that there was any want of due diligence on the part of the Plaintiff.

Now, these three conclusions—first, that this has been a fraud; secondly, that a fraud has been concealed; and, thirdly, that by reasonable diligence the Plaintiff could not have discovered it until within the last twenty years, or, in other words, he has not been guilty of want of reasonable diligence—would entitle him to recover these estates but for the points I am about to mention.

The question was raised whether this is not a mere ejectment bill which cannot be properly brought in this Court. As "fraud" is involved in the case it is properly brought in this Court. Sir *R. Baggallay* waived the objection on that ground, and therefore I must take it as being properly in equity instead of being at law, as it might have been. The jurisdiction is concurrent.

The only remaining question is one which will become most important in a further stage of the cause, viz., whether as against the Defendant, the present owner of this estate, the Plaintiff can recover these estates. It is urged that the Defendant, the present owner, claiming under the settlement of 1823, is a purchaser for value and without notice, or, in other words, that he is entitled to the protection of the latter part of the proviso of the 26th section. I have heard a very elaborate and learned argument upon the question as to who, in a marriage settlement, is the purchaser for valuable consideration. It is clear that the husband *Francis*, the illegitimate son, was not a purchaser under the settlement of 1823. I quite agree with the argument of the Solicitor-General, that in this case the wife was the purchaser for herself and her issue. It is a very material question, this being a demurrer, whether I can enter into the question of purchase for valuable consideration without notice. I invited the learned counsel to give me authority that it has ever been so decided, and all that they could say was, that where it appears on the face of the bill that the Defendant is a purchaser for valuable consideration without notice, a demurrer must necessarily lie; but no Plaintiff desiring to recover against a person in possession would allege that he is a purchaser for valuable consideration without notice. Therefore the case never has occurred, and never can occur. The question as to being a purchaser for valuable consideration without notice is a proper

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equity maintainable from the first. This does not apply to a fraudulent concealment of title.

[The LORD JUSTICE JAMES referred to *Shelford's* Real Property

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subject of plea or answer, but there is no instance that I know of where it has ever been raised upon demurrer.

But can I, on the allegations of this bill, consider Lady *Diana* and her issue as purchasers for valuable consideration without notice? First of all, it must be plain that if she knew of the fraud committed in 1823 (and according to the extraordinary allegations of this bill she and her father both knew that she was going to marry an illegitimate son, who had no kind of title to the estate), it is quite clear she cannot be permitted to retain any benefit she took for herself under the settlement. Then, can she purchase for her children? Can they be purchasers for valuable consideration? It is perfectly clear the children were not purchasers. I agree the parent is a purchaser for herself and them. I apprehend that if the parent's title is affected, the title of the children is affected also. I was referred to the case of *Le Neve* v. *Le Neve* (Amb. 436), where a man executed marriage articles in favour of his first wife and his issue by that wife. He survived that wife and married again, and a settlement was executed on the second wife. The second wife knew nothing whatever of the articles executed on the first marriage, but her agent did. Lord *Hardwicke* decided there, that inasmuch as the agent knew, she knew, and that what deprived her of title deprived her issue of title also. Accordingly, in *Toulmin* v. *Steere* (3 Mer. 222), Sir *W. Grant* says: "In the case of *Le Neve* v. *Le Neve* the interest of the unborn children was not attempted to be distinguished from that of the mother. The only question was, whether she had notice or not of the prior articles, and it being held that she was affected by her agent's knowledge of those articles, all the trusts of the second settlement, one of which was for the issue of the marriage, were postponed to those of the articles on the first marriage. Were it otherwise, a man would only have to purchase on behalf of infants to free an estate from all equitable incumbrances to which it might be subject." If, therefore, the proper interpretation of this bill is that which Sir *R. Baggallay* so strenuously contended for in his reply, viz., that it was only her father that had notice, still, as the bill alleges that her father was her agent, his knowledge would be her knowledge, and would, according to *Le Neve* v. *Le Neve*, be fatal to her title and equally fatal to the title of her issue, the present baronet, now in possession. I think, however, that the fair interpretation of the language of par. 31 is, that she herself had notice, because the allegation is that the Defendant *Diana Olivia Vane* had, through the said *Charles George Beauclerk*, or otherwise, full notice. I have no doubt, when an answer is put in, it will turn out that this allegation is utterly wrong; but for the present purpose I am bound to take it as correct. She had, therefore, direct notice of the fraud, and having direct notice of the fraud, neither she nor her children, on whose behalf she purchased, can retain any benefit from that purchase. It is not, therefore, necessary to go into the question whether constructive notice would be sufficient. Counsel reminded me that the word "notice" was not used in this section, and I am inclined

(a) 1 Ch. Cas. 146

Statutes (1), and *Petre* v. *Petre* (2) and *Dean* v. *Thwaite* (3) there cited.]

But, supposing the clause does apply, we say that all persons claiming as purchasers under the settlement of 1823 are within the saving. The word "notice" does not occur. What is required to affect a purchaser is knowledge or reason to believe. This denotes something personal, but the bill only alleges constructive notice through the wife's father, which does not satisfy the terms of the Act. *Thompson* v. *Cartwright* (4) furnishes a strong analogy.

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to think that the very difficult doctrine of a Court of Equity, as to implied notice, is purposely excluded. I think in these cases it must be positive notice —the person must know. But Lady *Diana*, according to the allegations of this bill, did positively know that the gentleman she was about to marry was illegitimate, and had no title to the estates. On these grounds, having heard the arguments on both sides, I concur in the arguments submitted on the part of the Plaintiff. On the allegations of this bill, I can neither take Lady *Diana* nor her son, the demurring parties, to be purchasers for valuable consideration without notice.

I think it is to be regretted that this case was brought on to be heard on demurrer, because I have no doubt the facts will turn out, when they are investigated, to be very different to what they appear in the bill, although, on the main fact of the illegitimacy of Sir *Francis*, I cannot for one moment believe, for the honour of the professional advisers and everybody else concerned, that there can be the slightest doubt of the fact of his illegitimacy, because, if the parties had been in a situation to prove that he was legitimate, the Plaintiff's conduct in filing this bill alleging the illegitimacy, accusing his father and mother and brother of this deliberate fraud to cheat him, is reprehensible to the last degree. I cannot believe he would have brought forward such a case unless he had well ascertained that his brother *Francis* was illegitimate. I cannot possibly believe that the advisers of these Defendants would ever have allowed this case to be discussed in open Court for two days on the assumption of the illegitimacy of *Francis*, if they were in a position to prove, that which they said at the bar they could prove, that in point of fact he was legitimate. At all events, by overruling the demurrer, I give them the opportunity of proving that fact. The parties who were concerned in this fraud are now gone. It was the fraud of the father, the mother, and *Francis*, who has been dead more than thirty years. The present Defendants are in no way implicated in this fraud, except that the bill alleges—and I have no doubt, I repeat, erroneously—that Lady *Diana* knew of it. I have no doubt it will turn out that she knew nothing about it, and had no more suspicion of it than the Plaintiff himself. I take it, for this purpose, that all the parties are innocent.

The result is that it is my duty to overrule these demurrers.

(1) 7th Ed. p. 223.
(2) 1 Drew. 371-397.
(3) 21 Beav. 621.
(4) 2 D. J. & S. 10.

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Then, as regards Sir *Henry* and his wife, we say that Sir *Henry's* twenty years' possession makes a good bar. Why should he, who was no party to the fraud, be in a worse position than if he had entered as a squatter with no title at all? There was no such fraud as would have prevented a fine by him, with five years' non-claim, from giving him a good title under the old law: *Langley* v. *Fisher* (1); *Bell* v. *Bell* (2). But if the Court be against us on these points, we say that the Plaintiff might, with reasonable diligence, have discovered the fraud more than twenty years ago: *Chetham* v. *Hoare* (3). He knew that some of the children were illegitimate, and was put upon inquiry.

The *Solicitor-General* (Sir *G. Jessel*), and Mr. *Glasse*, Q.C. (Mr. *Smart* with them), for the Plaintiff:—

The allegations as to the Plaintiff's having nothing to lead him to suspicion till 1866 cannot be got over on demurrer.

[The LORD JUSTICE MELLISH:—Could a Court of Equity have entertained this bill within twenty years from Sir *Frederick's* death?]

Yes. It alleges the existence of an outstanding term, which alone would prevent the bill from being demurrable within that period. But we rest the right to equitable interference on this ground, that a Court of Equity has jurisdiction to relieve against any fraud, and no reason can be given why a Court of Equity, which clearly would interfere when a person has through fraud got a legal title by means of conveyance, should decline to interfere when he has through fraud got a legal title by means of the *Statute of Limitations*. It does not signify that the person against whom the relief is sought was not privy to the fraud: *Charter* v. *Trevelyan* (4); he is not protected unless he can defend himself as a purchaser for value without notice, or under the analogous statutory provisions in sect. 26. Under the statute the Defendant is only protected if he is, or claims under, a *bonâ fide* purchaser. Now, no one is a *bonâ fide* purchaser whose agent had notice of the adverse

(1) 9 Beav. 90.
(2) Lloyd & G. temp. Plunkett, 44.
(3) Law Rep. 9 Eq. 571.
(4) 4 L. J. (Ch.) 209; 11 Cl. & F. 714.

title: *Le Neve* v. *Le Neve* (1); *Rolland* v. *Hart* (2); *Dean* v. *Thwaite* (3).

[The LORD JUSTICE JAMES referred to *Bridgeman* v. *Green* (4).

The provision in sect. 26 was intended to preserve the equitable doctrine as to fraud, and what that was understood to be appears from the first report of the Commissioners on the Law of Real Property (5). Knowledge of the agent is treated as knowledge of the principal: *Rolland* v. *Hart*. It is not mere constructive notice; and paragraph 31 of the bill completely prevents the Defendants from availing themselves on demurrer of the defence of purchase.

Mr. *Pearson*, in reply.

1875

Jan. 18. SIR W. M. JAMES, L.J., delivered the judgment of the Court:—

In this case the only question we have to determine is whether the Defendants ought or ought not to put in an answer to the Plaintiff's allegations. The Court has nothing now to do with the probability or improbability of the Plaintiff's story, with the probability or improbability of his ultimate success at the hearing, nor with any considerations of the hardship to the Defendants, a widow and son, themselves innocent, in that they are called on to meet a case of fraud alleged to have been originally committed generations ago by persons who have been dead many years.

The Plaintiff's case must for this purpose be taken to be true as stated by him. His case is, that under a family settlement certain estates stood limited to the use of his father for life, with remainder to the eldest son in tail, that he was such eldest son, and that on the death of his father the estates became in law vested in him, but that he was deprived of them by the following fraudulent contrivance:—

His father, according to his story, had lived with his mother as his mistress before their marriage, but she being with child he determined to marry her, and intended to marry her before the

(1) 2 Tud. L. C. in Eq. 4th Ed. 35; Amb. 436; 3 Atk. 646.
(2) Law Rep. 6 Ch. 678.
(3) 21 Beav. 621.
(4) Wilmot's Notes, 58.
(5) Page 49.

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birth of such child. Before, however, the marriage could be celebrated she was confined. The marriage took place some short time afterwards, and it was then agreed between the husband and the wife to prevent the child suffering from the untoward accident of its premature birth by falsifying the date of such birth and representing it as having taken place after the marriage. This was done, and that child was accordingly produced, represented, and treated as being the legitimate son, the eldest son, and the heir in tail of the settled property. Some years afterwards the Plaintiff himself was born, being, as he says, the real eldest son and heir in tail, but brought up as if he were only a younger child, and kept in ignorance of the real facts as to his position and right. When the supposititious child attained his majority he was informed of the fact that he was illegitimate, and with this knowledge the father and himself went through the form of suffering a common recovery in the character of tenant for life and tenant in tail in remainder to such uses as they should jointly appoint. A joint appointment was made, and afterwards, under a marriage settlement, the property was expressed to be limited to uses in favour of the demurring Defendants, the widow and eldest son of the supposititious heir.

The Plaintiff alleges that until a few years ago he was wholly ignorant of the deception which had been practised, and he has now filed his bill, contending that he is entitled to the assistance of a Court of Equity to be placed in possession of the estates, as estates of which he has been deprived by a concealed fraud. Unless his case is affected by lapse of time by the operation of the *Statute of Limitations*, or by some countervailing equity on the part of the Defendants, that case would seem to be a perfectly clear one. It is as gross a fraud as could well be conceived. It was, indeed, attempted to be argued that, as the Plaintiff's right was a clear legal right which became vested in him at his father's death, with no legal bar or impediment to prevent his taking possession of or recovering the estates, and the Defendants' possession originating in a mere trespass, being, in point of law, mere squatting on the property, this Court would not interfere. The Solicitor-General gave one, perhaps, sufficient answer to this contention, viz., that the bill alleges the existence of an outstand-

ing unsatisfied term of years. But we do not think it well to leave it to that answer. We think it right to say that the contention would, in our judgment, have equally failed if there had been no outstanding term. It was assumed in the argument that a mere squatter would have had a good defence from sufficient length of possession. We are of opinion that the law gives no special privilege to the length of squatting possession. It must always be borne in mind that in all questions under the *Statute of Limitations* this Court has nothing to do with the nature, origin, or duration of the Defendants' possession, but simply whether the Plaintiff has or has not proceeded in due time after the accruer, or that which is to be taken to be the accruer, of his right of suit. An estate may have been enjoyed as a fee simple estate for generations through any numbers of devolutions or dispositions, or may have been held by squatters successively for many years, without creating any bar to the proceedings of a rightful owner under a title newly accrued. And there is not, in our judgment, in this respect any difference whether the accruer is on the determination of a previous estate or on the discovery of a concealed fraud. It is right also to notice that the possession in this case is not the possession of trespassers. The supposititious son got into actual possession as owner by means of the fraud, and the possession of the Defendants was a possession not only apparently derived from him, but was, against all the world but the Plaintiff, a possession under a valid title really derived from him.

Although the contention we have disposed of as to the legal estate was raised, the counsel for the Defendants admitted, as they were in fact compelled to admit, that if the supposititious son himself were now alive it would be impossible for him effectually to contend that this Court would allow him to avail himself of the legal bar arising from the length of his fraudulent possession. And it was also conceded that this Court will wrest property fraudulently acquired, not only from the perpetrator of the fraud, but, to use Lord *Cottenham's* language, from his children and his children's children, or, as was said in *Huguenin* v. *Baseley* (1) and *Bridgeman* v. *Green* (2), from any persons amongst whom he may have parcelled out the fruits of his fraud.

(1) 14 Ves. 273. (2) Wilmot's Notes, 58.

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It appeared to us, therefore, throughout this case that the real question is as to the true meaning of the 26th section of the *Statute of Limitations*. On this two contentions were raised. First, that the Plaintiff had not alleged a sufficient title under the positive enactment in that section. Secondly, that the Defendants were within the protection of the proviso in favour of purchasers. As to the first, there does not seem to us to be any real doubt or question. It is difficult to conceive what would be a concealed fraud, if what is here alleged is not, namely, that a person is induced, by a deception practised on him from his earliest knowledge, to believe that he was only a younger when he was the eldest son, or how a person could be more effectually deprived by fraud of his estate than by his being designedly, by the persistent falsehood and deceit of those about him, kept in ignorance of his birthright, and so prevented from claiming it. The statute, indeed, says that a claimant must proceed within twenty years after he discovered, or might with reasonable diligence have discovered, the fraud. The Plaintiff alleges in so many words that he never did know or suspect, until the recent time mentioned by him, anything of the alleged fraud; and that we must take to be true, unless we are enabled judicially to conclude from other statements of his in the bill that that allegation is false, or that he might with reasonable diligence have discovered the fraud. We are unable to find in the bill any such statement or anything to shew any want of reasonable diligence on his part in ascertaining the truth.

That brings us to the remaining and real point, whether the bill shews that the Defendants are protected by the proviso. One matter relating to this was not argued before us, which we, however, think it right not to pass wholly unnoticed, viz.: we desire not to express any opinion as to whether the defence of *bonâ fide* purchaser for valuable consideration, without knowledge of or reason to believe the fraud alleged, can be raised by demurrer, or otherwise than by a plea verified by the oath of the Defendant. The case was argued before us, however, so as to raise the real substantial question whether the proviso means the actual personal knowledge of the purchaser, or whether under it the actual knowledge of the agent is to be deemed and taken to be the knowledge of the purchaser.

It was contended by the Solicitor-General that the only person protected was a *bonâ fide* purchaser, and that we ought, on the authority of Lord *Hardwicke*, to hold that a person is not a *bonâ fide* purchaser whose agent was affected with notice of that which should have prevented his purchasing. In this proviso, however, we think that the words "*bonâ fide*" were introduced altogether for a different purpose and with a different meaning, that it was meant that the purchaser should be really a purchaser, and not merely a donee taking a gift under the form of a purchase. For example, a person might take an assignment of a leasehold in consideration of covenants to pay the rent and perform all the covenants—might take a conveyance of a mortgaged estate in consideration of his paying off the mortgage. These might be *bonâ fide* purchasers, or they might, according to the facts, be in truth and substance volunteers receiving a gift of a valuable chattel real or a valuable estate incumbered. It would be easy to suggest many other circumstances by which it might be shewn that an apparent purchaser had not entered into the transaction honestly and substantially as a purchaser, but in some other character, or for some indirect purpose. And we conceive that it was with reference to that class of cases the words "*bonâ fide*" were introduced here, and that they were not meant to include and cover all, and more than all, that is afterwards expressed in the remainder of the proviso. What, then, is the legal meaning and effect of that which is so afterwards expressed? At the time this statute was passed it had undoubtedly been held by the highest authority that the actual knowledge of the agent through whom an estate is acquired is in this Court equivalent to the actual personal knowledge of the principal. This is also in accordance with the invariable course of decision at common law in regard to purchases of chattels. No one dealing through an agent is ever permitted to allege himself ignorant of that which is actually communicated to the agent in the course of the transaction. The agent in the matter, and in the course of the transaction acting within the limits of his agency, is the *alter ego* of the principal.

It appears to us beyond all question that, as the law of this Court stood when the statute was passed, the knowledge of the purchaser's agent acquired in the course of the transaction was

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for all purposes treated as the knowledge of the principal. It is also, we conceive, beyond question that in every other case, except under this section, this Court would treat the knowledge of the purchaser's agent as the knowledge of the purchaser. Was it then meant to make such a material alteration of the law? It is said in support of that (and not without force) that the words well known in this Court, "purchaser for valuable consideration without notice," were designedly not used, and that the words "who had not participated in the fraud, and did not know, and had no reason to believe," were designedly introduced so that only those purchasers should be affected who had actual knowledge, and who were in truth making themselves morally accomplices in the fraud, in fact receivers of stolen goods.

But we think that what the Legislature really meant to do was to exclude that constructive notice which had certainly been carried to a very startling extent in many instances, and that it did not mean to subvert, in respect of one small portion of the law of this Court, the well-settled principles and rules on which all the Courts have acted in respect of the relation of principal and agent, and in respect of the extent to which the knowledge of the latter is deemed to be the knowledge of the former. The Courts had, in fact, held, almost in so many words, that what the agent knows the principal knows, that the knowledge of the agent was sufficient to create *mala fides* in the principal; and we think it, therefore, reasonable to hold that the Legislature used the words in the same sense, and that when they said "who did not know or had not reason to believe," they meant "who did not know or had not reason to believe, either by himself or by some agent whose knowledge or reason to believe is by settled law deemed and taken to be his." We think it would lead to very startling consequences if any other interpretation were put on the clause. It is obvious that if actual personal knowledge were required every corporation or joint-stock company might acquire a good title to property, although its officers and solicitors were perfectly conversant with the grossest fraud perpetrated by the vendor; and in fact any person might deal with impunity in the purchase of what is in substance stolen property, provided he takes care to leave the whole dealing from first to last in the hands of his agent.

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We have arrived, therefore, at the conclusion that the averment in the 30th paragraph of the bill, that the father, as the agent of and on behalf of his daughter, negotiated the marriage settlement with full knowledge that her intended husband was illegitimate, and had no interest in the devised estates, is a sufficient averment to preclude the daughter from setting up the bar of purchase for valuable consideration under the 26th section of the Act, and that the son, who only claims through the same settlements, is in the same position, and is equally affected with knowledge through the knowledge of his mother's father and agent.

It appeared to us at the close of the argument that, as the whole of the Plaintiff's case against the Defendants appears to rest on the averments of the father's agency and the father's knowledge, it might be right to allow the Defendants to traverse that averment by plea. But as such a plea must be accompanied by an answer giving discovery as to everything that may be material to that issue, we think that there is no sufficient advantage to warrant that which is an unusual course, and that the Defendants must proceed in the usual way to meet the case by answer.

The result is the appeals must be dismissed, and of course with costs.

Solicitors: Messrs. *Belfrage & Middleton;* Messrs. *Sharp & Ullithorne.*

MARTIN *v.* HOBSON.

L. JJ.
1873
Jan. 18.

Legacy—Will—Construction—"Sum and Sums of Money owing to me"—Words.

A testatrix made a specific disposition of certain property, including "all sum and sums of money which shall be due and owing to me at the time of my decease," and gave the residue of her personal estate to other persons. At the time of her death in 1781, she was one of the two next of kin of her son, who had died intestate in 1778. The son was the residuary legatee of his father, who had died in 1776. In 1800 a decree was made for taking the accounts of a partnership in which the father had been engaged, and which had been dissolved by the death of the other partner a few months before the father's death. In 1820 the representatives of the surviving executor of the father paid into Court in this suit a sum of money on account

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of what was due from the executor to the father's estate in respect of moneys coming from the partnership. Nothing was shewn as to the state of the partnership assets or of the estates of the father or son at the time of the death of the testatrix :—

Held (affirming the decision of the Master of the Rolls), that the moiety of the testatrix in the fund in question did not pass under the gift of "sums of money due and owing to me at the time of my decease;" but under the residuary bequest, it not being shewn that the assets were at her death in such a state that her share could be treated as a sum of money then owing to her.

Bainbridge v. *Bainbridge* (1) distinguished.

THIS was an appeal from a decision of the Master of the Rolls on a Petition for payment out of a fund in Court.

Mary Christian, of *Antigua*, widow, by will dated the 14th of February, 1781, and proved on the 28th of the same month, after bequeathing two pecuniary legacies, gave to trustees the residue of her real and personal estate "upon trust to collect and get in all sum and sums of money which shall be due and owing to me at the time of my decease, and also to sell and dispose for the best price that can be got for the same all stock, sugar, rum, and other effects belonging to me, and the money arising from such debts, effects, and other the above-mentioned premises to lay out and invest on," &c. She then declared trusts of the fund so invested for her daughter *Margaret Gunthorpe* for life, and after her death upon trusts under which, in the events which happened, *Margaret Gunthorpe's* two children became entitled in equal shares. She then directed the trustees to stand possessed of her negroes upon the trusts therein declared, being trusts for Mrs. *Gunthorpe* for life, with similar limitations over in favour of Mrs. *Gunthorpe's* children. She then bequeathed certain pecuniary legacies, and concluded: "All the rest and residue of my estate of what nature soever, I give to my daughter the said Mrs. *Gunthorpe*, her heirs and assigns."

The testatrix, *Mary Christian*, and her daughter, Mrs. *Gunthorpe*, were the two next of kin of *Matthew Christian*, who had died intestate in 1778. *Matthew Christian* was the residuary legatee of *Mary Christian's* husband, *Robert Christian*, who had died in 1776. The fund in Court formed part of the residuary estate of *Robert Christian*, and the question now was, whether

(1) 9 Sim. 16.

Mary Christian's share of it was to be treated as included in the disposition of "sum and sums of money due and owing to me," or as having passed under the residuary bequest in her will.

The circumstances under which the fund arose were, so far as was known, the following:—

Robert Christian, of *Antigua*, by will made in October, 1775, gave to his daughter, Mrs. *Gunthorpe*, then a spinster, a legacy of £6000, which he directed to be paid out of his share of the property of the partnership existing between him and *John Smith*, and if that was not sufficient then out of his other real and personal estate; and he gave the residue of his realty and personalty to his son *Matthew Christian* absolutely. By a codicil dated the 2nd of May, 1776, he noticed that *John Smith* had died, and gave some further directions about the legacy, under which, in the events which happened, £5000 of it became payable on the marriage of his daughter, and the remaining £1000 at the expiration of a year from his decease, the directions being continued that the sums should be primarily payable out of his share in the partnership property, and if that was insufficient, out of his other real and personal estate. He died in 1776, and the marriage of his daughter was solemnized soon afterwards.

Matthew Christian died in 1778, intestate, leaving his mother, *Mary Christian*, and his sister, Mrs. *Gunthorpe*, his next of kin.

At the testator's death the partnership accounts were unsettled. Mr. and Mrs. *Gunthorpe* filed their bill in the Court of Chancery in *Antigua* against *Robert Christian's* executors, to obtain payment of the £6000. Before this suit came to a hearing the testator's real estates in *Antigua* were sold by auction, and a supplemental bill was filed against the purchasers. On the 18th of April, 1782, the causes came on to be heard, and it was ordered by consent that the purchasers should pay to Mr. and Mrs. *Gunthorpe* the amount of the legacies of £5000 and £1000, and that the legacies should be assigned to trustees. The purchasers accordingly paid the £6000 to Mr. and Mrs. *Gunthorpe*, and Mr. and Mrs. *Gunthorpe* assigned the legacies to trustees.

After this the present suit of *Martin* v. *Hobson* was instituted by the trustees, to whom the legacies had been assigned, against *Hobson*, the surviving executor of *John Smith*, *Casamajor*, the sur-

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viving executor of *Robert Christian*, the executors of a deceased executor of *Robert Christian*, and an administrator *ad litem* of *Matthew Christian*, to take the accounts of the partnership and to have the legacies paid out of *Robert Christian's* share; and in December, 1800, a decree was made for taking those accounts.

On the 8th of November, 1804, the Master reported that the estate of *Smith* was indebted to the partnership more than the estate of *Robert Christian* was by the sum of £5469, so that upon payment of that sum to *Casamajor* out of the partnership property the estates would be on an equality, and would be entitled to an equal division of the residue of the partnership property.

By an order dated the 16th of March, 1818, it was ordered that *Casamajor* should pay into Court £6388 to the credit of the cause, "the separate account of *Robert Christian*," that the costs should be taxed and paid out of £13,432 consols standing to the credit of the cause, and that the residue of that sum should be carried over to the separate account of *Robert Christian*; and an inquiry was directed as to debts and legacies of *Robert Christian*. By a subsequent order in 1818 the surviving Plaintiff was declared entitled to be paid the legacies and interest out of the moneys which then were or should thereafter be standing to the separate account of *Robert Christian*. The fund in Court, after payment of costs, was accordingly applied in payment of the legacies, leaving a balance of £316 due. In 1820, *Casamajor* having died indebted to the estate, his children paid into Court in the cause the sum of £2364 in respect of what was due from him. Out of this sum the balance remaining due in respect of the legacies was paid, and by an order made in 1824 the residue was invested in £2339 consols, "the account of the separate estate of *Robert Christian*." The existence of this fund was forgotten till 1860, when an arrear of dividends amounting to £2096 had accrued upon it.

Some of the Respondents then presented a petition praying for a division of the fund, on the supposition that it passed under the gift in *Mary Christian's* will to Mrs. *Gunthorpe* for life with remainder to her children. The petition was adjourned into Chambers, and proceedings went on at great length to ascertain the parties entitled. Before any certificate had been made another petition was presented, by which the Respondents claimed the whole

fund as having passed under the residuary gift to Mrs. *Gunthorpe*. In July 1872, a certificate was made finding who were the parties entitled on either view of the construction of the will, and on the 29th of July, 1872, the Master of the Rolls decided that the Respondents in this appeal were entitled to the whole fund. This appeal was presented by a party who was found to be entitled to a share if the fund was comprised in the gift to Mrs. *Gunthorpe* for life.

Mr. *Southgate*, Q.C., and Mr. *Cadman Jones*, for the Appellant:—

We contend that everything which the testatrix Mrs. *Christian* had a present right to receive, and which could only come to her in the shape of money, falls within the description of "sums of money due and owing to me." This was money which, so far as appears, came out of the assets of a partnership, and therefore never could have come to her but as money. The case is stronger than *Bainbridge* v. *Bainbridge* (1).

Mr, *Roxburgh*, Q.C., and Mr. *Caldecott*, for the Respondents:—

The burden of proof is on the Appellant to shew that this fund does not pass under the residuary gift. To do this he must make out that at the time of the death of the testatrix it came under the description of a sum of money owing to her. For anything that appears it may have been in the shape of leaseholds or real estate at that time.

Mr. *Cadman Jones*, in reply.

SIR W. M. JAMES, L.J.:—

In this case the burden of proof lies on the Appellant, who has to make out that the fund in dispute passed under the gift of "all sum and sums of money which shall be due and owing to me at the time of my decease." We know nothing further than this: that long after the death of the testatrix a sum of money came in, which appears to have arisen from *Robert Christian's* share in a partnership business; but we knew nothing of the state of the assets, either of *Robert Christian* or of *Matthew Christian*, at the

(1) 9 Sim. 16.

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time of the death of the testatrix. Under these circumstances, it is not made out to our satisfaction that this was a sum of money due and owing at her death. In *Bainbridge* v. *Bainbridge* (1) the *ratio decidendi* evidently was, that the estate had been got in by the executor so as to constitute a debt due from him.

SIR G. MELLISH, L.J.:—

I am of the same opinion. I think it very likely that the expression "sum and sums of money due and owing to me" would be held to extend beyond debts properly so-called, and might include all sums of money which there was a present right to receive, though the administrations which were necessary to be taken out before they could be received had not been taken out. But in order to come within this description the subject must be something which at the death of the testatrix could be described as a sum of money. Here, what the testatrix had, was a distributive share in the residuary personal estate of the son, who was entitled as residuary legatee to the residue of his father's estate, including the father's share in the assets of a partnership. These assets, for anything we know to the contrary, may at the death of the testatrix have consisted of real estate, and we do not think that her interest in the moneys arising from their subsequent sale can be considered a sum of money due and owing to her at her death.

Solicitors: Mr. *Ellerton*; Messrs. *Edmands & Mayhew*.

(1) 9 Sim. 16.

In re HARMONY AND MONTAGUE TIN AND COPPER MINING COMPANY.

L. JJ.
1873
Jan. 25.

SPARGO'S CASE.

Company—Subscriber to Memorandum—Paid-up Shares—Payment in Cash—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.

Any *bonâ fide* transaction between a company and a shareholder which, if the company brought an action against him for calls, would support a plea of payment, is "payment in cash" within sect. 25 of the *Companies Act*, 1867.

S. took shares in a company formed for working a mine which he sold to them. The whole nominal amount of the shares was immediately payable, as was also the purchase-money of the property. It was agreed between *S.* and the company that he should be credited in account with the price of the property, and debited with the amount payable on his shares; and the balance of the account thus made out was shortly afterwards exactly balanced by cash payments by *S.*:—

Held (reversing the decision of the Vice-Warden of the Stannaries), that *S.* must be considered as having paid up his calls in cash.

THIS was an appeal motion by *Thomas Spargo* from an order of the Vice-Warden of the Stannaries ordering him to pay to the Registrar, as liquidator of the company, £450, the amount originally payable in respect of nine shares for which he was settled on the list of contributories, and ordering him to pay a balance alleged to be due from him in respect of forty-two other shares of which he had been the holder, but which he had long since disposed of.

Michell and *Stevens* were licensees of a sett for twelve months from the 28th of January, 1871, with the right at any time within that period to call for a lease for twenty-one years. They and *Spargo* entered into arrangements for promoting a company to work this mine, and determined that its capital should be £3200, in sixty-four shares of £50 each; £16 per share to go for working capital, and £34 per share for the purchase of the mine, treating it as worth £2176. A company for that purpose was accordingly registered on the 9th of March, 1871, under the above name. The capital was stated by the memorandum of association to be £3200, in sixty-four shares of £50 each. *Spargo* subscribed the memorandum for thirty-one shares, two other persons for two

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shares each, and the remaining four subscribers for one share each. Neither *Michell* nor *Stephens* was a subscriber.

On the 16th of March, 1871, a meeting was held, at which all the seven subscribers were present, and at which the following resolutions were passed unanimously :—

"That the sum of £2176 be credited Mr. *Thomas Spargo* for the lease, &c., of the property, and that the same be paid out of the share capital of the company. That Mr. *T. Spargo* be and is hereby appointed the manager of the company. That Mr. *F. H. Hearn* be and is hereby appointed the secretary to the company. That the statement of accounts produced to this meeting be allowed and passed; balance in favour, £989 11*s.* 6*d.* That Mr. *Spargo*, as manager, issue certificates for shares in the company as follows." Then followed, first, the names of the seven subscribers to the memorandum, with the numbers of shares for which they had respectively subscribed it set against their respective names; next, the names of three persons who had applied for shares, amounting to five in all; and lastly, the name of *Spargo*, with the balance of twenty shares set against it.

From the account kept in the books of the company it appeared that all the shares except *Spargo's* were fully paid up in cash in March, 1871. *Spargo's* account stood as follows in the ledger :—

1871.	Dr.	£	*s.*	*d.*	1871.	Cr.	£	*s.*	*d.*
Mar.	To share capital, 31 shares, signed for in mdum. ..	1550	0	0	Feb. 16	By Cash	2	10	0
					28	Ditto	25	0	0
	Ditto 20 taken at meeting	1000	0	0	Mar. 3	Ditto	6	18	6
						Purchase of Lease of Mine ..	2176	0	0
					Sept.	Salaries a/c ..	63	0	0
						Sundry charges	75	0	0
					Aug. 5	Cash	150	0	0
					Sept.	Ditto	51	11	6
		£2550	0	0			£2550	0	0

1871.		£	*s.*	*d.*	1871.		£	*s.*	*d.*
Nov.	To Cash	45	13	3	Nov.	By Rent a/c ..	37	10	0
Dec.	Wages due at Mine	25	0	0		Salaries a/c ..	31	10	0
					Dec	Rent a/c ..	4	3	4
						Salaries a/c ..	10	10	0

After the above meeting *Spargo*, at different times, disposed of a number of his shares at a premium. A Mr. *Riddell* took twelve

of them in August, 1871, and subsequently acquired six more shares. The next general meeting was held on the 13th of September, when Mr. *Riddell* and three other persons were elected directors. Part of the minutes was as follows:—

"Mr. *Spargo* submitted the balance sheet, and a discussion arose thereon respecting the sum of £2176 charged for purchase of the lease, which it appeared had not yet been transferred to the company. It appeared, also, that by an agreement entered into in August last, between Mr. *Spargo* and Captains *Stephens* and *Michell*, Mr. *Spargo* was to receive one half that sum for bringing out the company, the remaining half to be divided equally between Captains *Stephens* and *Michell*. It was ultimately proposed and agreed that Mr. *Spargo* should forthwith pay £543 in cash and execute a transfer of twenty shares to the company as a security for the transfer of the lease, the company undertaking to settle with Captains *Stephens* and *Michell* out of the said money and shares, and to pay the balance in new shares and money to Mr. *Spargo*."

Resolutions were then passed for increasing the capital of the company to £10,000 by the issue of new shares; and rules and regulations were adopted in the place of those in Table A. to the *Companies Act*, 1862.

Spargo handed over the £543, and transferred shares, according to the arrangement mentioned in the minute. No lease, however, was ever granted, difficulties having been raised as to its form on the part of the lessees. No new shares were ever issued in pursuance of the resolutions at the September meeting, and the company having proved a failure an order for winding it up was obtained on the 21st of December, 1871. *Spargo* was placed on the list of contributories for nine shares, being all that were standing in his name at the commencement of the winding-up.

In February, 1872, the Registrar, as liquidator, applied for an order under sect. 165 of the *Companies Act*, 1862, for *Spargo* to pay into Court £1633, alleged to have been retained by him out of the assets of the company, and the above-mentioned sum of £2176. The Vice-Warden refused the application, and there was no appeal from his decision.

The Registrar then applied for an order upon *Spargo* to pay

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into Court £450, being £50 per share on the nine shares in respect of which he was on the list of contributories; and also to pay into Court £893, being the balance of £50 per share on the forty-two other shares taken by *Spargo*, after deducting £1207, the amount of the moneys which the Registrar computed to have been paid by *Spargo* on behalf of the company. The Vice-Warden made the order asked for, and *Spargo* appealed.

Mr. *Roxburgh*, Q.C., and Mr. *Woodroffe*, for the Appellant:—

Spargo can only be made liable as an officer of the company who has misconducted himself, or as a contributory. An attempt to charge him on the former ground has failed, he therefore can only be attacked as a shareholder past or present. But the case cannot be dealt with on the former ground, for no list of past members has been settled. Then, how can he be liable as a present member for those shares with which he has parted, and in respect of which other persons are on the list of contributories?

[The LORD JUSTICE MELLISH:—It appears to me that you must shew your shares to have been fully paid up. When you take shares you become bound to pay cash for them. If you do not do so, and the company nevertheless registers them in your name as fully paid up, and you sell them to *bonâ fide* holders as fully paid up shares, they are not liable to pay calls on them; but how is your original liability to pay got rid of?]

They were fully paid up. The company was under a present obligation to pay for the mine, *Spargo* under a present obligation to pay for his shares. The two were set off, and if *Spargo* had been sued at law the facts would have supported a plea of payment, and the *Companies Act*, 1867, sect. 25, is satisfied: *Fothergill's Case* (1).

[They also referred to *Waterhouse* v. *Jamieson* (2).]

Mr. *Fry*, Q.C., and Mr. *Joseph Dixon*, *contrà*:—

We contend that under the Act of 1867 *Spargo* is liable on all the shares he took, no memorandum such as is required by the

(1) *Ante*, p. 270. (2) Law Rep. 2 H. L., Sc. 29.

Act having been registered. The Act requires that if there be no such memorandum the shares shall be paid up in cash.

[The LORD JUSTICE MELLISH :—In *Fothergill's Case* (1) both the Lord Chancellor and I thought that anything which would support a plea of payment would be enough.]

We cannot say that what was done here would not support a plea of payment; but does it amount to payment in cash? If it does, the Act of 1867, sect. 25, has not altered the law. *Cleland's Case* (2) shews the opinion of Vice-Chancellor *Wickens*, that the cancellation of a debt arising from the sale of property to the company is not enough. The case is substantially one of shares allotted as fully paid up. As to the shares in respect of which *Spargo* was no longer on the register at the commencement of the winding-up, it is true that he cannot be called upon as a contributory, but he is under a liability to the company for not having paid them up; and under the *Companies Act*, 1862, s. 101, when a person is on the list as a contributory the Court has jurisdiction to settle all matters depending between him and the company: *Stringer's Case* (3).

SIR W. M. JAMES, L.J. :—

I am of opinion in this case that the order of the Vice-Warden cannot stand.

The question turns upon what is the true intent and meaning of the 25th section of the *Companies Act*, 1867, which we had to consider very fully in *Fothergill's Case*, in which judgment was delivered yesterday by the Lord Chancellor and ourselves. In that case no doubt it was not necessary for us to lay down what would amount to "payment in cash," since we were clearly of opinion that there had not been any payment of cash or anything that could be called a payment of cash in that particular case, but it was said by the Lord Chancellor, and we entirely concurred with him, that it could not be right to put any construction upon that section which would lead to such an absurd and unjustifiable result as this, that an exchange of cheques would not be payment

17 & 19

(1) *Ante*, p. 270. (2) Law Rep. 14 Eq. 387.
(3) Law Rep. 4 Ch. 475.

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in cash, or that an order upon a banker to transfer money from the account of a man to the account of a company would not be a payment in cash. In truth, it appeared to me that anything which amounted to what would be in law sufficient evidence to support a plea of payment, would be a payment in cash within the meaning of this provision. The object of the section was, I apprehend, to prevent such contracts as had been before the Court in *Pellatt's Case* (1), and *Elkington's Case* (2), in which a man was to take shares, and to pay for them by supplying goods when wanted. It was considered that there was mischief in collateral contracts of that kind, which deprived creditors of the remedies which they would expect to have against persons whose names they saw registered on the list of shareholders. In *Fothergill's Case* (3), the bargain in effect was to give paid up shares in satisfaction of the money which was to be paid for other shares. But if a transaction resulted in this, that there was on the one side a *bonâ fide* debt payable in money at once for the purchase of property, and on the other side a *bonâ fide* liability to pay money at once on shares, so that if bank notes had been handed from one side of the table to the other in payment of calls, they might legitimately have been handed back in payment for the property, it did appear to me in *Fothergill's Case*, and does appear to me now, that this Act of Parliament did not make it necessary that the formality should be gone through of the money being handed over and taken back again; but that if the two demands are set off against each other the shares have been paid for in cash. If it came to this, that there was a debt in money payable immediately by the company to the shareholders, and an equal debt payable immediately by the shareholders to the company, and that each was accepted in full payment of the other, the company could have pleaded payment in an action brought against them, and the shareholder could have pleaded payment in cash in a corresponding action brought by the company against him for calls. Supposing the transaction to be an honest transaction, it would in a court of law be sufficient evidence in support of a plea of payment in cash, and it appears to me that it is sufficient

(1) Law Rep. 2 Ch. 527. (2) Law Rep. 2 Ch. 511.
(3) *Ante*, p. 270.

for this Court sitting in a winding-up matter. Of course, one can easily conceive that the thing might have been a mere sham, or evasion, or trick, to get rid of the effect of the Act of Parliament, but any suggestion of sham, or fraud, or deceit seems to be entirely out of the question in this case, because everybody in the company knew of the transaction; every shareholder of the company was present, and was a party to the resolution; there was no deceit practised on any creditor, nor was there any registration of these shares, except as shares paid up. This seems to me to dispose of the case. It was argued, however, that the payment by the company was made for a consideration which has absolutely failed. If however the payment was made, the subsequent failure of the consideration could not prevent its being a payment, nor prevent its repayment by the shareholders from being a payment in full of the shares, though there might be an action or a bill by the company either for the return of the money or for damages, in case there was a subsequent failure to do something in respect of the property. But I see no trace whatever, no shadow of anything like what may be called a failure of consideration. What the parties were dealing with was a license or sett for a year, with a right to get a license or sett for twenty-one years. That was the property which the parties undertook to deal with. The company, with knowledge of all this, not only paid the £2176, in the manner which appears, to the Appellant, but afterwards made arrangements with him for satisfying the two other persons who were interested with him for their proportion of the property. After this disputes arose, not between this gentleman and themselves, but between the intending lessors and themselves; not as to the right of one to have the lease and the obligation of the other to grant a lease, but as to what would be the proper conveyancing language in which that lease was to be expressed. It appears to me that it would be an abuse of language to say that there was anything like a failure of consideration on the part of Mr. *Spargo*, which is to entitle the company to treat that payment as a payment never made, and to insist that the shares remain unpaid to this day. This applies to the forty-two shares as well as the nine shares. Therefore, it is not necessary to discuss the question as to what we might do under the 101st section, if this

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were a case where Mr. *Spargo* had not paid up his shares, but they had been so dealt with that as between the company and the present holders they must be treated as paid up.

I am of opinion that the order of the Vice-Warden ought to be discharged with costs of the proceedings in the Vice-Warden's Court.

SIR G. MELLISH, L.J. :—

I am of the same opinion. I gave my opinion in *Fothergill's Case* (1) yesterday, on the proper construction of the 25th section of the Act of 1867. I then stated, that in my opinion, if the circumstances relied on would in an action for the money due upon shares be evidence only in support of a plea of accord and satisfaction, this section would prevent their being a good defence; but that if they would support a plea of payment, then the 25th section did not prevent their being a good defence. In the present case, I am of opinion that if an action were brought at law for the amount originally payable on these shares, there would be a valid defence, under a plea of payment. Nothing is clearer than that if parties account with each other, and sums are stated to be due on one side, and sums to an equal amount due on the other side on that account, and those accounts are settled by both parties, it is exactly the same thing as if the sums due on both sides had been paid. Indeed, it is a general rule of law, that in every case where a transaction resolves itself into paying money by *A.* to *B.*, and then handing it back again by *B.* to *A.*, if the parties meet together and agree to set one demand against the other, they need not go through the form and ceremony of handing the money backwards and forwards.

Solicitors: Messrs. *Kimber & Lee;* Messrs. *Gregory, Rowcliffes, & Rawle.*

(1) *Ante*, p. 270.

In re HOWARTH.

L. JJ.
1873
Feb. 22.

Infant—Maintenance—Freehold Estate.

On an application by an infant for maintenance, the Court has jurisdiction, without suit, to charge the expenses of his past maintenance and the costs of the application on the *corpus* of a freehold estate to which he is entitled in fee.

THIS was a Petition in the Court of Chancery of *Lancaster*, which, by leave of the Vice-Chancellor, was mentioned to the Lords Justices.

Thomas Howarth, by will dated the 25th of October, 1853, after providing for payment of his debts and giving certain legacies, gave and bequeathed to *James Howarth* and his heirs two freehold farms upon trust during the term of ten years to apply the rents in manner therein mentioned, and after the expiration of that term upon trust for *Reuben Howarth* for life, and after his decease upon trust for the eldest son of *Reuben Howarth* living at *Reuben Howarth's* decease, his heirs and assigns.

The testator died in February, 1857. *Reuben Howarth* died in 1869, leaving the Petitioner, *John Thomas Howarth*, his only surviving son, who was born in August, 1857.

The two farms produced a rent of £50 a year. *James Howarth* received the rents till August, 1872, when he died insolvent, owing a considerable balance in respect of the rents.

John Thomas Howarth presented his petition "In the matter of *J. T. Howarth*, an infant," stating the above facts, and that the Petitioner had no property except the above two farms; that the Petitioner lived with his mother and worked as a weaver, earning about 12*s.* a week, by means of which and the earnings of his mother as a washerwoman they were maintained; that the Petitioner had no duly constituted guardian; that *Thomas Howarth* was the heir-at-law of *James Howarth*, but that the Petitioner was advised that under the will the legal estate in the farms was vested in himself. The Petition prayed that the Petitioner's mother or some other proper person might be appointed guardian of his person and estate and receiver of the rents and profits of his estate during his

L. JJ. 1873 *In re* HOWARTH.

minority, and that a proper allowance might be made for the Petitioner's past and future maintenance.

It appeared from the evidence that the Petitioner was in very delicate health, so that his working as a weaver was highly injurious to him.

The Vice-Chancellor on the 27th of November, 1872, referred it to the Registrar to approve of a guardian and receiver, and to inquire of what his fortune consisted, and who had maintained him since his father's death, and what would be proper to be allowed for his maintenance and education from any and what time past and for the time to come during his minority, and out of what fund such allowance ought to be made.

The Registrar on the 28th of January, 1873, certified his approval of guardians and a receiver, and certified that the Petitioner's fortune consisted only of the two farms, that the Petitioner's mother had maintained the Petitioner since his father's death, and that £20 should be allowed her for past maintenance, such sum to be raised out of or charged upon the *corpus* of the Petitioner's property, and that it would be proper that the whole net rents should be allowed for the next two years for the maintenance of the Petitioner, after keeping down the interest on any sum which the Court should think fit to charge upon or direct to be raised out of the property in respect of the said sum of £20 or the costs of this matter.

On the Petition coming on again the Vice-Chancellor was of opinion that an order carrying into effect the recommendations of the certificate would be for the infant's benefit, but, doubting his jurisdiction to make it, desired that the matter might be mentioned to the Lords Justices, expressing his readiness to make the order if their Lordships were of opinion that he had jurisdiction (1).

(1) 1873. Feb. 18.
MR. LITTLE, V.C.:—

This was an application for maintenance by a male infant entitled in fee under the trusts of a will to a real estate producing an income of £50 per annum, and who is nearly sixteen years of age, and in delicate health. The infant possesses no available means except this estate and the future income of it. The proposal laid before me upon foot of the Registrar's report was that the costs of the application, and a sum of £20 to be allowed to the infant's mother for past maintenance, should be raised by a mortgage or charge upon the estate, and that, subject thereto, the future income of the

Mr. *J. P. Lake*, for the Petitioner, referred to *Marlow* v. *Pitfield* (1); *Jenner* v. *Morris* (2); *Fentiman* v. *Fentiman* (3); *Nottley* v. *Palmer* (4); *In re Allen* (5).

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estate, after paying the interest on the charge, should be allowed for the infant's future maintenance.

I was and am satisfied that it would be proper and beneficial to the infant that this application should be granted, but I doubted the power of the Court to make any order binding the *corpus* of the property by the proposed charge, and I further doubted whether, supposing the Court would have had power to make such an order in a suit to execute the trusts of the will under which the infant derives title, it could make the order upon a mere petition for maintenance.

I have been referred to the cases of *Marlow* v. *Pitfield* (1 P. Wms. 559) and *Fentiman* v. *Fentiman* (13 Sim. 171) in support of the application. Those were both decisions in suits to execute the trusts of wills; and, besides that distinction, the several states of facts involved in those cases were very materially different from those in the present case. The case of *Nottley* v. *Palmer* (11 Jur. (N.S.) 968) was also mentioned, but this case appears to me to have no application. And no precedent has been produced upon which I can rely in making the order desired; while, on the other hand, the modern cases, and especially *Calvert* v. *Godfrey* (6 Beav. 97), *Wood* v. *Patteson* (10 Beav. 541), and *Field* v. *Moore* (19 Beav. 176; 7 D. M. & G. 691) are strong authorities to shew the absolute want of jurisdiction in the Court to bind an infant's real estate by its order, whether the interest be a legal or an equitable one, and however advantageous to the infant may be the object sought to be carried into effect by the order.

Now, feeling as I do that the interest of the infant would be best consulted by the order sought for being made, I should be very glad if I could be placed in a position in which I could with propriety make the order. But I cannot merely upon my own authority deviate from what I consider to be the uniform course of the Court upon a subject which must very frequently have called for consideration. For it is manifest that cases of infants in want of maintenance succeeding to small real estates or shares of real estates must be of almost every day occurrence, and one would therefore expect to find that if the jurisdiction existed in the Court to apply the *corpus* of real estate for maintenance there would be no difficulty in producing any number of precedents of orders to that effect. At the same time, if the infant's advisers are still of opinion that it is within the competency of the Court to grant their application, I will very willingly consent that the subject be mentioned to the Court of Appeal, without the expense of an appeal being incurred; and if their Lordships shall intimate their opinion to be that the order desired may be made upon this Petition, I will at once make it.

(1) 1 P. Wms. 559.
(2) 3 D. F. & J. 45.
(3) 13 Sim. 171.
(4) 11 Jur. (N.S.) 968.
(5) "In the matter of *J. T. R. Allen*, an infant" (V. C. E. 8 March, 1850; Reg. Lib. 1849, A., f. 760.) On petition of the infant and his mother *Eliza-*

L. JJ. 1873 *In re* HOWARTH.

SIR W. M. JAMES, L.J.:—

I am of opinion that there is jurisdiction to make an order for charging the *corpus* of the estate. We can only give an opinion, for the person on whom the estate will descend as heir if the Petitioner should die under twenty-one not being before the Court, no order can be made by which he will be bound. It is certainly for the benefit of infants who have no means of maintenance besides the rents of freehold estate that the Court should have jurisdiction to relieve them from the difficulties incident to that position. I apprehend that here if the mother were to sue the Petitioner for necessaries supplied to him, a judgment might be obtained by which his inheritance would be bound, and the order asked for substantially comes to the same thing. The cases of *Fentiman* v. *Fentiman* and *In re Allen* are in point, and following them, I am of opinion that there is jurisdiction to make an order charging the inheritance with the past maintenance and costs.

SIR G. MELLISH, L.J., concurred.

Solicitor for the Petitioner: Mr. *Trevor-Roper, Rochdale.*

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beth Allen, widow, it was referred to the Master to inquire and state "whether it will be fit and proper that any and what sum should be raised by way of charge upon the freehold and leasehold property devised and bequeathed by *J. H. Allen*, the father of the Petitioner *J. T. R. Allen*, to the Petitioner *Elizabeth Allen*, with remainder to the Petitioner *J. T. R. Allen*, as in the said will mentioned, or either of the said properties, for the purpose of discharging the debt of £150 incurred as in the petition mentioned, for the education of the Petitioner *J. T. R. Allen*, and providing for the education of the Petitioner during his minority in such manner as shall qualify him for the profession of a barrister-at-law, and for the costs of this application and the costs of raising such sum; and if the said Master shall find that any sum is fit and proper to be so raised for such purpose, then he is to be at liberty to receive proposals for raising the said sum, and he is to state the same, or such as he shall approve, with his opinion thereon, to the Court, and after the said Master shall have made his report such further order shall be made as shall be just."

WEBB *v.* SADLER.

L. C. and L. JJ.
1873
Jan. 27.

[1870 W. 154.]

Power of Appointment—Invalid exercise of Power—Extent of Invalidity—Power of Appointment over Realty—Conversion—Gift to the Executors or Administrators of A.—Personæ Designatæ.

Husband and wife, having, under their marriage settlement, a joint power of appointment over personalty in favour of the children of the marriage, of whom there were three survivors, appointed one third of the fund to trustees upon such trusts as *H.* (one of the sons) by deed, executed with the consent of the father during his life, and after his death with the consent of the trustees of his will, or by will, should appoint; and in default of such appointment, upon trust for *H.* for life, or until bankruptcy or assignment (such bankruptcy or assignment being limited to twenty-one years after the death of his surviving parent); and after *H.'s* death, upon trust for his executors or administrators, as part of his personal estate; but if such interest should be previously determined, then upon the trusts therein mentioned:—

Held, that the appointment to such uses as *H.* should appoint, with consent of the trustees, was void, but that the limitation over in default of appointment by *H.* was valid, and gave *H.* an absolute interest in the share, subject to the contingency of his committing a forfeiture within the prescribed period.

Husband and wife had a joint power of appointment over real estate among the children of the marriage for such estates and interests, and in such manner as they should think fit. In default of and subject to such appointment the estate was to be held, subject to the parents' life interest, in trust for all the children to whom no share had been appointed, to vest in them at twenty-one or marriage. The settlement contained a power of sale and exchange, but no trust for absolute sale.

The husband and wife appointed two-fourths to *H.* and another of their children, the appointment to *H.* being in the same terms as that of the personalty, and declared that the shares of any person interested in the capital arising from any sale under the settlement should be of the quality of personal estate:—

Held, that the appointors had power to convert the real into personal estate, and that *H.* took an absolute interest in his share subject to the same contingency as in the case of the personalty.

Order of *Bacon*, V.C., varied.

THIS was an appeal from a decision of Vice-Chancellor *Bacon* (1). By one of two settlements dated the 13th of November, 1821, executed prior to the marriage of *George Stebbing Sadler* and

(1) Law Rep. 14 Eq. 533.

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Louisa Firmin, certain personal estate, the property of the intended wife, was settled upon trusts for the benefit of the wife for life for her separate use, with remainder to the husband for life, with remainder to the children of the marriage as the husband and wife should jointly, or as the survivor should by deed or will appoint, and in default of appointment for all the children who being sons should attain twenty-one, or being daughters should attain twenty-one or marry, in equal shares, assignable to such children at the respective ages or times aforesaid. This settlement contained no hotchpot clause.

By the other of the two settlements certain real estates, the property of the intended husband, were conveyed to trustees and their heirs from and after the determination of the life estates of the husband and wife, to the use of all and every, or such one or more exclusively, of the other or others of the children of the marriage, or the issue of any such child or children, either entirely or in such parts, shares, and proportions, at such age or respective ages, days, or times, for such estates, rights, and interests, and subject to such powers, provisoes, conditions, and limitations over (such powers, provisoes, conditions, and limitations being for the benefit of all and every, or some one or more of the said children or grandchildren), and in such manner as the husband and wife during their joint lives, or the husband after the death of his wife, should appoint, and in default of appointment in trust for all and every such child and children of the marriage to whom or for whose benefit no part or share of or in the said premises should have been appointed as aforesaid, in equal shares as tenants in common, to vest at twenty-one or marriage.

The settlement contained the usual powers of sale and exchange with trusts for the reinvestment of the proceeds in land to be settled to the same uses; but there were no trusts for absolute sale.

On the same day *G. S. Sadler* executed a bond, conditioned to be void on payment by his heirs, executors, or administrators, within one year after his decease, to the trustees of the said settlement of £2000, to be applied by them according to the trusts of that settlement.

There were issue of the marriage four children—*George Thomas, Harcourt, Clara Sophia*, and *Henry Robert Sadler*.

L. C. and L. JJ. 1873 WEBB v. SADLER.

Harcourt Sadler attained twenty-one, and died on the 5th of April, 1852, intestate, leaving his father, *G. S. Sadler*, his heir-at-law.

On the 1st of May, 1852, *G. S. Sadler* and his wife appointed one-third of the funds contained in the first settlement, subject to their own life estates, to *George Thomas Sadler* absolutely; and on the 1st of June, 1856, they appointed, in like manner, another third part of the same funds for the benefit of *Clara Sophia Sadler*, who shortly afterwards married *John Weir*, when her share was settled.

By a deed-poll dated the 19th of December, 1859, *G. S. Sadler* and *Louisa* his wife appointed the remaining one-third of the personalty after their own deaths to trustees upon trust to raise £1500 and interest upon certain trusts, and to stand possessed of the residue upon such trusts as *Henry Robert Sadler* at any time should by deed to be duly executed by him, but nevertheless with the consent in writing of the said *G. S. Sadler*, during his life, and after his decease with the like consent of the persons or person who for the time being should be the acting trustees or trustee under any last will and testament of *G. S. Sadler*, and whether therein named, or to be appointed under any power therein, or by the Court of Chancery or other competent authority, and which consent, either by the said *G. S. Sadler* or by the other person or persons thereinbefore referred to in that behalf, should be testified by his or their signature of the deed or deeds by which any such appointment or appointments should be made, or as the said *H. R. Sadler*, if his life interest under the next succeeding trust should not have determined during his life under or by virtue of the provisions in that behalf thereinafter contained, but not otherwise, should by his will, or any codicil thereto, limit or appoint; and in default of and subject to any such limitation or appointment, then in trust to pay the income to *H. R. Sadler* during his life, or until his interest under the present trusts should sooner determine under and by virtue of the provision thereinafter contained; and from and after his decease (if and provided that his interest under the last preceding trust should not have determined under and by virtue of the provision in that behalf therein contained), then subject as aforesaid, and in default of any limitation or appointment, upon trust for his executors or administrators as

L. C. and L. JJ. 1873 WEBB v. SADLER.

part of his personal estate; but if such interest should have determined, then subject as aforesaid, and in default of any such limitation or appointment, upon the like trusts as would have affected the residue of the same third share, if the same had been duly appointed in favour of *H. R. Sadler* only during his life, or until the period of such determination: Provided always that if *H. R. Sadler*, at any time during the lives or life of *G. S. Sadler* and *Louisa* his wife, or the survivor of them, or during the period of twenty-one years next after the decease of such survivor, should be declared bankrupt, or take the benefit of any Insolvent Debtors Act, or assign, alien, charge, or in any manner incumber or affect the income thereinbefore directed to be paid to him after the decease of *G. S. Sadler* and *Louisa* his wife, the trust thereinbefore declared for his benefit during his life should absolutely cease, and thenceforth during his life the same income should be held in trust for and paid to the persons to whom the same would be payable if *H. R. Sadler* were then dead.

By another deed-poll dated the same 19th of December, 1859, *G. S. Sadler* and *Louisa* his wife appointed two-fourths of the real estate comprised in the second indenture of settlement, subject to their own life interests, in favour of Mrs. *Weir* and *H. R. Sadler* respectively. The trusts in favour of *H. R. Sadler* were the same as those in the last-mentioned deed of appointment; and after his death, and in default of and subject to appointment by him, or such determination of his estate by bankruptcy or alienation, the trust was declared to be for his executors or administrators as part of his personal estate. And it was thereby declared that the shares and interests of the persons beneficially interested in the capital or principal moneys arising from any sale under the powers contained in the same indenture of settlement should be of the quality of personal and not real estate, and that the same moneys should not be invested in the purchase of real estate.

On the 14th of January, 1866, *George Thomas Sadler* died intestate, leaving a widow and several children, sons and daughters, two of whom had attained twenty-one.

In the course of the year 1866, at the request of *G. S. Sadler* and his wife, the real estates were sold under the powers of sale contained in the second settlement.

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G. S. Sadler died in 1869, and his wife died in 1870.

The bill was filed for the purpose of ascertaining the rights of the parties interested under the two indentures of settlement, and amongst the questions in dispute were the following: First, whether the powers given by the deeds of the 19th of December, 1859, to *H. R. Sadler*, to appoint by deed, with the consents therein mentioned, or by will, if he should not previously have committted a forfeiture, were valid; and whether, if such powers were invalid, the limitations in default of appointment failed also; and secondly, whether the declaration in the second deed of appointment of the 19th of December, 1859, that the proceeds of the real estate should be of the quality of personal estate, was binding as against the heir-at-law of *Harcourt Sadler*.

The Vice-Chancellor held, first, that the whole of the appointments in favour of *H. R. Sadler* contained in the deeds-poll were invalid, except to the extent of giving him an estate for life, or until bankruptcy or assignment; and that his share, subject to his life interest, went to the persons entitled in default of appointment; and secondly, that the real estate was converted into personalty by the second deed-poll.

From this decision, except so far as it related to the conversion of the real estate into personalty, *H. R. Sadler* appealed.

Mr. *Morgan*, Q.C., and Mr. *G. O. Edwards*, for the Appellant:—

We admit that the clause requiring the consent of the trustees is invalid, both as being an attempt to import a stranger into the power, and as a violation of the rule against perpetuities. But this clause may be rejected and the power of appointment given to *H. R. Sadler* maintained. It is only added as a proviso, and it makes no difference that it precedes the gift of the power instead of following it: *Alexander* v. *Alexander* (1); *Fry* v. *Capper* (2); *Churchill* v. *Churchill* (3); *Busby* v. *Salter* (4); *Sugden* on Powers (5). But if this power should be held altogether invalid, the subsequent limitations in default of appointment are valid:

(1) 2 Ves. Sen. 640.
(2) Kay, 163.
(3) Law Rep. 5 Eq. 44.
(4) Preston on Abstracts, vol. ii. p. 164.
(5) 8th Ed. 668.

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Ingram v. *Ingram* (1). The late case of *Carr* v. *Atkinson* (2) is exactly in point. The effect of those limitations is, that *H. R. Sadler* takes an absolute interest, subject to the contingency of his forfeiting his life estate within twenty-one years after the death of his surviving parent; for a gift of personal estate to a man for life, and after his death to his executors and administrators, gives him the absolute interest, even though there is an intermediate power to dispose of it by will: *Bray* v. *Bree* (3). In the present case the construction is made still clearer by the additional words "as part of his personal estate."

The Vice-Chancellor was right in declaring that the whole of the real estate was converted into personalty by the declaration contained in the second deed-poll. It has been long settled that a power to appoint real estate among a class is well exercised by an appointment to trustees upon trust to sell and divide the proceeds: *Kenworthy* v. *Bate* (4). That is the effect of the declaration in the present case.

LORD SELBORNE, L.C.:—We are clearly of opinion that the powers of appointment given to *H. R. Sadler* with the consent of the trustees are altogether void.

Mr. *Amphlett*, Q.C., and Mr. *Crossley*, for the Plaintiffs:—

We contend that both real and personal estate went, as in default of appointment; and that the real estate was converted into personalty. The power of appointment given to *H. R. Sadler* being void, the limitations in default of appointment were void also. Those limitations were only intended to take effect if the power of appointment took effect. *Ingram* v. *Ingram* was a case in which the void power was to appoint to objects of the original power, so that it was the intention of the donee of the original power that those objects should take at all events. And we refer to the observations of Lord *St. Leonards* on that case in his work on Powers (5).

But the ultimate limitation is void for another reason. It is a gift to *H. R. Sadler* for life, and after his death, in certain events.

(1) 2 Atk. 88.
(2) Law Rep. 14 Eq. 397.
(3) 2 Cl. & F. 453.
(4) 6 Ves. 793.
(5) 8th Ed. p. 515.

to his executors and administrators. They would take as *personæ designatæ*, and would hold the property as trustees of the will; or the expression may be construed to mean next of kin. In either case *H. R. Sadler* would have no power of dealing with the property during his life: *Wilson* v. *Mount* (1); and the gift is therefore void for remoteness.

This is made clearer by the manner in which the real estate is given in the second deed-poll. There the ultimate gift is also to the executors and administrators, where they must certainly take as *personæ designatæ*.

Mr. *Kay*, Q.C., and Mr. *Warmington*, for the eldest son of *G. T. Sadler*, who was heir-at-law of *Harcourt Sadler*:—

On the first point, we agree with the contention of the Plaintiffs, that the limitations over are void. The remainders will not be accelerated by the failure of a prior gift: *Alexander* v. *Alexander* (2).

On the second point, we say that the realty was not converted into personalty. The appointors could not alter the nature of the property. At all events they could not, while dealing with only a part, direct the whole to be converted. There was no trust for sale, and the share of *Harcourt Sadler* had already vested in him as real estate; and a subsequent declaration by appointors would not affect the rights of his heir-at-law. The fact of an actual sale under the power having taken place can make no difference: *Earlom* v. *Saunders* (3).

Mr. *H. Humphreys*, for the widow of *G. T. Sadler*, contended that the question of conversion was not open upon the present appeal.

Mr. *Eddis*, Q.C., and Mr. *Kingdon*, for the trustees of Mrs. *Weir's* settlement.

Mr. *Haynes*, for the executors of *G. S. Sadler*.

Mr. *G. Murray*, for the surviving trustee of *G. T. Sadler's* settlement.

Mr. *W. King*, for the trustees of the original settlement.

(1) 2 S. & S. 493. (2) 2 Ves. Sen. 640. (3) Amb. 241.

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WEBB v. SADLER.

LORD SELBORNE, L.C.:—

The first point in this case is one of construction. There is no bias in the mind of the Court upon a question of construction. The sole object is to find out the meaning of the words which are used, and when that is done the legal effect has to be ascertained. Here, it appears to us quite clear that no power of appointment whatever is given to *Henry Robert Sadler* by the first clause of the first deed-poll and the corresponding clause in the other instrument, excepting the power to be exercised, with the consent in writing, after the death of the parents, of the acting trustees or trustee, who were persons to whom no such authority could be delegated, independently of any question of remoteness. If, therefore, that is an inseparable condition of the exercise of the power, the power altogether fails. We all think it is an inseparable condition of the exercise of the power. There is no analogy between the effect of such a clause and the cases where there is a separate and superadded condition after the gift of an estate. Here there is no power except with consent.

Then the next question is, whether the subsequent appointments, "in default of and subject to any such limitation or appointment" containing dispositions in favour of the son, are so connected with the void power, that the void power failing they fail also. It seems to me that such a construction would be expressly contrary to the declared intention. The declared intention is, that unless estates that would displace this gift to the son are created in favour of other persons by means of the power, then the son is to take under this part of the instrument; and if the power is void, then no such estate could be created, and the event never could arise which alone was meant to prevent the gift in favour of the son taking effect.

The words "and subject to" confirm this view. If it had been intended to create a charge, and the gift made to the son were "subject to the charge," then, if the charge did not arise, the son would have taken it free from that charge.

Then arises the third question, on which we agree with the Appellant. That question does not seem to us, judging from the language of the Vice-Chancellor, to have been so fully presented to His Honour in argument as it has been to us. We have here a gift for life to *H. R. Sadler*, followed by an absolute gift after death,

the two gifts being separated from each other, for this reason only, that legal conditions of forfeiture are annexed to the estate during his life, and that interest is not to be absolute if forfeiture of the life estate takes place under those conditions. That being the scheme and purpose of the deed, it naturally follows that its framers separate, in point of expression, the life interest from the absolute reversionary estate, because they go on to say that if he alienates the income during his life or becomes bankrupt that interest is to be forfeited, and if so, the particular power given over the whole is to cease, and the interest given absolutely in the reversion is only to arise if and provided no such forfeiture should have taken place. But if that event is limited within such a period of time as the law allows and has not happened, then, as it seems to us, there is a plain declaration of intention that the *corpus* is to be part of his personal estate. He has the whole life interest, and the whole *corpus* after that life interest is to be part of his personal estate. In my judgment you cannot make, in a man's lifetime, a reversion part of his personal estate *simpliciter* without giving him absolute power of alienation over it. All persons who take beneficially take simply through him. If as creditors, it is because they have rights by law against the personal estate, and this was part of the personal estate; and if as legatees, not because there is a gift to the legatees here, but for a similar reason, namely, because he can dispose of his personal estate by will, and they take it only as part of his personal estate. So with respect to every other mode of alienation. In my judgment such a gift is exactly the same thing as if the testator had said, "In trust for the said *Henry Robert Sadler*, his executors and administrators, as part of his personal estate."

There was a case much less clear than this before the Master of the Rolls, *Long* v. *Watkinson* (1), where a brother had made a will in favour of his sister, contemplating, on the face of the will, the possibility of the event, which happened, of her dying in his lifetime. The brother gave his personal estate to her absolutely; but if she died in his lifetime, then he said, "My instructions are then to pay over all the residue and remainder of my estate and effects to the executors or executrixes which my said sister may appoint,"

(1) 17 Beav. 471.

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but not adding, as here, as part of her personal estate. It was held even there, that the administration must be exactly on the same principle as if it were part of the personal estate in her lifetime, and the Master of the Rolls expressly said this (1): "In my opinion the contest, whether the residuary legatee or the next of kin take the property, is in many cases a contest arising from a misapprehension of the character in which the executor or executrix takes the property. The executor or executrix who takes the property does so as a trustee, and the person who takes the property beneficially takes it as a *cestui que trust*, and not as a *persona designata*. It is, in my opinion, inaccurate to lay down as a rule that in such cases the fund belongs either to the residuary legatee or to the next of kin. It belongs to the persons who are interested in the estate of the person to whose executor it is given." While the donee is alive, who is interested in the property except himself? Everybody taking it after his death can only take it through him or in his right, and such an estate is necessarily alienable in his lifetime; and in the present case, the appointment being within due limits as to time, in my judgment it is well made.

With regard to the real estate, it appears to me that it was competent, as I read the terms of the power, to modify the estate or interest in the realty given to the objects of the power by appointing it in any reasonable or convenient manner that could be considered to be for their benefit. Among other modes of modification, I am of opinion it was competent to the donee of the power to say it should be converted and held as personalty. And I also think that it was equally competent to do this as to an individual share, as with respect to the whole. As to the share, the appointors have said so in the plainest words, by directing that the real estate, which, for argument's sake, I will suppose continued in specie down to the time of the death of the tenant for life, is to go after his death to the executors as part of his personal estate. Nothing is more familiar to this Court than real estate by virtue of a trust impressed upon it being enjoyed as personalty, and *vice versâ*, personal estate being enjoyed as realty. There is a clear intention that these shares of the real estate should go in that manner as personalty, and be administered by the executors in the same way. In my judgment it is wholly unnecessary, and therefore improper

(1) 17 Beav. 474.

to go into any ulterior question as to the effect of the exercise of the power of sale upon the other shares of the property. The only question for our decision is as between the Appellant and the Respondents; and in favour of the Appellant, I hold that there is a good conversion in equity by the terms of the deed of appointment. The order of the Vice-Chancellor will be altered, and a declaration made that from and after twenty-one years from the death of the survivor of *G. S. Sadler* and his wife, and provided that *H. R. Sadler* during that time does not become bankrupt or alienate his life interest, *H. R. Sadler* is absolutely entitled to his share of the personalty; and a similar declaration as to his share of the proceeds of the realty.

SIR W. M. JAMES, L.J.:—

I am of the same opinion. For some time there was an opinion entertained by the Courts that the words "executors and administrators" following a gift for life were to be considered next of kin, or that the executors were to take beneficially as *personæ designatæ*. That was acted on in *Palin* v. *Hills* (1) before Lord *Brougham*, where he reversed a decision of the Master of the Rolls; but for many years there has been no question that "executors and administrators" mean executors and administrators, and nothing else. In this settlement the additional words, "as part of the personal estate," have been inserted for the very purpose (the instrument evidently being prepared by some gentleman acquainted with the law) of excluding any question whatever as to anybody being entitled but the personal representative; and a gift to *A.* for life, and after his death to his legal personal representative, is a valid absolute gift to *A.*

SIR G. MELLISH, L.J.:—

I am of the same opinion.

Solicitor for the Plaintiffs: Mr. *Joseph Beaumont.*

Solicitors for the other parties: Messrs. *Johnson & Weatheralls;* Messrs. *Bridges, Sawtell, & Co.;* Mr. *Mark Shephard;* Mr. *Hemsley;* and Mr. *A. C. Edwards.*

(1) 1 My. & K. 470.

L. C.
and L. JJ.

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HALL *v.* HALL.

[1870 H. 190.]

Jan. 13, 21, 30. *Voluntary Settlement—Power of Revocation—Change of Mind—Destruction of Deed—Variation from Instructions.*

15 Ch D 575

The absence of a power of revocation, and the fact that the attention of the settlor was not called to that absence, do not make a voluntary settlement invalid; they are merely circumstances to be considered in deciding on the validity of a voluntary settlement.

A widow instructed a solicitor to prepare a deed settling certain houses and buildings on herself for her life, and after her death for the benefit of her children. The deed, as prepared, did not exactly correspond with the instructions, but was read over to and executed by her. There was no suggestion made to her that the deed ought to contain a power of revocation. Some years afterwards she burnt it, and expressed satisfaction at having got rid of it. She executed a mortgage of part of the settled property, after asking the consent of a son who was both beneficially interested and a trustee of the settlement, and made a will purporting to dispose of the whole property:—

Held (reversing the decree of *Wickens*, V.C.), that, under the circumstances, the deed of settlement was valid, and not affected by the want of a power of revocation or by the divergence from the instructions.

ELIZA HALL was, at the time when she made the settlement hereinafter mentioned, a widow, residing at *Shipley*, in *Yorkshire*, and about fifty years of age. She had then seven children, and she had several freehold houses and buildings situate at *Shipley*.

In the year 1852 she went to a solicitor, Mr. *Humble* of *Bradford*, and informed him of her wish to make a settlement of her property on herself and some of her children and grandchildren, giving as a reason that she did not wish all her property to go to her eldest son. She expressed a great aversion to making a will. Mr. *Humble* took down instructions accordingly, and then prepared and engrossed the deed of settlement hereinafter mentioned. The deed varied from the instructions in some particulars, as mentioned in the judgment of the Lord Justice *James*.

The deed was dated the 24th of December, 1852, and was expressed to be made between *Eliza Hall* of the one part, and *Lewis Hall* and *George Alderson* of the other part, and thereby, after reciting that the said *Eliza Hall* was desirous of settling and

assuring the hereditaments thereinafter described and intended to be thereby conveyed in the manner thereinafter mentioned, it was witnessed that for effectuating such desire, and for the nominal consideration therein mentioned, she, the said *Eliza Hall*, did thereby grant and convey unto the said *Lewis Hall* and *George Alderson* and their heirs, certain messuages and buildings at *Shipley* with their appurtenances, To have and to hold the said messuages and buildings and the hereditaments thereby conveyed with the appurtenances unto the said *Lewis Hall* and *George Alderson*, their heirs and assigns, upon trust to pay the rents and profits of the said hereditaments, when and as the same should become due and be received, unto the proper hands of the said *Eliza Hall*, or otherwise to permit her to receive the same for and during the term of her life, for her sole and separate use, independently of the control of any future husband, and so as not to be subject to his debts, control, or engagements. And from and after the decease of the said *Eliza Hall* upon trust to receive the said rents and profits and to pay the same to *Sophia Hall*, *Jesse Hall*, and *Ellis Hall*, three of the children of the said *Eliza Hall*, or to apply the same for or towards their maintenance and education during their respective minorities, and when the youngest should attain the age of twenty-one years (the said *Eliza Hall* being then dead) upon trust to sell and dispose of the said hereditaments, either by public auction or private contract, for the best price that could be obtained for the same, and to enter into and make and execute all such contracts and conveyances as might be necessary to carry the said sale into effect. And then upon trust, in the first place, to deduct and retain the costs and expenses of the sale; and in the next place, to pay and divide the residue or surplus unto and amongst *John Hall*, the said *Lewis Hall*, and *Edwin Hall*, *Ruth Hall*, and the said *Sophia Hall*, *Jesse Hall*, and *Ellis Hall*, the sons and daughters of the said *Eliza Hall*, their executors and administrators, in equal shares and proportions as tenants in common: Provided, nevertheless, that in case the said *John Hall*, *Lewis Hall*, *Edwin Hall*, *Ruth Hall*, *Sophia Hall*, *Jesse Hall*, and *Ellis Hall*, or any of them, should depart this life in the lifetime of the said *Eliza Hall*, or after her death any of them the said *Sophia Hall*, *Jesse Hall*, and

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Ellis Hall should die under the age of twenty-one years without leaving lawful issue, upon trust to pay and divide the shares or respective shares of them, her, or him so dying unto and equally amongst the survivor and survivors of them the said *John Hall*, *Lewis Hall*, *Edwin Hall*, *Ruth Hall*, *Sophia Hall*, *Jesse Hall*, and *Ellis Hall*, who should be then living, and the lawful issue of such of them as should be then dead, such issue taking his or her parent's share only. And in the deed was contained a covenant for further assurance on the part of the said *Eliza Hall*, and the usual trustees' receipt and indemnity clauses, and also a power of appointing new trustees vested in the trustees or trustee for the time being.

Mrs. *Hall* and her brother *John Beanland* came on the 24th of December, 1852, to the office of Mr. *Humble*, when the deed was read over to her, and she executed it. There was some conflict of evidence between Mr. *Humble* and Mr. *Beanland* as to what took place on that occasion, and as to whether he told her that the deed would be irrevocable. The effect of the evidence is stated in the judgment of the Lord Justice *James*. Mr. *Humble* did not suggest to her, and it never occurred to him to suggest, that the deed ought to contain a power of revocation.

Mr. *Humble* registered the deed at the *Wakefield* Registry on the 1st of January, 1853, and then sent or gave it to Mrs. *Hall*. She kept it until the year 1855, when she gave it to *Lewis Hall*, one of her sons, and one of the trustees of the deed; he kept it for some months, and then, as some of the other children disapproved of his keeping it, he returned it to Mrs. *Hall*. In 1859 Mrs. *Hall* instructed Mr. *Humble* to make a will for her by which she purported to dispose of the property comprised in the deed of settlement. Mr. *Humble* prepared a will accordingly, which she executed, but which was revoked by her subsequent will. In the year 1860 or the year 1861 she burnt the deed. The evidence as to the circumstances under which she burnt the deed was conflicting; there was also conflicting evidence as to her expressions at that time and at other times; some of the witnesses stating that she thought she had put an end to the trusts of the deed, and expressed her satisfaction at having done so; others stating that she knew she could not do so.

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By an indenture dated the 24th of October, 1861, Mrs. *Hall* conveyed part of the hereditaments comprised in the deed of settlement to *Eliza Matilda Matthews*, by way of mortgage for securing the repayment of £200 and interest. The deed of settlement was not referred to in the indenture of mortgage; but according to the statement of *Lewis Hall*, she asked his consent to the mortgage, and he, being ignorant of his duties under the deed of settlement, gave his consent, but he was not a party to the indenture of mortgage.

In 1866 Mrs. *Hall* made another will, also prepared by Mr. *Humble*, in which she purported to devise specifically to her different children the different houses and buildings comprised in the deed of settlement, and made other devises and bequests.

She died in June, 1866, and for some time afterwards her property was treated as having passed under her will. In 1870, however, *Lewis Hall* filed a bill against the other persons interested, and against the other trustee, stating that he had been unable to find the deed of settlement, but that he had recently discovered that Mr. *Humble* had prepared the deed, and had a draft thereof in his possession; and the bill prayed for execution of the trusts of the deed.

In 1871 some of the grandchildren of Mrs. *Hall*, suing by their next friend, filed a cross-bill (*Hall* v. *Hall* [1871 H. 20]) to have the deed of settlement set aside and the will of 1866 established.

The Vice-Chancellor *Wickens* made a decree in both suits, setting aside the deed of settlement; as reported (1).

Lewis Hall, the trustee of the deed, appealed.

The appeal came on to be heard on the 13th of January. When the case for the Appellant had been partly opened, their Lordships expressed their wish to examine Mr. *Humble* and Mr. *Beanland vivâ voce*, and the hearing was adjourned for their attendance.

They accordingly attended on the 21st of January, and were examined. The effect of their evidence is stated in the judgment of the Lord Justice *James*. (a)

The argument of the appeal was then proceeded with.

Mr. *Greene*, Q.C., and Mr. *Morshead*, for the Appellant:—

There can be no doubt that Mrs. *Hall* wished to make an irre-

(1) Law Rep. 14 Eq. 365.

(a) See post, p. 438.

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vocable settlement of this property, whether the law was explained to her or not.

[The LORD JUSTICE JAMES:—A voluntary deed of gift of real estate is always to a certain extent revocable, inasmuch as the land can be sold for valuable consideration.]

The absence of a power of revocation is not fatal to a voluntary deed; it is only a circumstance to be taken into consideration as part of the evidence on which the deed is impeached. *Mountford* v. *Keene* (1) was a case of purchase for valuable consideration. *Nanney* v. *Williams* (2), *Forshaw* v. *Welsby* (3), and *Toker* v. *Toker* (4), shew what the law is. *Coutts* v. *Acworth* (5) was a strong case, and was disapproved of in *Phillips* v. *Mullings* (6). In *Everitt* v. *Everitt* (7) the deed was improvident. Here Mrs. *Hall* knew perfectly well what she was about; and there is no suggestion that she was under the influence of any one else. As to her imagining that the deed was revocable, that is contrary to the notion entertained by persons ignorant of law. The variations from the instructions are unimportant, and not greater than occur in most cases. Moreover, the deed is not impeached on that ground. A deed is not to be lightly set aside without special reasons, none of which are found here. *Clavering* v. *Clavering* (8), *Boughton* v. *Boughton* (9), and *Bolton* v. *Bolton* (10), shew what the law of this Court is.

Mr. *Miller*, Q.C., and Mr. *V. Hawkins*, for the principal Respondents:—

It is clear that Mrs. *Hall* was never told that she could have a revocable settlement. She had an objection to making a will, and a revocable deed was what she wanted. It is clear from her acts that she never considered the deed to be irrevocable. If the deed had been sent to a conveyancer to prepare, he would have added a power of revocation, or have called the attention of the settlor to the point, and Mr. *Humble* ought to have done the same. *Naldred* v. *Gilham* (11) is almost exactly the same case. *Mountford* v. *Keene* has always been acquiesced in. In *Phillips* v. *Mullings* a

(1) 19 W. R. 708; 3 Dav. Prec. "Settlements," 823, n.
(2) 22 Beav. 452.
(3) 30 Ibid. 243.
(4) 31 Ibid. 629; 3 D. J. & S. 487.
(5) Law Rep. 8 Eq. 558.
(6) Law Rep. 7 Ch. 244, 247.
(7) Ibid. 10 Eq. 405.
(8) 2 Vern. 473.
(9) 1 Atk. 625.
(10) 3 Sw. 414, n.
(11) 1 P. Wms. 577.

revocable deed would not have answered the purpose. In *Everitt* v. *Everitt* (1) an irrevocable deed was set aside. The whole doctrine of the Court on the subject is laid down in *Huguenin* v. *Baseley* (2), and there the intention to have an irrevocable deed was much more clearly proved. It is true that the solicitor was not concerned for the donees, but that can make no difference. The same solicitor is usually employed for both: *Phillipson* v. *Kerry* (3). The Court must be satisfied that the solicitor did all that he ought to have done: *Cooke* v. *Lamotte* (4).

Mr. *Lindley*, Q.C., Mr. *Bagshawe*, Mr. *Stallard*, and Mr. *F. A. Lewin*, for other parties.

Mr. *Greene*, in reply, cited *Bill* v. *Cureton* (5) and *Petre* v. *Espinasse* (6).

Jan. 30. SIR W. M. JAMES, L.J.:—

The original bill in these causes was a bill for the execution of the trusts of a voluntary settlement of freehold property, executed by a widow lady of mature age, being fifty years old or thereabouts. By the settlement she reserved to herself a life interest, directed the rents to be applied after her death for the maintenance of her minor children until they should all attain the age of twenty-one, and directed that the property should be then sold and the proceeds divided among her seven children and their issue.

The cross bill prayed that the settlement might be declared void in equity and be set aside.

The Vice-Chancellor made a decree in accordance with the prayer of the cross bill, but it clearly appears from the judgment that the Appellant's counsel is well warranted in saying that although in form he is appealing from the Vice-Chancellor's decree, he has in his favour the opinion of that learned Judge, who felt himself constrained by the result of the authorities, although he did not think it quite easy to recognise as sound the conclusion which he drew from them.

(1) Law Rep. 10 Eq. 405.
(2) 14 Ves. 273.
(3) 32 Beav. 628.
(4) 15 Beav. 234, 247.
(5) 2 My. & K. 503.
(6) Ibid. 496.

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It is necessary, therefore, to inquire whether there is any such binding authority or any sound principle on which that conclusion can be based.

Many cases have been referred to. One of the earliest, if not the earliest, in which the absence of a power of revocation was relied on was the case of *Naldred* v. *Gilham* (1). In that case the Master of the Rolls had, "with great clearness," decreed in favour of the settlement; and although that decree was reversed by Lord *Macclesfield*, it is plain, from his judgment, not only that he did not mean to lay down any such general rule as that contended for in the present case, but that he had no idea that such a rule existed.

It is said to have been laid down in *Huguenin* v. *Baseley* (2) that the absence of a power of revocation was strong evidence that the party did not understand the transaction:—[His Lordship then read from Lord *Eldon's* judgment.]

If, however, it had been considered by the distinguished counsel and the eminent Judge in that case that the matter could have been disposed of easily and summarily on the mere ground that there was an omission of a power of revocation not satisfactorily accounted for, the vivid eloquence of the Advocate (the charm of whose argument was represented by Lord *Cottenham* many years afterwards as still fresh in his recollection) and the elaborate and exhaustive judgment of the Judge which has made that case one of the most celebrated and valuable in our reports, would have been a superfluous, if not an idle display of intellectual power—a mere forensic and judicial exercise.

To come down to the more modern cases. In *Nanney* v. *Williams* (3) there was the conclusive circumstance that the settlor actually struck out the word "irrevocably," and that the deed as it was executed contained a recital that the testator was desirous of "revocably" settling the property. In that case, moreover, the solicitor who prepared the deed took a life interest in remainder, with remainder to his children in tail. But even in that case the learned Judge did not consider himself warranted in declaring the deed void, without a very careful and elaborate examination of all the surrounding facts and circumstances, the subsequent con-

(1) 1 P. Wms. 577.
(2) 14 Ves. 273, 297, 298.
(3) 22 Beav. 452.

duct and proceedings of the settlor, and the evidence of the solicitor, from which he considered it proved that the deed omitted that power of revocation, in the event of his changing his mind, which the settlor always intended to reserve.

In *Forshaw* v. *Welsby* (1), before the same learned Judge, where the deed was set aside at the instance of the settlor himself, the Court came to the conclusion, on all the facts and circumstances, that the deed was in truth in the nature of a *donatio mortis causâ*.

But there is one case, and one only, *Mountford* v. *Keene*, before the Master of the Rolls, in which (as reported) the broad proposition relied on in this case appears to have been laid down. [His Lordship read the material portions of the judgment as reported (2)]. It is not probable that the Master of the Rolls intended to lay down that which he is here reported to have said, wholly irrespective of the consideration that there was "a set of relatives quarrelling over the poor enfeebled semi-paralytic old man," and of the other circumstances in that case, which might have well warranted the conclusion that it was not the deliberate act of a person understanding sufficiently the nature of what he was doing. At all events, the Master of the Rolls could not have intended to overrule his own very elaborate judgment in *Toker* v. *Toker* (3), affirmed as that decision was by the Court of Appeal (4).

It will be observed that that case is almost identical with the present case; the only distinction being, that it was the case of an aunt and one nephew, instead of the case of a mother and her children. In that case the Judge did what we have done in this case; he caused the solicitor to be examined *vivâ voce*, and with very much the same result.

It appears, therefore, from the examination of the authorities, that there is no such established rule as that to which the Vice-Chancellor conceived himself constrained to yield.

Is there, then, any foundation in principle for such a rule? The law of this land permits any one to dispose of his property gratuitously, if he pleases, subject only to the special provisions as to subsequent purchasers and as to creditors. The law of this land permits any one to select his own attorney to advise him; and it

(1) 30 Beav. 243.
(2) 19 W. R. 708.
(3) 31 Beav. 629.
(4) 3 D. J. & S. 487.

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seems very difficult to understand how this Court could acquire jurisdiction to prescribe any rule that a voluntary conveyance executed by a person of sound and disposing mind, free from any fraud or undue influence of any kind, and with sufficient knowledge of its purport and effect, should be void because the attorney of his own selection did not advise him to insert a power of revocation, or did not take his express direction as to the insertion or omission of such a power. It might, with as much reason, have prescribed that such a deed should be executed and so attested as is required for a will, or that, like a married woman's deed, it should be acknowledged before a judge or commissioner.

The true rule is that which was laid down by Lord Justice *Turner* in *Toker* v. *Toker* (1), that the absence of a power of revocation is a circumstance to be taken into account, and is of more or less weight according to the other circumstances of each case. In this case, dealing with that absence accordingly, are there any facts to shew that the settlement is other than the free, determined act of the settlor?

There is some conflict of evidence between Mr. *Beanland*, the brother of the lady, and the solicitor, who is in the unfortunate position of being solicitor and witness in a suit to avoid a deed prepared by himself:—[His Lordship then stated and commented on the evidence.]

On the evidence it is quite clear that the lady understood what she was doing, and that it was a final, irrevocable settlement of her property. The settlement in itself is very reasonable and just. It is impossible to say that there is anything more improvident in a mother giving her children an assured provision after her death than there is in a husband making a similar provision for his wife and children, or a donee of a power making an irrevocable appointment.

There are the facts that the deed was registered; that the deed was actually delivered to the son, one of the trustees; and that, although it was re-delivered to the mother, it was so only because the other children, for some reason, preferred it being in her custody; and when the lady afterwards mortgaged the property, she asked the permission of her son, the trustee, to do so.

(1) 3 D. J. & S. 487, 491.

In the face of these facts, the subsequent conduct of the lady, even if admissible to make evidence for herself against her own deed, that is to say, her burning the deed, her mortgaging the property, her satisfaction that she had got rid of the old deed, and her making a will, are of no weight or value. They prove change of mind, but do not prove that at the time of the execution of the deed her mind was other than therein expressed.

In the course of the case it appeared that the deed differed in two material respects from the instructions given to the solicitor, or rather from the notes which he took down of the conversation for his own guidance. The lady, it is obvious, could not have dictated such instructions, but must have simply answered his questions or assented to his suggestions as to the details. Amongst those notes and instructions there is this: "The rents to be divided amongst (which would, *primâ facie*, appear to mean equally amongst) the children." In the deed they are to be in effect paid to the minors, or sole minor, during minority. Another note is: "Power of sale to trustees with lady's consent." No such power of sale is inserted in the deed. The solicitor, however, deposes that the provision as to the minors was expressly approved of by the lady. He might well have thought that the intention was that the trustees were not to sell during her lifetime without her consent, and that as they could not under the deed sell at all during her lifetime, that object was sufficiently effected.

Under the circumstances, and having regard to the fact that no case is made in this respect by the cross-bill, it is not material to inquire what would have been the effect of such an apparent departure from the donor's intentions if unexplained.

The conclusion, then, is, that there is no ground established for setting aside this deed, and that the cross-bill ought to be dismissed—and dismissed with costs.

There must be, of course, in the original cause, the ordinary decree for the execution of the trusts of the settlement, and for the sale of the property and division of the proceeds accordingly. [His Lordship then directed what accounts were to be taken and inquiries made, and gave directions as to the election to be made by children who took interests under the deed and other interests under the

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will. And he decided against the claim of one of the Defendants, who had bought part of the land from devisees under the will.]

LORD SELBORNE, L.C.:—

I agree in the judgment just delivered.

During the argument I was very much struck by the departure of the deed, in two not immaterial points, from the instructions of the settlor; and if the deed had been impeached on that ground, and if the transaction had been recent, I might probably have required more evidence than that before us to satisfy me that the deed could stand. But the bill does not allege that in either of those respects the deed was not in accordance with the real intention of the settlor, and the transaction is now twenty years old. Under these circumstances, I concur in the view, on this part of the case, which the Lord Justice has taken.

On the rest of the case I never felt any doubt. The absence of a power of revocation in a voluntary deed, not impeached on the ground of any undue influence, is, of course, material when it appears that the settlor did not intend to make an irrevocable settlement, or when the settlement itself is of such a nature, or was made under such circumstances, as to be unreasonable and improvident unless guarded by a power of revocation. I do not, however, see on what principle the absence of such a power can be considered material in a case like the present, from which both these elements are absent.

SIR G. MELLISH, L.J., concurred.

Solicitor for *Lewis Hall:* Mr. *M. K. Braund,* for Mr. *J. Green, Bradford.*

Solicitors for the Plaintiff in the cross suit: Messrs. *Duncan & Murton,* for Mr. *G. Humble, Bradford.*

Solicitor for other Parties: Messrs. *Paterson, Snow, & Burney,* for Messrs. *Busfeild & Atkinson, Bradford.*

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[1870 L. 94.]

LENEY *v.* HILL.

[1870 L. 93.]

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Proof of Debts—Joint and Separate Estates—Proof by Partner against Estate of Co-partner—Principal and Surety.

H., a partner in a banking firm, entered into a bond with a board of guardians, on being appointed their treasurer, with two sureties, one of whom was *K.*, a partner in the firm, and the other was *E.*, who was not a partner. *H.* kept the account of the guardians' money at his bank under a special heading, "*Norwich* Union," and a sum of £5677 was standing to that account when the bank stopped payment. *H.* died shortly after the stoppage, and his estate was administered in Chancery. The other partners were adjudicated bankrupts. The joint estate and *H.'s* separate estate were alleged to be insolvent; joint debts to a large extent remained unpaid; *K.'s* separate estate was solvent. The amount due to the guardians was paid by *E.*, who recovered by proof upon the separate estate of *K.*, his co-surety, one moiety of the amount paid. The trustee of *K.'s* separate estate, who was also the trustee of the estate of the bankrupt partners, then claimed to prove against *H.'s* separate estate for the amount of the moiety paid to *E.* out of *K.'s* estate:—

Held, that, as the partnership received the money from and owed it to the guardians, the relation of principal and surety never in reality existed between *H.* and *K.* The claim was therefore disallowed.

Order of the Master of the Rolls affirmed.

Whether *Ex parte Topping* (1) would apply to a case where the separate estate in respect of which the proof is sought to be made is solvent, so that any surplus would go to the joint estate, *Quære.*

THIS was an appeal from a decision of the Master of the Rolls.

Sir *Robert Harvey*, the testator in the causes, had been, for some years previous to his decease, the treasurer of the *Norwich* Board of Guardians. At the time of his appointment, and thenceforward to his decease, he was a partner in the banking firm of *Harveys & Hudsons*, the only other partners being *Roger Allday Kerrison* and *Roger Kerrison.*

On his appointment Sir *R. Harvey*, together with his brother, *Edward Kerrison Harvey*, and his partner, *Roger Allday Kerrison*,

(1) 4 D. J. & S. 551.

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executed a bond, dated the 23rd of October, 1860, which recited that Sir *R. Harvey* had been duly appointed treasurer to the board of guardians, and had been required by them to enter into a bond, with two sufficient sureties, for the due discharge of his office and of the trusts reposed in him; and thereby Sir *R. Harvey*, *E. K. Harvey*, and *R. A. Kerrison* became jointly and severally bound in the penal sum of £10,000 for the due discharge by Sir *R. Harvey* of his duties as treasurer.

All sums of money received by Sir *R. Harvey* as treasurer were deposited in *Harveys & Hudsons' Bank*, to the credit of an account headed "*Norwich* Union."

The bank stopped payment on the 16th of July, 1870, on which day *R. A. Kerrison* and *R. Kerrison* filed a declaration of insolvency; and on the 22nd of July they were adjudicated bankrupts.

Sir *R. Harvey* died on the 19th of July, before he could be adjudicated bankrupt, and his estate was being administered in Chancery in the above suits, of which the first was the suit of a separate creditor of Sir *R. Harvey*, and the second that of a joint creditor of the firm of *Harveys & Hudsons*.

At the time of the stoppage of payment there was standing to the credit of the account headed "*Norwich* Union" the sum of £5677 14*s.* 1*d.* This sum was paid to the guardians by *E. K. Harvey* as surety; and he then proved in the bankruptcy against the separate estate of *R. A. Kerrison*, his co-surety, for half of that sum, namely, £2838 17*s.*, which, as *Kerrison's* separate estate was solvent, he received in full.

The trustee in bankruptcy of the separate estate of *R. A. Kerrison* then claimed to prove in the suits in Chancery on behalf of the separate estate of *R. A. Kerrison* against the separate estate of Sir *R. Harvey* for the £2838 17*s.* paid out of the separate estate of *R. A. Kerrison* to *E. K. Harvey*, alleging that the separate estate of Sir *R. Harvey* was insolvent.

As to this allegation, there was evidence on behalf of the executor of Sir *R. Harvey*, the Defendant in the suits, to shew that it was impossible to say whether it was true or not.

The joint estate was also alleged to be insolvent. At any rate joint debts to a large extent remained unpaid. The Master of the Rolls refused the claim, and the trustee, *E. C. Bailey*, appealed

from this decision (1). The Appellant was also the trustee in bankruptcy of the joint estate of *R. A. Kerrison* and *R. Kerrison*.

Mr. *Fry*, Q.C., and Mr. *Cozens-Hardy*, for the Appellant:—

Under the circumstances of this case Sir *R. Harvey's* estate must be administered as in bankruptcy: *Lodge* v. *Prichard* (2); and the case is governed, as an exception to the usual rule in bankruptcy that on the bankruptcy of a firm there cannot be a proof on behalf of the estate of one partner against the estate of another until all the joint debts are paid, by the decision in *Ex parte Topping* (3). The case of *Ex parte Collinge* (4), which was cited against us in the Court below, is distinguishable. It is no objection that the admission of the proof would benefit the joint creditors, because the estate of the creditor partner, which seeks to prove against the co-partner's insolvent separate estate, is itself solvent, so that what is recovered will go towards the fund of the joint creditors, for whom the Appellant is also trustee, for that very case is contemplated by Lord *Westbury* in *Ex parte Topping*. Nor is it an objection that the joint creditors have had the benefit of the deposit which was in the bank at the time of the stoppage; for as the separate estate of a partner cannot prove against the joint estate, no right in the nature of a set-off can arise: *Ex parte*

(1) 1872. Nov. 27. W.N. (1872) 215. LORD ROMILLY, M.R., after stating the facts of the case, said that, without expressing an opinion as to the case of *Ex parte Topping*, although it surprised him when cited in the argument, he thought that it did not govern the present case. This claim, if successful, would be, in fact, taking away from an insolvent separate estate a sum to be added to the joint estate, which was quite a different matter, as well as being at variance with the rule in bankruptcy, which forbade proof by one partner against his co-partner's estate whilst joint creditors remained unpaid, a rule which enured for the benefit of the separate creditors as well as of the joint creditors. If this claim were allowed, the dividend of the separate creditors of Sir *R. Harvey* would be lessened, and the amount taken from that dividend would be added to the surplus of *R. A. Kerrison's* solvent separate estate, and thence be paid over for distribution amongst the joint creditors of the firm. It would be contrary to the rules in equity that separate creditors of one partner should thus be made to contribute towards payment of the joint debts, and opposed to the principles on which estates are administered in bankruptcy. Without reference to cases the principle was clear and the application must be refused.

(2) 1 D. J. & S. 610.
(3) 4 Ibid. 551. 11 Jur. N.S. 210
(4) Ibid. 533.

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Harris (1). The bond executed by the parties expressly stated the occasion on which it was executed, and that *R. A. Kerrison* was only a surety.

[They also referred to *Ex parte Kingston* (2).]

Sir *R. Baggallay*, Q.C., and Mr. *Horton Smith*, for the Plaintiff in the suit of *Lacey* v. *Hill*, representing the separate creditors of Sir *R. Harvey*,

Mr. *Southgate*, Q.C., and Mr. *Merewether*, for Sir *R. Harvey's* executor, and

Mr. *Ford North*, for some of the separate creditors, who had obtained liberty to attend the proceedings, were not called on.

They referred, however, to *Ex parte Bass* (3).

SIR W. M. JAMES, L.J.:—

I am of opinion that the order of the Master of the Rolls ought to be affirmed.

There is always a great number of nice and complicated questions arising upon the rules in bankruptcy as to joint and separate estates. The rules so laid down are a sort of rough code of justice, because some rule must be laid down for the purpose of keeping joint and separate estates distinct, and for paying the joint and separate creditors. But that is a mere artificial distinction. There is nothing like that known to the common law, and there being those rules, a great number of difficulties necessarily occur.

As a general rule, a separate estate cannot prove against a joint estate and a joint estate cannot prove against a separate estate till the creditors of the respective estates sought to be proved against are satisfied. The joint estate cannot prove against the separate estate, however much the insolvency of the joint estate may be attributed to the conduct of the partner whose separate estate is being administered. In *Ex parte Topping* (4) the Court held that the rule as to proof between the two separate estates of the two partners may, in certain cases, be relaxed.

But in the case before us the real contention is in substance an

(1) 2 V. & B. 210.
(2) Law Rep. 6 Ch. 632.
(3) 36 L. J. (Bkcy.) 39.
(4) 4 D. J. & S. 551.

effort on behalf of the trustee of the joint estate (for the Appellant also fills that character) to get in from the separate estate of Sir *R. Harvey*, which is alleged to be insolvent, in competition with the separate creditors of that estate, something which is to go into the joint estate for the benefit of the joint creditors. And there is this peculiarity in this case, that beyond all question there never was in reality the relation of principal and surety between the two partners. The partnership received the money of the guardians, and the partnership owed the money to them, and it would be a violation of every principle of equity that the joint estate, whose default has been the origin of the whole difficulty, should get from the separate estate of one of the partners something the abstraction of which would prejudice that partner's separate creditors, and would go, under the actual circumstances of the case, to enlarge the assets of the joint estate, which has already received the whole of the money.

SIR G. MELLISH, L.J. :—

I am of the same opinion.

If it had been necessary to determine how far *Ex parte Topping* (1) should be held to apply to a case where the separate estate in respect of which the proof is sought to be made is solvent, so that any surplus would go to the joint estate, I should have liked to take further time for consideration; but it appears to me that it is impossible that the proof, the rejection of which is now under appeal, can be allowed in a case like this, where, practically, it is the partnership which is primarily liable to pay the debt to the guardians. If all had remained solvent, and those liabilities had been properly settled, the partnership which had received the £5677 14*s.* 1*d.* in money would have had to repay it. Under the circumstances of this case I think it would be unjust to allow a proof to be made against the separate estate of Sir *R. Harvey* merely to increase the funds of the joint estate. The appeal will be dismissed with costs.

Solicitors: Messrs. *Sole & Co.*; Messrs. *Linklaters & Co.*; Messrs. *Norris, Allens, & Carter.*

(1) 4 D. J. & S. 551.

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In re GRESHAM LIFE ASSURANCE SOCIETY. *Ex parte* PENNEY.

Company—Transfer of Shares—Power of Directors to refuse to register Transfer—Rectification of Register—Insurance Company.

The deed of settlement of a life insurance company provided that any shareholder should be at liberty to transfer his shares to any other person who was already a shareholder, or who should be approved by the board of directors, and that no person not being already a shareholder, or the executor, &c., of a shareholder, should be entitled to become the transferee of any share unless approved of by the board:—

Held (reversing the decision of the Master of the Rolls), that the directors were not bound to disclose their reasons for rejecting a transferee, provided they had fairly considered the question at a meeting of the board; and that, in the absence of evidence to the contrary, the Court would take for granted that they acted reasonably and *bonâ fide*. But if there is evidence to shew that directors who have such a power have exercised it capriciously or unfairly, the Court has jurisdiction to interfere, and this jurisdiction may be exercised on a summons under the 35th section of the *Companies Act*, 1862.

Robinson v. *Chartered Bank* (1) distinguished.

THIS was an appeal from a decision of the Master of the Rolls.

The *Gresham Life Assurance Society* was a company registered under the *Joint Stock Companies Act*, 1844 (7 & 8 Vict. c. 110), and afterwards registered under the *Companies Act*, 1862.

The 17th clause of the deed of settlement was as follows:—"That subject to the provisions herein contained, and subject also to the provisions of the *Joint Stock Companies Act*, so long as the company shall be subject to the provisions of that Act, every shareholder shall be at liberty to sell and transfer his shares to any other person who shall already be a shareholder, or who shall have been approved of as such by the board of directors, and that no person not already a shareholder, or the executors or administrators, legatee or next of kin, of any shareholder shall be entitled to become the transferee of any share unless approved of by the board; and that whilst any call or instalment, or interest on any call or instalment, shall be in arrear or unpaid upon or in respect of any

(1) Law Rep. 1 Eq. 32.

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share, the same shall not be transferable otherwise than by operation of law without the special leave of the board of directors; and any transfer of shares not effected by operation of law must be according to the form A. in the first schedule hereto, or to the like effect."

On the 4th of May, 1872, Mr. *J. R. De Paiva* sold ten shares in the company, of which he was the registered owner, to Mr. *W. J. Penney*. The shares were sold on the *Stock Exchange* in the ordinary way, and the transfer was executed by *De Paiva* and lodged for registration at the company's office, but the directors, having considered the subject at a board meeting, refused to register it. In reply to a letter from *De Paiva*, the directors declined to give any reason for objecting to *Penney* as a shareholder; and in an affidavit filed by the secretary he stated that the directors had come to the conclusion at which they had arrived "upon deliberation and after consideration, and with reference only to the circumstances of the case."

De Paiva and *Penney* accordingly joined in a summons, under the 35th section of the *Companies Act*, 1862, calling upon the company to rectify the register by inserting the name of *Penney* in place of *De Paiva*.

The Master of the Rolls granted the application, and from this decision the company appealed (1).

Mr. *Fooks*, Q.C., and Mr. *Locock Webb*, for the Appellants:—

The question depends entirely on the clause in the deed of

(1) 1872. Nov. 25. LORD ROMILLY, M.R., said that the arguments addressed to him on behalf of the company amounted to this, that under the 17th clause in the deed of settlement the directors were at liberty to refuse to register any transfer to any person not already a shareholder without giving any reason for their refusal. In his opinion the real meaning of the clause was, that when a shareholder had sold shares to any person not already a shareholder, and the name of the purchaser became known to the board, they might refuse to register it if they had any reasonable ground of objection to the purchaser; and the Court was the judge whether the objection was reasonable. If they had a reason for refusing to register the transfer they might refuse, and a slight reason might do; but they must give it. They could not refuse to register without any reason, out of caprice or from fraud. The board had given no reason why this transfer should not be registered, and he must take it that it was done capriciously. The application to rectify the register must be granted.

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settlement, by which absolute power of approval or disapproval is given to the directors. There is no obligation in them to disclose their reasons. It might expose them to an action to do so, and at all events would, in many cases, lead to serious inconvenience. If any fraud or improper motives were proved, or if the directors had refused to consider the subject, the case would be different, but no such case is made here, and it is proved that the resolution was taken after deliberation: *Bargate* v. *Shortridge* (1); *Walker's Case* (2); *Bermingham* v. *Sheridan* (3).

This is not a case which can be determined under the 35th section of the *Companies Act*, the applicants ought to have filed a bill: *Simpson's Case* (4); *Ward and Henry's Case* (5).

[SIR W. M. JAMES, L.J.:—We both think that we have full jurisdiction to decide the case under the 35th section of the *Companies Act*, 1862, subject to the discretion which the Court has to direct a bill to be filed if it should think it desirable.]

Mr. *Romer* (Mr. *Southgate*, Q.C., with him), for the Respondents:—

The directors have no power to refuse to register a transfer without assigning a cause. If they refuse to give their reason, it must be assumed that they have none, and that they are acting capriciously, if not fraudulently. We have filed an affidavit that Mr. *Penney* is in all respects a fit and proper person to be a shareholder, and as the directors have not cross-examined the witness nor replied to the affidavit, it must be taken to be true. This is not an ordinary partnership, but a joint stock company, and the Court will, therefore, construe its rules favourably so as to facilitate the transfer of shares: *Weston's Case* (6); *Poole* v. *Middleton* (7); *Robinson* v. *Chartered Bank* (8); *Pinkett* v. *Wright* (9); *Slee* v. *International Bank* (10); *Taft* v. *Harrison* (11).

(1) 5 H. L. C. 297.
(2) Law Rep. 2 Eq. 554.
(3) 33 Beav. 660.
(4) Law Rep. 9 Eq. 91.
(5) Ibid. 2 Ch. 431.
(6) Law Rep. 4 Ch. 20.
(7) 29 Beav. 646.
(8) Law Rep. 1 Eq. 32.
(9) 2 Hare, 133.
(10) 17 L. T. (N.S.) 425.
(11) 10 Hare, 489.

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SIR W. M. JAMES, L.J.:—

In this case I feel compelled to come to a different conclusion from that of the Master of the Rolls. The clause in the deed of settlement appears to me very clear, which provides that no transfer shall be made to any person outside the company unless that person shall be approved of by the board of directors. No doubt the directors are in a fiduciary position both towards the company and towards every shareholder in it. It is very easy to conceive cases such as those cases to which we have been referred, in which this Court would interfere with any violation of the fiduciary duty so reposed in the directors. But in order to interfere upon that ground it must be made out that the directors have been acting from some improper motive, or arbitrarily and capriciously. That must be alleged and proved, and the person who has a right to allege and prove it is the shareholder who seeks to be removed from the list of shareholders and to substitute another person for himself. Therefore, if a case had been made out such as was made in one of the cases cited, where a man attempted to transfer his shares, and a demand had been made upon him for the payment of a debt which they had no right to make a condition precedent to such transfer; or if the directors had said to a shareholder, "We will not allow you to transfer your shares unless you give us each a present of £10," this Court would have jurisdiction to deal with it as a corrupt breach of trust; but if there is no such corrupt or arbitrary conduct as between the directors and the person who is seeking to transfer his shares, it does not appear to me that this Court has any jurisdiction whatever to sit as a Court of Appeal from the deliberate decision of the board of directors, to whom, by the constitution of the company, the question of determining the eligibility or non-eligibility of new members is committed. If the directors had been minded, and the Court was satisfied that they were minded, whether they expressed it or not, positively to prevent a shareholder from parting with his shares, unless upon complying with some condition which they chose to impose, the Court would probably, in exercise of its duty as between the *cestui que trust* and the trustees, interfere to redress the mischief, either by compelling the transfer or giving damages, or in some mode or other to redress the mischief which the

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shareholder would have had a just right to complain of. But if it is said that wherever any shareholder has proposed to transfer his shares to some new member, the Court has a right to say to the directors, "We will presume that your motives are arbitrary and capricious, or that your conduct is corrupt, unless you choose to tell us what your reasons were, and submit those reasons to our decision," it would appear to me entirely altering the whole constitution of the company as provided by the articles. I cannot conceive that any director would choose to accept office, or exercise the power entrusted to him, if he were liable to be called upon to say what the particular reasons were or the particular motive was which influenced him in coming to the conclusion that any person was not eligible as a shareholder. I think, therefore, that these directors were well advised in not subjecting themselves to be cross-examined and interrogated as to what particular reasons they might have for personally objecting to this gentleman, and in confining themselves to saying, by their secretary, that the question was discussed at a board of the directors, that the propriety of the transfer to the particular transferee was the subject-matter for discussion, and having taken that into their consideration, they had arrived at the conclusion to which they had arrived. This conclusion, of course, in the absence of any suggestion to the contrary, or of any evidence to the contrary, we must take to be a *bonâ fide* conclusion on their part that, for some reason or other connected with the interests of the company, they did not think it fit to recognise that gentleman as a transferee. That gentleman was not then and is not up to the present moment in any relation of *cestui que trust* towards them, and therefore he has no right to complain, and the transferor has no right to complain unless he can induce us to believe that he could not find some other purchaser for those shares, either among the shareholders or outside the company, more agreeable to the directors, and who would give the same price. I am of opinion that we cannot sit as a Court of Appeal from the conclusion which the directors have arrived at if we are satisfied that the directors have done that which alone they could be compelled by mandamus to do, to take the matter into their consideration. It appears that they have taken the matter into their consideration,

and there is nothing to shew that they have acted otherwise than honestly and fairly. I am of opinion, therefore, that the order of the Master of the Rolls ought to be discharged.

SIR G. MELLISH, L.J.:—

I am of the same opinion. It is quite clear that if this question were raised in a Court of Law the Court could not compel the registration of the applicant, because that which is made by the articles a condition precedent to his becoming a shareholder never has been performed, namely, his approval by the directors; but if the directors had refused to take the matter into their consideration a Court of Law would, by mandamus, have compelled the directors to take it into their consideration, but unquestionably it could not have compelled them to approve him. I admit that the question, to a certain extent, is different in a Court of Equity. It has been held, under the 35th section of the *Companies Act*, that the Court may enter into equitable considerations, and I am disposed to think, although it is not necessary distinctly to decide it in this case, that if it were made out that the directors were committing a breach of trust towards any one of their shareholders in refusing to allow him to transfer his shares for a purely arbitrary reason, that might be a ground why the Court should interfere. But, on the other hand, this being an insurance company, it is quite obvious that it may be a matter of very great importance to the company that they should have a substantial body of shareholders. The very existence and credit of the company may depend upon that, and in order to procure that by the deed of settlement the directors are invested with an absolute power to reject any transferee. Then it is said that they ought not to have objected arbitrarily, to which I agree. But it is further contended that in order to secure the existing shareholder against being deprived of the right to sell his shares, the directors are bound to give their reason why they reject the transferee, and if they reject him without giving a reason that is a ground from which the Court ought to infer that they were acting arbitrarily. I cannot agree with that. It appears to me that it is very important that directors should be able to exercise the power in a perfectly uncontrollable manner for the benefit of the shareholders; but it is impossible

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In re GRESHAM LIFE ASSURANCE SOCIETY. *Ex parte* PENNEY.

that they could fairly and properly exercise it if they were compelled to give the reason why they rejected a particular individual. Take the most ordinary reason why they are entitled to reject him, viz., that they believe him to be in a state of insolvency or that they could not discover what his pecuniary position was. Are they to state that as their reason for doing so? Is it to be said that they are bound to admit anybody as a shareholder, whatever doubts they may have as to whether he is insolvent or not, or whether he is pecuniarily able or not to pay the calls? Are they to be prevented from rejecting a person on that ground unless they openly say so and inform him that that is the ground upon which they reject him? It is perfectly obvious that directors would never like to exercise their power if they were liable to be called upon to exercise it under those conditions, because, of course, the shareholder would immediately challenge their decision, he would make an application to a Court of Equity to have the matter tried, and they would at once be involved in a considerable litigation. Or they might be reluctant to run the risk of publishing their opinion as to the solvency of a person for fear of bringing on his bankruptcy, whereas if nothing was said he might be able to get through his difficulties in a perfectly solvent condition. So also if the objection involved something against the man's character, if they were to be obliged to tell it, of course the matter would be instantly challenged. Actions might be brought, and the directors might be examined and cross-examined as to what the grounds for their imputation were. I am, therefore, of opinion that in order to preserve to the company the right which is given by the articles a shareholder is not to be put upon the register if the board of directors do not assent to him, and it is absolutely necessary that they should not be bound to give their reasons, although I perfectly agree that if it can be shewn affirmatively that they are exercising their power capriciously and wantonly, that may be ground for the Court interfering. In my opinion we are not at all overruling any case that has been decided heretofore. The case most relied on as most nearly touching the question is *Robinson* v. *Chartered Bank* (1). That was decided on demurrer, and, moreover, there was in that case direct and

(1) Law Rep. 1 Eq. 32.

positive evidence that the directors were refusing to allow Mr. *Robinson* to assign his shares at all to anybody. I quite agree that this would be a breach of trust towards the shareholders. They have no right to say, "We will force a particular shareholder to continue a shareholder, and we will not allow him to transfer his shares at all." That would be an abuse of their power. In the same way it would be an abuse of this power to object, on any ground not applying personally to the transferee, to say, for instance, that a particular shareholder should not transfer his shares till he had given security for the calls. Those would be plain cases of abuse, and I do not find any single case where it has been held that the directors, under a power like this, are bound to communicate the reasons for which they reject the intended shareholder.

Solicitor for the Appellants: Mr. *T. H. Devonshire.*

Solicitors for the Respondents: Messrs. *Mackenzie, Trinder, & Co.*

L. C. and L. J. M.
1873
March 17.

YATES *v.* UNIVERSITY COLLEGE, LONDON.

[1861 Y. 15.]

Will—Construction—Condition rendered impossible by Testator—Bequest to found a Professorship according to certain Rules.

A testator gave certain personal estate to a college for founding a professorship of archæology, for the regulation of which professorship he purposed preparing a code of rules and regulations; and he directed that his executors should, as soon as they conveniently could after his death, communicate the bequest, together with a copy of the rules and regulations, to the college, and that, within twelve months after the bequest had been so communicated to them, the college should signify their acceptance of the rules and regulations; and in case the college should decline to accept them, the bequest should be void, and the property should sink into his residuary estate.

The testator died without preparing any rules and regulations for the professorship:—

Held (reversing the decision of *Bacon*, V.C.), first, that the reference to the proposed rules could not be read as a description of the professorship intended to be founded, but merely as a condition attached to the bequest; and, secondly, that as the condition had become impossible by the act of the testator, the bequest took effect absolutely.

Affirmed by H. of L. 2 H. L. 438

THIS was an appeal from a decision of Vice-Chancellor *Bacon*.

James Yates, late of *Lauderdale House*, *Highgate*, by his will, dated the 24th of February, 1864 (amongst other things), bequeathed as follows:—

"I give and bequeath all dividends, income, and annual produce of a sum of £3980 Consolidated Stock of the *London and North Western Railway Company*, now held by me, and all other the stocks, shares, and debentures of and in the said company which I may be possessed of or entitled to at the time of my decease, unto my said wife, if she shall survive me, during her life, subject nevertheless to the payment by my said wife, out of the said dividends and annual income, to *John Morris*, Esq., Professor of Mineralogy and Geology at *University College*, *London* (if he shall survive me), during the joint lives of him and my said wife, of the yearly sum of £25. And from and immediately after the decease of my said wife I give and bequeath the said stock, shares, and debentures of and in the said *London and North Western Railway Company* to

University College, London, upon trust to pay the annual income thereof to the Professor of Mineralogy and Geology for the time being of that college, as an endowment of the said professorship. And I give and bequeath the dividends, interest, and annual income of the sum of £5500 Consolidated Stock of the *North London Railway Company* (formerly called the *East and West India Docks and Birmingham Junction Railway Company*), and also the ninety new shares of £10 each in the same company, £5 whereof per share has been paid up, and also the fifty preference shares of £20 each in the same company, to which stock or shares I am now entitled; and all other the stock, shares, and debentures of and in the same company, which I may be possessed of or entitled to at the time of my decease, unto my said wife during her life; and from and immediately after her decease, then I give and bequeath the same stock and shares, and the dividends, interest, and annual income thereof, unto the said *University College, London*, for the purpose of founding in it a new professorship of archæology, for the regulation of which professorship I purpose preparing a code of rules and regulations which I intend to authenticate under my hand. And I hereby expressly declare my will and mind to be, that as soon as conveniently may be after my decease my executors shall communicate to the said *University College* the fact of my said last mentioned bequest to the said college, and a copy of the said rules and regulations; and the said *University College* shall, within twelve calendar months next after the fact of the said bequest shall have been communicated by my said executors as aforesaid, signify by writing, under the hand of their president, treasurer, or secretary, their acceptance of the said rules for the future regulation of the said professorship. And I further declare that, if the said *University College* shall decline or refuse to accept the same rules for the regulation of the said professorship, or shall not, within the said space of twelve calendar months, signify to my executors, in manner aforesaid, their acceptance of the same, then I declare that the said bequest of the said stock, shares, and debentures, and every other legacy and bequest herein or in any codicil hereto contained in favour of the said *University College*, shall be wholly null and void, and the said stock and shares, and all other benefits hereby or by any codicil hereto, by me intended for the

L. C. and L. J. M. 1873 YATES v. UNIVERSITY COLLEGE, LONDON.

said *University College*, shall sink into and form part of my residuary estate. And I give to the said *University College* (but subject to the conditions aforesaid) all my books on mineralogy and geology, and also my mineralogical and geological specimens, to be arranged and preserved by the professor of mineralogy and geology, and employed by him as he shall see occasion at his lectures, or by any other professor or lecturer in the same college who may require the use of them. I give to the said *University College* all my casts of antique coins, statues, and all other antiquities in my possession at the time of my decease, to be arranged and preserved by the aforesaid professor of archæology, and employed by him as he shall see occasion at his lectures, or by any other professor or lecturer in the same college who may require the use of the same. I also give to the said *University College* all my books, maps, plates, and drawings, being illustrations of Greek and Roman antiquities; and it is my wish that the same shall be added to the library of that college, more especially for the use of the said professor of archæology and the benefit of his pupils. And I also give to my great-nephew *Henry Yates Thompson*, if living at my death, but if he be not then living, then to such person as, if there be no females living at my decease, would be my heir-at-law, my share in the same college, with the intent that the same share shall always be held and enjoyed by my heir-at-law for the time being, so that he may have means of knowing whether my various bequests in favour of the college, and the two aforesaid professorships, are applied and maintained as I have endeavoured to prescribe and appoint." The testator directed that his charitable legacies should be paid out of his pure personal estate, and that all legacy duty should be paid out of his residuary personal estate. He then bequeathed his residuary personal estate to his wife absolutely, and appointed her and two other persons (one of whom had declined to prove and refused to act) his executors.

The testator died on the 1st of May, 1871.

The bill was filed on the 21st of December, 1871, by the widow, *Dorothea Yates*, against the college, and the other acting executor, alleging that the testator did not at any time before his death prepare any code of rules and regulations for the new professorship of archæology in his will, which were authenticated

under his hand, and praying for a declaration that, in the events which had happened, the bequests of the railway stocks, shares, and debentures, and every other legacy and bequest contained in the will in favour of the college, were wholly null and void; that such stocks, shares, and debentures, and other legacies and bequests, formed part of the residuary estate of the testator; and that the Plaintiff was absolutely entitled to the same as residuary legatee. The Vice-Chancellor held that the gifts to the college failed, and that the property passed to the residuary legatee (1). The college appealed from this decision.

(1) 1872. Dec. 2. WN 1872 217

SIR JAMES BACON, V.C.:—

This case has been argued very fully and elaborately, and very satisfactorily, because I believe every case of any importance that bears upon the question of conditional gifts in wills, and upon the performance of such conditions, has been referred to. But after all, none of the authorities have much bearing upon the question.

The really important consideration is, what is the construction of this will, because it is upon that, and upon that alone, that the judgment of the Court can be founded; and without looking to circumstances extraneous to the will, but reading only the will as it stands, I find that a gentleman, being in some way connected with or attached to *University College*, intends, at the time he pens his will, to confer a benefit on the college. But it is upon two conditions, one of which has been very little adverted to in the course of the argument. The first and most important condition is: "If I shall draw up rules and regulations, then it will be known what is to become of my legacies." The other condition is the acceptance of those rules and regulations by the college. And that makes the great distinction between the case now before the Court and those cases where conditions have been imposed, the performance of which is rendered impossible by accidental circumstances, or the act of the testator himself.

With that preface, and seeing that the object, and I think the sole motive, of the testator was, that the professorships—or one of them, if they are only branches of the same—should be improved, and that a totally new professorship of archæology should be established in the college, and that it should be done according to his scheme and will, and in no other way, we find that he makes this disposition:—[His Honour then read the bequests, as stated above, and continued:—] Is it possible to doubt that his object was that the professorship of archæology should be conducted according to schemes and rules he should prepare? and, if he died, as he did, without preparing any such rules, how is it possible that any effect can be given to the gift? *University College* is to hold this legacy upon trust. For what? Upon the trusts which he shall declare by rules and regulations which he intends to prepare. He directs that the fact of the bequest shall be communicated to the college, and a copy of the rules and regulations, and he proceeds: "The *University College* shall, within twelve calendar months next after the fact of the said

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YATES v. UNIVERSITY COLLEGE, LONDON.

Mr. *Amphlett*, Q.C., and Mr. *Cozens-Hardy*, for the Appellants, were stopped by the Court (1).

Mr. *Kay*, Q.C., and Mr. *Hallett*, for the Respondent:—

The making of the rules by the testator and their acceptance by the college constitute a condition precedent to the gift taking effect. There is nothing illegal or unusual in the condition, nor was its performance impossible at the time when the will was made. It has only become impossible by the testator's own act. Therefore the gift cannot take effect: *Johnson* v. *Castle* (2); *Cary*

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bequest shall have been so communicated by my said executors, as aforesaid, signifying by writing under the hand of their president, treasurer, or secretary, their acceptance of the said rules for the future regulation of the said professorship." When I am asked to consider what the sole motive of the testator was, I answer—No doubt that his sole motive in augmenting the stipends of the professorship of mineralogy and geology, and his sole motive in giving these legacies to found a professorship of archæology, was that it should be, not as the college might wish, not as they, in their judgment, might prescribe in rules and regulations, but that it should be on his scheme, and unless that could be carried into effect, he meant to make no gift at all. What he provides afterwards shews that to be his plain intention and motive, for he says, making himself the arbiter of the rules and regulations, that if the college would not take it as he prescribed it to them, they should not have that nor any thing else under his will.

The question seems to be a mere question of construction; and if the construction which I put on the will is the right one, I believe it is free from all the difficulties which may be said to arise from any of the cases referred to, or the rules to be found in the text books.

Without doing violence to the words and meaning of the testator, it seems to me impossible to say that *University College* can take any benefit under the will. To say they are ready to accept the conditions is to say nothing. It is impossible for them to perform any conditions, because they do not know what they are. The testator has so arranged the matter that it depended on him first to give words to the conditions to make them at all binding on the college, and if he dies, as he has died, without saying in what way he meant his money to be expended, or on what trusts, the gift, in my opinion, wholly fails, and, as a plain consequence, the residuary legatees are entitled to the benefit of the legacies.

(1) The following authorities were cited by the counsel for the college in the Court below: *Darley* v. *Langworthy*, 3 Bro. P. C. 359; *Ring* v. *Hardwick*, 2 Beav. 352; 1 Jar. on Wills, 827; 1 Swin. on Wills, 387, 404; *Williams* on Executors (6th Ed.), 1173.

(2) 8 Vin. Abr. 104, pl. 2.

v. *Bertie* (1); *Lowther* v. *Cavendish* (2); *Lloyd* v. *Branton* (3); *Harvey* v. *Aston* (4); *Hawkes* v. *Baldwin* (5); *Simpson* v. *Vickers* (6); *Burgess* v. *Robinson* (7); *Acherley* v. *Wheeler* (8); *Wheddon* v. *Oxenham* (9); *Davis* v. *Angel* (10). The condition is of the essence of the gift. The testator had no intention to found a professorship, except in accordance with the scheme which he proposed to draw up; and as he never drew up any rules, it must be supposed that he altered his mind, and gave up the intention to found the professorship.

Mr. *Hinde Palmer*, Q.C., for the executor.

LORD SELBORNE, L.C.:—

It appears to us that this is a mere question of construction, as to which I am bound to say that I agree with the Vice-Chancellor in thinking that very little light or assistance is afforded to the Court by the numerous authorities to which reference has been made.

The testator, by present words of gift, subject to a life interest to his wife, expresses himself thus: "And from and immediately after her decease, then I give and bequeath the same stock and shares, and the dividends, interest, and annual income thereof, unto the said *University College, London*, for the purpose of founding in it a new professorship of archæology." The question arises, not upon those words, but upon the clause which follows. I pause here, however, for the purpose of saying that, so far, there is an immediate bequest, which, unless controlled or qualified by something afterwards found in the will, clearly vests an immediate interest by way of remainder in these particular funds in *University College, London*, for the purpose of founding a new professorship of archæology. Because, first of all, the words "I give and bequeath" are unaccompanied by any terms of condition or contingency; and, secondly, the law always leans in favour of the vesting of remainders, and does not, unless there is something to make that construction necessary, construe them to be in suspense or con-

(1) 2 Vern. 333.
(2) 1 Eden, 99; 3 Bro. P. C. 186.
(3) 3 Mer. 108.
(4) 1 Atk. 361.
(5) 9 Sim. 355.
(6) 14 Ves. 341.
(7) 3 Mer. 7.
(8) 1 P. Wms. 783; Comyn Rep. 513.
(9) 2 Eq. Ca. Ab. 546, 547.
(10) 10 W. R. 722.

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tingency. Then the question is, what is the effect of the next words which follow, and which I will read, in connection with the first? "For the purpose of founding in it a new professorship of archæology, for the regulation of which professorship I purpose preparing a code of rules and regulations which I intend to authenticate under my hand." When endeavouring to find out for myself by what road the learned Judge below might have arrived at the conclusion he did, the most likely explanation of His Honour's view that occurred to me was this—that those words referring to a code of rules and regulations were to be read, in connection with the words which precede them, "for the purpose of founding in it a new professorship of archæology," as defining the particular professorship which he meant to found; so as to make the regulation of that professorship by those rules part of the definition of the professorship itself; excluding, therefore, the idea that he meant to found any professorship of archæology, except one regulated by the rules which he was to prepare. But is that a sound construction of the words? I clearly think it is not—for two reasons. One reason is this—that if the testator had only intended something to be done by himself afterwards, he had always the power, since it was not convenient for him to do it then, of making a future codicil or a future will. Here he plainly intends to do something at present, and he speaks of a further purpose and intention which he has of doing something else hereafter. Are we to nullify the present, and make it to be entirely suspended upon a future act, whether that future act was viewed by him as a testamentary act or not? It seems to me to be against every right principle of construction to say that words of immediate gift, which are perfectly sensible as they stand in the will, are to be narrowed by the declaration of his intention to do something in future which he does not think fit to do at that time. There is another reason which, to my mind, is equally conclusive. Regulation, in the case of a charity, is one thing—foundation is another. A scheme, rules, and regulations presuppose a foundation to be regulated. What the testator does is to create the substance of the foundation; and then he tells us that he contemplates and intends providing a code of regulations afterwards. The fact is that he does something now, and whether he shall do the

rest which he contemplates hereafter or not depends upon himself. In the result he has not done it. Therefore I reject the suggestion that the future regulation of this professorship is a thing of the essence of the foundation itself.

But if that conclusion is rejected, there is nothing else in the will upon which a shred of argument could be based. The testator contemplates preparing a code of rules and regulations which could have no existence unless he did prepare them, and then, upon the supposition that he does so, he goes on to declare his will, so far as it is dependent upon that: "I hereby expressly declare my will and mind to be that, as soon as conveniently may be after my decease, my executors shall communicate to the said *University College* the fact of my said last-mentioned bequest, and a copy of the said rules and regulations." They could not, of course, communicate a copy of rules and regulations which did not exist: there could be no obligation on the part of the executors to communicate a thing not existing. The college was to have twelve months after the communication was made to declare whether they would accept the rules or not. That illustrates the meaning of certain passages in some of the authorities which speak of some impossible conditions as not being enough to defeat a gift, even when they are in form precedent; the real meaning of which is that a condition may be expressed with relation to some matters which are of such a nature that there is no condition at all unless those matters exist. All that is said about the rules presupposes the existence of the rules, and anything presupposing the existence of the rules simply falls to the ground, and is no condition at all, if the rules do not exist. It is unnecessary to go into an examination of what the legal effect would be if there were such rules, though I take it to be clear that the forfeiture could not in any case have arisen until a communication was made by the executors, and that could not have been made until they had a copy of the rules to communicate, and the college would never lose the bequest unless they had declined or refused to accept the rules then communicated, or had omitted within twelve calendar months to signify in writing their acceptance of those rules when communicated.

My judgment, therefore, is in favour of the appeal.

L. C. and L. J. M. 1873 YATES. v. UNIVERSITY COLLEGE, LONDON.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

Solicitors for the Appellants: Messrs. *Cookson, Wainwright, & Pennington.*

Solicitors for the Respondents: Messrs. *Hyde & Tandy.*

L. C. and L. J. M. 1873 *March* 19, 20.

CAMPS *v.* MARSHALL.

[1871 C. 147.]

Defendant of Unsound Mind—Entering Appearance.

The Plaintiff and his sister had given a mortgage to *M.*, a solicitor, and the bill was filed against *M.* and the sister to have accounts taken of what was due, and for redemption. The sister was alleged to be of unsound mind, though not found so by inquisition. The Plaintiff's solicitor did not serve the bill on the sister, but, by the Plaintiff's instructions, assumed to act for her, entered an appearance in her name, and obtained at the Rolls the appointment of a guardian *ad litem*. The appearance and the appointment of a guardian were discharged by *Wickens*, V.C., on evidence that the sister had sufficient capacity to authorize a solicitor to act for her, and that she had authorized *M.* so to act:—

Held, on appeal, that whether the capacity of the sister was proved or not, the order of the Vice-Chancellor was right, for that the appearance and the appointment of a guardian founded on it were irregular.

THIS was a motion by way of appeal from an order of Vice-Chancellor *Wickens.*

The original bill in this cause was filed on the 1st of July, 1871, against *William Marshall,* a solicitor, and *Ann Camps,* a sister of the Plaintiff, to have accounts taken for the purpose of ascertaining the amount due on a mortgage from the Plaintiff and *Ann Camps* to *Marshall,* and to redeem on payment of what should be found due. After *Marshall* had answered, the bill was, on the 27th of September, 1872, amended. *Ann Camps,* who was alleged to be of unsound mind, was not served either with the original or the amended bill; but on the 27th of September, 1872, Mr. *J. B. Monckton,* the Plaintiff's solicitor, by the Plaintiff's instructions, entered an appearance for her, and on the 18th of November,

1872, on an affidavit by himself and by a medical man who had visited her, he obtained an order at the Rolls assigning *Thomas Henry Gardiner* as her guardian. It was stated at the bar that this course was commonly followed.

On the 10th of December, 1872, Mr. *Bartlett*, the Defendant *Marshall's* agent, took out a summons to set aside the appearance entered for *Ann Camps* and the appointment of a guardian. This was supported by an affidavit of two persons to the effect that *Ann Camps* was competent to manage her affairs, and had retained *Marshall* to act for her in the suit, and a retainer signed by her was afterwards produced.

On the 18th of January, 1873, Vice-Chancellor *Wickens* made an order that the appearance entered for *Ann Camps* should be withdrawn, and the order of the 18th of November, 1872, discharged. A motion was now made on behalf of Mr. *J. B. Monckton*, and Mr. *Gardiner*, to discharge this order of the Vice-Chancellor.

Mr. *Morgan*, Q.C., and Mr. *G. W. Collins*, for the appeal motion, referred to *Charlton* v. *West* (1), and contended that the proceedings were regular: *Daniell's* Ch. Pr. (2); and that the Vice-Chancellor had taken an erroneous view of the evidence and incorrectly come to the conclusion that *Ann Camps* was of sufficiently sound mind to give a retainer. They proposed, if the Court felt doubt, that a physician should be appointed by the Court to see Miss *Camps*, the Plaintiff undertaking to pay the fee, or that an inquiry should be directed: *Lee* v. *Ryder* (3).

Mr. *Hardy*, Q.C., and Mr. *Speed*, *contrâ*, were not called upon.

LORD SELBORNE, L.C.:—

The order which the Vice-Chancellor has discharged was not obtained in accordance with the practice of the Court, and whatever may be the grounds on which His Honour has gone, we concur in the conclusion at which he has arrived. The General Order (Cons. Ord. VII., rule 3) points out the course to be taken by a Plaintiff who has difficulty in proceeding on account of a Defendant

(1) 3 D. F. & J. 156. (2) 5th Ed. p. 160.
(3) 6 Madd. 294.

L. C. and L. J. M. 1873 CAMPS v. MARSHALL.

being of unsound mind. First, he must prove that he has served the Defendant with process in the proper manner, according to the rules of the Court. Then, on the Defendant's default, in not appearing, the Plaintiff must come to the Court, and the Court will inquire into the circumstances. An application to the Court is required that the Court may exercise its discretion, and unless the relations of the Defendant intervene it usually appoints the solicitor to the suitors' fund to conduct the defence. It is quite inadmissible that the Plaintiff should instruct a solicitor to take steps on behalf of a Defendant of unsound mind, and I am disposed to think that even if a disinterested friend were to intervene it would be necessary to prove service of the bill; but it is better not to decide that point till it arises. I see no reason to suppose that the Plaintiff's solicitor acted otherwise than in good faith, and this accounts for the Vice-Chancellor not having given costs. It has been urged that if the order of the 18th of November, 1872, is discharged, we ought, on the materials before us, to take the matter into our own hands and see that this lady is provided with proper protection. I doubt, however, whether we can thus proceed of our own motion; and I am not satisfied, on the evidence, that the Vice-Chancellor came to an erroneous conclusion in considering that she was capable of authorizing a solicitor to act for her. If she was so capable it is not for us, especially at this stage of the cause, to determine whether she is doing well in intrusting her affairs to a co-Defendant whose interest the Plaintiff considers to be adverse to hers. In our other jurisdiction we propose to call the attention of the Commissioners in Lunacy to this case.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

Solicitors: Messrs. *Monckton & Co.*; Mr. *T. H. Bartlett.*

In re STEPHENS (A LUNATIC).

L. C. and L. J. M.
1873
March 24.

Practice—Court of Chancery (Funds) Act, 1872 (35 & 36 *Vict. c.* 44)—*Transfer of Stock in Public Company—Form of Transfer.*

When a sum of stock in a public company is transferred into Court under the *Court of Chancery (Funds) Act*, 1872 (35 & 36 Vict. c. 44), the deed should express the transfer to be made to the account of the Paymaster-General, and not to the Paymaster-General.

MR. *LANGWORTHY* applied to the Court in consequence of a difficulty which had arisen as to the form of transfer of certain funds into Court under the *Court of Chancery (Funds) Act*, 1872 (35 & 36 Vict. c. 44).

On the 21st of January, 1873, the Court ordered a sum of £1430 £5 per Cent. Guaranteed Stock of the *Madras Railway Company*, belonging to the lunatic, to be transferred into Court, to the credit of "In the Matter of *Stephens*, a lunatic." A deed of transfer of the stock was accordingly prepared, in which the stock was expressed to be transferred to the account of the Paymaster-General for the time being on behalf of the Court of Chancery, and was executed by the secretary of the company and by the Assistant Paymaster-General. The officer of the company, however, whose duty it was to register the transfer, objected to register it, on the ground that the transfer ought to have been made to the Paymaster-General for the time being, and not to his account, in order that the company might have some transferee on the register.

Mr. *Kekewich*, for the company, said that if any liability should arise in respect of the stock, it might be important to the company, that the name of the Paymaster-General should be on the register. He referred to the 6th section of the *Court of Chancery (Funds) Act* and the 15th of the *Chancery Funds Rules*, 1872 (1).

LORD SELBORNE, L.C., said that no stock was ever transferred to the account of the Paymaster-General on which there could be any liability. The form of the transfer, as executed, was made in

(1) Law Rep. 7 Ch. xxxv.

L. C. and L. J. M. 1873 *In re* STEPHENS.

accordance with the Act of Parliament; but it was important to ascertain what the practice of the *Bank of England* was in transferring sums of stock in the public funds, in order that the practice might be uniform.

The COURT was subsequently informed by the Assistant Paymaster-General that sums in the public funds are always transferred to the account of the Paymaster-General for the time being, on behalf of the Court of Chancery; and the Court accordingly directed that the transfer of the railway company's stock should be made in the same form.

The COURT gave no opinion as to the form in which the entry ought to be made in the books of the company.

Solicitors: Messrs. *Ford & Lloyd;* Messrs. *Freshfield.*

BALL *v.* RAY.

[1872 B. 63.]

L. C. and L. JJ.

1873

Jan. 13, 14.

Injunction—Nuisance—User—Increased Nuisance—House.

The occupier of a house in a street in *London* had, many years ago, converted the ground floor into a stable. In 1871 a new occupier altered the stable so that the noise of the horses was an annoyance to the next-door neighbour, and prevented him from letting his house as lodgings:—

Held, that the fact of horses having been previously kept in the stable, but so as not to be an annoyance, did not deprive the neighbour of his right to have the nuisance restrained:

Annoyance caused by the unusual use of a house may be a nuisance where like annoyance from the ordinary use of it would not be.

Decree of the Master of the Rolls reversed.

THE Plaintiff in this case had taken a lease of the house No. 18, *Green Street, Grosvenor Square*, for sixteen years, from the 24th of June, 1861, at a rent of £130 a year; and he used the house as a private hotel, letting the rooms as lodgings.

The house No. 19 had, since 1830, been occupied by Mr. *Steward*, a livery-stable keeper; and for more than fifty years the ground floor of No. 19 had been fitted up and used as stables, but sometimes it was used as a coachhouse. In 1871 the Defendant, who was a captain in the Life Guards, became the occupier of No. 19. He made some alterations in the stable-fittings, the nature and effect of which were disputed, and there was also a dispute whether he kept more horses on the ground floor of No. 19 than had been previously kept.

The Plaintiff, in April, 1872, filed the bill in this suit to restrain the Defendant from keeping horses on the ground floor of No. 19, so as to occasion any nuisance or annoyance to the Plaintiff or his lodgers. The Plaintiff alleged and produced evidence that ever since the Defendant had used the ground floor as a stable the noises occasioned by his horses had been a nuisance and annoyance to the Plaintiff and his lodgers, and that his lodgers had left the house in consequence thereof. The Defendant denied that there was any such nuisance, or at all events, that it was greater than it had been before his time. The conclusions which the Court drew

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on the disputed questions of fact appear from the judgments of their Lordships.

The Master of the Rolls dismissed the bill without costs, being of opinion upon the evidence that there had been no such increase of nuisance as to justify the Plaintiff in applying to the Court.

The Plaintiff appealed.

Mr. *Higgins*, Q.C., and Mr. *Chester*, for the Appellant:—

A clear case of nuisance is made out, and of needless nuisance, for the stable-fittings could easily be altered so as to put an end to it.

Sir *R. Baggallay*, Q.C., and Mr. *A. T. Watson*, for the Defendant:—

Horses had been kept for many years in this place long before the Plaintiff came there, and no increase of nuisance is shewn. The Court cannot determine exactly how many horses may be kept, or what amount of annoyance may be borne: *Soltau* v. *De Held* (1); *Baxendale* v. *McMurray* (2). A mere change in the manner of carrying on a business is not enough: *Inchbald* v. *Robinson* (3); *Crossley* v. *Lightowler* (4).

LORD SELBORNE, L.C.:—

In this case the bill is to restrain for the future, and to obtain damages for the past, on account of a nuisance to the Plaintiff's house. The Master of the Rolls was not satisfied that the Plaintiff's case was made out upon the evidence, though he thought it a case of hardship upon the Plaintiff, and therefore dismissed the bill without costs.

Now, with great deference to the judgment of the Court below, I must say that I am unable to perceive any material contradiction in the evidence as to any material question of fact in the cause. It appears to me that the Plaintiff has proved what it was his duty to prove, and that the Defendant has attempted to meet that only by raising issues irrelevant to the case.

The case is this: The alleged nuisance is committed on the

(1) 2 Sim. (N.S.) 133.
(2) Law Rep. 2 Ch. 790.
(3) Law Rep. 4 Ch. 388.
(4) Ibid. 2 Ch. 478.

ground floor of the street-front of the Defendant's house in *Green Street*, which is next door to the Plaintiff's dwelling-house, used by the Plaintiff as a private hotel, by which, as he says, he makes, and has made, his livelihood. The manner of the nuisance alleged is this, that the Defendant has *de novo* in the year 1871, within a year of the filing of the bill, constructed, or reconstructed, certain stables upon the ground floor of the house adjoining the Plaintiff's dwelling-house in *Green Street* with iron mangers fastened against the party-wall which divides that house from the best living rooms of the Plaintiff's house; the horses' heads being turned in their stalls towards that party-wall, and the chains by which they are held in their stalls being iron chains, fixed either to the wall, or, as I rather think is the case, to the iron mangers attached to the wall. The other fittings and appliances of the stable are alleged in the bill, and proved by the evidence to constitute a new state of things created by the Defendant in the year 1871:—[His Lordship then stated the allegations and the principal evidence].

The true result of the evidence, as it appears to me, on that part of the case is this, that during the tenancy of Mr. *Steward* there never was more than one horse kept in such a manner as to be in any sense in contact with the Plaintiff's house. But supposing it to be shewn that there had been one or more kept in a different manner, so as not to create a nuisance, that would not affect the question. It is shewn that at present they do create a nuisance, and a nuisance of a most injurious effect on the comfort and value of the Plaintiff's house, calculated to destroy his livelihood; and it appears to me that we have here all the circumstances which are necessary to entitle a Plaintiff whose property is injured to the protection of this Court.

With regard to the question of law in the case, I shall say very little, because these questions are eminently questions of fact rather than law; but I desire to say as much as this: In making out a case of nuisance of this character, there are always two things to be considered, the right of the Plaintiff and the right of the Defendant. If the houses adjoining each other are so built that from the commencement of their existence it is manifest that each adjoining inhabitant was intended to enjoy his own property for

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the ordinary purposes for which it and all the different parts of it were constructed, then so long as the house is so used there is nothing that can be regarded in law as a nuisance which the other party has a right to prevent. But, on the other hand, if either party turns his house, or any portion of it, to unusual purposes in such a manner as to produce a substantial injury to his neighbour, it appears to me that that is not according to principle or authority a reasonable use of his own property; and his neighbour, shewing substantial injury, is entitled to protection. I do not regard it as a reasonable or as a usual manner of using the front portion of a dwelling house in such a street as *Green Street*, that it should be turned into stables for horses; and, if it is so used, then the proprietor is bound to take care that it is so used as not to be a substantial annoyance, detrimental to the comfort and to the value of the neighbours' property.

In my judgment, that which is unreasonable has been done here, and it is proved that the Defendant has created a substantial interference with the comfort and value of his neighbours' property. I think that a decree ought to be made for an injunction with costs, and an inquiry directed as to damages, as asked by the bill.

SIR G. MELLISH, L.J.:—

I am of the same opinion. I will first consider whether, if this case had been tried at law, an action could have been maintained by the Plaintiff against the Defendant; and then, if such an action could have been maintained at law, whether there is any reason why the Plaintiff should not have a remedy in this Court.

If the case had been tried at law, the pleadings would have raised distinctly the issues which would be material for the determination of the case. In the first place the Plaintiff, of course, would have had to shew in his declaration what the nuisance was of which he complained. That would have been denied by the Defendant under the plea of "Not guilty," and the burden of proof would have been on the Plaintiff to make out that the Defendant had committed an actionable nuisance. Then the Defendant, in addition to the plea of "Not guilty," under the circumstances of this case, would, no doubt, have pleaded that he and the occupiers of his premises had, for a period of twenty years, been

accustomed, as of right, to commit the alleged nuisance in the same way in which the Defendant had committed it.

In answer to that, the Plaintiff would, of course, have traversed, and he might in addition have new assigned that, even although the Defendant had acquired a prescriptive right to commit such a nuisance, yet he had committed nuisances in excess of the right which he had so acquired.

Now I do not think it necessary in this case to consider whether there has been any excess, because, as I read the Plaintiff's bill, it does not at all allege that if the Defendant had acquired a right to commit a nuisance, there has been any excess. He puts his case on this, that previous to the time when the Defendant had committed the nuisance there was no nuisance at all. The two issues that have therefore to be determined are, first, Does the Plaintiff make out that the Defendant has committed an actionable nuisance? and, secondly, if the Plaintiff does make it out, has the Defendant made out that he is entitled to commit that nuisance by reason of its having been committed by the occupiers of his premises, as of right, for a period of twenty years?

In my opinion, and indeed it is hardly seriously denied by the counsel for the Defendant, the Defendant has committed an actionable nuisance. I entirely agree with what has been said by the Lord Chancellor, that when in a street like *Green Street* the ground floor of a neighbouring house is turned into a stable, we are not to consider the noise of horses from that stable like the noise of a pianoforte from a neighbour's house, or the noise of a neighbour's children in their nursery, which are noises we must reasonably expect, and must to a considerable extent put up with. A noise of this kind, if it materially disturbs the comfort of the Plaintiff's dwelling-house and prevents people from sleeping at night, and still more, if it does really and seriously interfere with the Plaintiff's trade as a lodging-house keeper, beyond all question constitutes an actionable nuisance.

That being so, the real question to be determined in this case is, Has the Defendant made out that that nuisance has been exercised for a period of twenty years? It appears to be very important to bear in mind that the burden of proof is upon him, and it clearly ought to be upon him. When this house was first turned into a

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stable it was in all probability a great inconvenience, and caused annoyance to the owners of the neighbouring houses; but until it became a nuisance, and an actionable nuisance, they would have no remedy on account of that inconvenience. No doubt the owner of the next house is, under such circumstances, in a position of great difficulty as to when he should commence his legal proceedings. If he commence them too early, when an actionable nuisance cannot be proved, he loses, and all the costs will be thrown upon him. He therefore naturally waits until there really is a nuisance which he can prove beyond all question; and then the Defendant may be able to plead that the nuisance has gone on for twenty years. It appears, therefore, to be quite right to throw upon the Defendant the burden of proving very clearly that the nuisance really has been continued during twenty years. Now, in my opinion, there is actually no evidence that this nuisance had existed for twenty years; and if this case had been tried at law it would have been the duty of the Judge to tell the jury that there was no evidence on that issue, and to direct a verdict for the Plaintiff.

On the whole, I am of opinion that the Plaintiff has most clearly made out his case; and I am confident that had he brought an action at law there must have been a verdict in his favour. That being so, there cannot be any doubt that he has also a remedy in this Court; for this is not one of those cases where, although an action for a nuisance might be maintained at law, yet in this Court there would be no remedy.

SIR W. M. JAMES, L.J.:—

I am entirely of the same opinion.

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2 Ch D. 703.

MINUTES:—Injunction to restrain the Defendant from keeping or suffering any horses to be on the ground floor of No. 19, *Green Street*, so as to occasion any nuisance to the Plaintiff, his family, and lodgers residing in No. 18, *Green Street*, as aforesaid. Direct an inquiry to ascertain the damage sustained by the Plaintiff by reason of the user by the Defendant of the said building so as to occasion a nuisance to the Plaintiff; and order the Defendant to pay the amount of such damages when ascertained, and to pay the costs of the suit.

Solicitors for the Plaintiff: Messrs. *Miller & Miller.*

Solicitors for the Defendant: Messrs. *Wilde & Co.*

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[1870 W. 190.] *Applied.* W. BRUCE LD. *v.* J. STRONG [1951] 2 K. B. 447

L. C. and L. JJ. 1873 Jan. 29.

Arbitration—Reference—Stay of Proceedings—Common Law Procedure Act, 1854 (17 & 18 *Vict. c.* 125), *s.* 11.

The lease of a mine contained an agreement to refer disputes between the lessors and three lessees to arbitrators or their umpire, pursuant to the provisions of the *Common Law Procedure Act*, 1854. The lessees sank a shaft, and through the shaft drew minerals from an adjoining mine. The lessors filed a bill to restrain the lessees from so doing. Two of the three lessees applied for an order to stay proceedings in the suit, and that the matter might be referred to arbitration:—

Held, on the construction of the lease, that the Court would not decide, but would leave it to the arbitrators to decide whether the matters in dispute between the parties were within the agreement to refer:

Held, also, that the arbitrators would have power to decide whether the claims of the lessors were or were not against good faith, and would have power to direct payment of damages:

Held, that neither the want of any appeal, nor the inability of the arbitrators to grant an injunction, formed any objection to a reference:

Held, on the construction of the Act (17 & 18 Vict. c. 125, s. 11), that it was no objection to the application that two only of three Defendants were, at the commencement of the suit and at the date of the application, ready and willing to concur, and (*per* Lord *Selborne*, L.C.) that the dissent of a Defendant, if persisted in, would not necessarily be a ground for refusing the order.

Order of *Wickens*, V.C., staying proceedings in the suit, affirmed.

By an indenture of lease, dated the 25th of April, 1866, the Plaintiffs, who were tenants in common of a certain estate in *Devonshire*, called *Capel Tor*, demised to the three Defendants all the mines and minerals under the estate, and the buildings on the estate, and certain lands in use and paid for by the former lessees of the mines, with liberty to dig and sink shafts, to take stone, and to divert water as should be necessary to work the mines, yielding a royalty of one-fifteenth of the money value of the produce when sold. The lease contained the following arbitration clause: "Provided always, and it is hereby agreed and declared, that if and whenever any dispute, question, or difference shall arise between the said parties to these presents, or their respective executors,

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administrators, or assigns, touching any dues or moneys payable or retainable under these presents, or the price to be paid for any engine, machine, or apparatus taken by the lessors, their heirs, or assigns, in pursuance of the provisions in that behalf hereinbefore contained, or touching these presents, or any clause, or matter, or thing herein contained, or the construction hereof, or the working of the said mines, or any compensation or satisfaction to be paid or made, or any other thing to be done under the covenants by the lessors herein contained, or touching the rights, duties, and liabilities of either party in connection with the premises, the matter in difference shall be referred to two arbitrators, or their umpire, pursuant to and so as in all respects to conform to the provisions in that behalf contained in the *Common Law Procedure Act*, 1854."

The lessees, who were trustees for certain adventurers, were also, at the date of the lease, the lessees of other mines, which were contiguous to the mines comprised in the lease. It appeared that the Defendants, shortly after taking their lease from the Plaintiffs, sunk a shaft through the Plaintiffs' land, in a slanting direction, into the adjoining land, and made use of the shaft not only to work the mine under the Plaintiffs' land, but also to bring minerals and refuse from the other land into the Plaintiffs' land, and thence to raise them. The Plaintiffs, on discovering the fact, objected, but expressed themselves willing to grant a licence, and to do all other acts, on payment by the Defendants of a reasonable and proper way-leave, and compensation for the use of dressing-floors and deposit and heap room. This the Defendants refused to pay, and the Plaintiffs thereupon filed this bill to restrain the Defendants from conveying any substance from the adjoining lands into the *Capel Tor* estate, and from leaving any tramway open, without the Plaintiffs' consent, for the purpose of enabling the Defendants to work any mines not comprised in the lease granted by the Plaintiffs.

It appeared from the correspondence between the parties, that part of the contention of the Defendants was, that they had been led by the Plaintiffs to believe that such working would be allowed.

Two of the Defendants took out a summons to stay proceedings, and to refer the matter in dispute to arbitration, under the *Com-*

mon Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 11 (1). The summons was adjourned into Court.

The third Defendant did not at first concur in the application, but subsequently consented to be bound by the order of the Court.

The Vice-Chancellor *Wickens* made an order to stay proceedings, as reported (2).

The Plaintiffs appealed.

Mr. *Greene*, Q.C., and Mr. *Dunning*, for the Plaintiffs:—

We maintain, first, that the Act does not oust the authority of this Court, and does not authorize more than a temporary stay of proceedings; and secondly, that the matters in question in this suit are not within the agreement to refer. The Defendants are bringing through our land minerals and refuse from another mine. But this is not done under their lease, and the arbitrators therefore will not have power to award payment to us. If it was done under the lease, of course the matter might be referred, but it is not, and we must resort to the Court. This is not one of the matters which we have agreed to refer. Besides, all the Defendants were not always willing to refer, and the Act requires that they should be so, at all events when the suit is brought.

Moreover, in this case an injunction may be required, and that

(1) Sect. 11 is as follows: "Whenever the parties to any deed or instrument in writing to be hereafter made or executed, or any of them, shall agree that any then existing or future differences between them, or any of them, shall be referred to arbitration, and any one or more of the parties so agreeing, or any person or persons claiming through or under him or them, shall nevertheless commence any action at law or suit in equity against the other party or parties, or any of them, or against any person or persons claiming through or under him or them, in respect of the matters so agreed to be referred, or any of them, it shall be lawful for the Court in which action or suit is brought, or a Judge thereof, on application by the Defendant or Defendants, or any of them, after appearance and before plea or answer, upon being satisfied that no sufficient reason exists why such matters cannot be or ought not to be referred to arbitration according to such agreement as aforesaid, and that the Defendant was at the time of the bringing of such action or suit and still is ready and willing to join and concur in all acts necessary and proper for causing such matters so to be decided by arbitration, to make a rule or order staying all proceedings in such action or suit, on such terms as to costs and otherwise as to such Court or Judge may seem fit. . . ."

(2) Law Rep. 14 Eq. 572.

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the arbitrators cannot grant, so that we may be driven after all to this Court. The Court, therefore, ought at once to assume jurisdiction: *Wheatley* v. *Westminster Brymbo Coal and Coke Company* (1). The jurisdiction of the Court is not ousted by every agreement to refer: *Wood* v. *Robson* (2); *Cooke* v. *Cooke* (3); *Cook* v. *Catchpole* (4); *Witt* v. *Corcoran* (5). The expense and delay will, under

(1) 2 Dr. & Sm. 347.
(2) 15 W. R. 756.
(3) Law Rep. 4 Eq. 77.
(4) 34 L. J. (Ch.) 60.
(5) 1871. June 12.

SIR JAMES BACON, V.C.—

By articles of partnership between *J. Witt* and *T. Corcoran* it was provided that if either of the partners should commit a breach of the articles it should be lawful for the other partner, by notice in writing given to his co-partner within one month after he should have heard or become aware of such breach, to determine the partnership, and upon the giving or leaving such notice, should have the option of purchasing the share of the partner committing such breach as if the partner committing the same had died; it was also provided that if any doubt, difference, or dispute should at any time arise between the parties "touching the construction of these presents, or any clause, matter, or thing therein contained, or any account, valuation, appraisement, or division of assets, debts, or liabilities to be made as hereinbefore is mentioned, or any other matter or thing whatsoever in anywise relating to or concerning the partnership, or the trade, business, or affairs thereof, then and in such case, and so often as the same shall happen, such doubt, difference, or dispute, shall be reduced into writing, and be submitted and referred to the arbitration of two indifferent persons, one to be appointed by each partner within one month after either of them shall have made to the other a requisition to that effect, or the umpire of such arbitrators." It was further provided that the provisions of the *Common Law Procedure Act*, 1854, with respect to the appointment of arbitrators, their proceedings and powers, should extend and be applicable to the reference to arbitration thereby agreed to be made.

Disagreements arose between the partners, and on the 24th of March notice of dissolution was served upon *Witt* by *Corcoran*. *Witt* disputed the legality of the notice and the validity of the grounds of dissolution put forward by *Corcoran*; and on the 4th of April *Witt* filed his bill to restrain *Corcoran* from advertising or circulating his dissolution of the 24th of March, 1871, and to have such notice declared void.

On the same day *Corcoran* served *Witt* with notice of the appointment of an arbitrator, and called upon him to concur in submitting such matters to arbitration, and to appoint another arbitrator.

Witt declined to appoint an arbitrator, or in any way to concur in the reference, and on the 4th of May *Corcoran* served notice of his intention, in default, to appoint a second arbitrator.

Under these circumstances, *Witt* moved to restrain *Corcoran* from proceeding in the arbitration.

Mr. *Kay*, Q.C., and Mr. *Nalder*, in support of the motion, contended that

the arbitration, be greater: *Croskey* v. *European, &c., Steam Shipping Company* (1).

Mr. *Dickinson*, Q.C., and Mr. *Romer*, for the Defendants, were not called upon.

LORD SELBORNE, L.C.:—

We all agree that the Vice-Chancellor has come to a right conclusion in this case.

The whole argument has depended really upon the construction of the lease and of the Act of Parliament. With respect to the lease, one cannot but be struck with these two points: first, that it contains as absolute a contract as the law would permit these parties to make *inter se*, that such questions as are included in the agreement shall be referred to arbitration. It is not giving one party an option which the other may dissent from, but all the parties to this lease are bound by the agreement to refer so far as such an agreement can by law bind them.

Then what is it that they are to refer to arbitration? It struck me throughout that the endeavour of the Appellants has been to require this Court to do the very thing which the arbitrators ought to do—that is to say, to look into the whole matter, to construe the instrument, and to decide whether the thing which is complained of is inside or outside of the agreement. The Plaintiffs, in fact, ask the Court to limit the arbitrators' power to those things which are determined by the Court to be within the agreement.

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it was not a case for arbitration, and that pending the suit the jurisdiction of the Court could not be ousted by an attempted reference to arbitration.

Mr. *Amphlett*, Q.C., and Mr. *Bagshawe*, for the Defendant, contended that the notice to proceed in the arbitration was valid, and that the question was one to be decided by an arbitrator rather than by the Court.

The VICE-CHANCELLOR held that there was nothing in the articles of partnership to oust the jurisdiction of the Court to decide upon the subject-matter of the suit—the validity of the notice of dissolution. Having full and ample possession of the quarrel, the Court was bound to pronounce a decision, and in the meantime the proceedings of the Defendant in the arbitration must be restrained as asked by the notice of motion.

Solicitors: Messrs. *Flower & Nussey*; Messrs. *Clowes, Hickley, & Co.*

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(1) 1 J. & H. 108.

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In most of such cases the real question between the parties is whether the matter in dispute is within or without the agreement. Here they seem to have taken more than ordinary pains to throw in words that cover all things collateral as well as all things expressed. That which they agree to refer is every question, first of all, "touching any dues or money payable or retainable under these presents"—that, no doubt, is something provided for expressly by the agreement; secondly, "or the price to be paid for any engine, machine, or apparatus taken by the lessors, their heirs or assigns, in pursuance of the provisions in that behalf hereinbefore contained"—that again is a thing which is within the provisions of the lease; thirdly, "or touching these presents, or any clause or matter or thing herein contained, or the construction hereof." Whenever, therefore, there is a dispute between the parties as to whether the instrument, according to its true construction, does or does not warrant the particular thing to be done, they have agreed that that dispute shall be referred. Surely, then, it would be extravagant to say that if the Court thinks that, according to the true construction of the instrument, the thing ought not to be done, therefore it is not to be referred.

But the clause does not stop there. After having apparently exhausted everything which is necessarily within the terms of the lease, it goes on to say: "or"—that is, any question touching—"the working of the said mines." What can be larger? It states that any question whatever as to the working of the mines is to be referred. Then it goes on with another provision: "or any compensation or satisfaction to be paid or made, or any other thing to be done under the covenants by the lessors herein contained." The lessors reserve to themselves a right to interfere with the workings and privileges of the lessees, making them compensation. Then, all that having been said, these words are superadded to the whole: "or touching the rights, duties, and liabilities of either party in connection with the premises." Now, those words, "in connection," evidently are apt to include, and I think must have been intentionally used to include, everything relating to the demised property and the use of it, even things which might arise out of collateral matters between the parties.

I cannot but think that the very facts of this case, and the nature

of the present controversy, independently of anything that I find in the letter of the lease, strongly indicate the reasonableness of such a provision. I do not suppose that those words were used in foresight of the exact controversy which has arisen, but if they had been, their use would have been very well illustrated by it, because the real controversy, or at least one main part of the controversy, is, whether the objection which the Plaintiffs are now making to the manner in which the Defendants are using the mine is not against the faith of the real contract between them, and against the faith of what has passed between them.

I am not going, of course, to say anything as to the way in which the arbitrator, with all the evidence before him, may view that point; but I cannot help thinking it reasonably clear that, under these words, if subsequently to the execution of the lease there had been communication between the parties, and the landlord had given a verbal consent to something which the lease did not authorize, and money had been expended upon the faith of the thing being done, that would be a matter which the arbitrator would with perfect propriety take into account. So, if there were a contemporaneous collateral agreement having any equitable force, which added something to or took something away from the rights of either party, I cannot but think that these words, "or touching the rights, duties, and liabilities of either party in connection with the premises," would perfectly authorize the arbitrator, and indeed make it his duty, to take all those matters into account in order to see what were their mutual rights and liabilities in respect of the demised property at the time when the question arose.

I also think, though some doubt has been expressed about it, that it would be perfectly within the arbitrator's power to direct money to be paid, if he thought money should be paid, for something which he deemed to have been wrongfully done by the lessees. It appears to me, therefore, that there is no reason to doubt that the present controversy is within the terms of the agreement of reference, or that the arbitrator would have as large powers as arbitrators can have to do justice under it.

Then we are told that this is an arbitrary tribunal, final and without appeal, and so forth, and that these are not fit questions to go before the arbitrator. But I think that the Legislature and

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the Act of Parliament under which the Court is now asked to act have given the answer to that argument. If parties choose to determine for themselves that they will have a domestic forum instead of resorting to the ordinary Courts, then since that Act of Parliament was passed a *primâ facie* duty is cast upon the Courts to act upon such an agreement.

16 Eq 569

The parties here have made that agreement. They probably knew what were the reasons in favour of determining these questions by arbitration, and what were the reasons against it, and they made it part of their mutual contract that these questions should be so determined. The Plaintiffs cannot, therefore, be now heard to complain if that part of their contract is carried into effect.

Then, with regard to the other two points, it is said that the arbitrator could not grant an injunction. No doubt he could not grant an injunction; but he might say that the thing was not to be done, and there being liberty to apply to this Court, this Court would then grant the injunction. I agree that if, in the present state of circumstances, the Court saw there was a case for now granting the injunction, that would be an extremely good reason for not sending the matter to arbitration. But nothing has been said to us which has any tendency whatever to make us think that, in the present state of circumstances, there is a case for now granting an injunction.

The only other argument appears to be that under the Act it is a condition precedent to such an order as this that every Defendant must, before the suit began, have been willing, and still continue willing, to go to arbitration. I do not think it is so according to the true construction of the Act. The section is certainly imperfectly expressed, and looks very much as if it had undergone a process of amendment in which the language was not very accurately considered. But in substance the Act clearly gives a right to one of several Defendants to make the application to the Court, taking notice that there may be more than one Defendant. That by itself tends to shew that the Legislature did not intend to make it necessary that all parties should concur in the application. Nor are there afterwards such clear words as to lead to that conclusion. The words which follow are: "If the Defendant was at the time of the bringing of such action or suit and still is ready and willing." Does not that mean the same

Defendant who is making the application? And that view of the meaning of the Act is surely fortified by considering the whole nature of the case. The several parties have met together, and by an agreement in writing have determined that certain disputes shall be referred to arbitration. They now wish to have that agreement performed, and it is not the dissent of somebody else, whether he be a Defendant or whether he be a Plaintiff, which ought to prevent the Court from performing it.

The result is, in my judgment, that the Vice-Chancellor's decision is correct, and the appeal motion must be dismissed with costs.

SIR W. M. JAMES, L.J.:—

I am of the same opinion. With regard to one argument pressed upon us—that we ought not to send the matter to arbitration because the arbitrator would decide without appeal—I can easily conceive that two sensible men may possibly have had that in their view, and that they would prefer even running the chance of the arbitrators making a mistake to having every matter brought into a Court of Law, or into the Court of Chancery, to be heard before a Vice-Chancellor, with an appeal to this Court, and then perhaps an ultimate appeal to the House of Lords. I can conceive that sensible men may prefer an arbitrator even to being at liberty to carry one another through litigious proceedings in three successive Courts.

With regard to the other points, I entirely agree with what the Lord Chancellor has said. It appears to me that any Defendant has a right to make this application, and that there is no difficulty arising from the absence of another Defendant. If this Court saw that the thing could not be effected without the concurrence of somebody else who would not concur, that would be a sufficient reason why the matter should not be sent to arbitration; but if the other person is willing to concur, there is no difficulty in substance. It appears to me there is no difficulty upon the words of the section.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

Solicitors for the Plaintiffs: Messrs. *Fox & Robinson.*
Solicitors for the Defendants: Messrs. *Child & Batten.*

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Feb. 19.

WALSH *v.* WASON.

[1871 W. 170.]

Equity to a Settlement—Limitation in Default of Children.

Where a wife is entitled to an equity to a settlement, the fund will be limited, after the death of the wife and in default of children of the wife, to the husband whether he does or does not survive the wife.

20 Eq 798
W.R. D/67

IN this case *Sarah Walsh*, a married woman, was by a decree of the Court declared entitled to an equity to a settlement in a sum of about £400 then in Court, which sum was directed to be carried to a separate account. And it was declared that the same ought to be settled upon the said *Sarah Walsh* during her life for her separate use, and after her death for such of the children of the said *Sarah Walsh*, by her present or any future husband, as being a son or sons should attain the age of twenty-one years, or being a daughter or daughters should attain that age or marry.

A question was then raised whether, in default of such children, the trusts of the fund should be for the incumbrancers of the husband *William Walsh*, according to their priorities, and subject thereto, upon trust for the husband absolutely; or should be for the husband or his incumbrancers if he survived his wife, but in case he died in the lifetime of his wife, then for the wife.

The Master of the Rolls said that he had in similar cases made orders giving the fund to the husband only in the event of his surviving, and wished the matter to be mentioned to the Lord Chancellor.

Mr. *Jackson, Q.C.*, for an incumbrancer of the husband, said that the authorities on the subject were clear, and cited *Carter* v. *Taggart* (1); *Spirett* v. *Willows* (2); *In re Suggitt's Trusts* (3); *Croxton* v. *May* (4).

Mr. *Terrell*, for the husband and wife, admitted that the question was decided by authority.

(1) 1 D. M. & G. 286.
(2) Law Rep. 1 Ch. 520; Ibid. 4 Ch. 407. 12 Jur NS 538
(3) Law Rep. 3 Ch. 215.
(4) Ibid. 9 Eq. 404.

Mr. *Graham Hastings*, for trustees.

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LORD SELBORNE, L.C.:—

The ultimate limitation to the husband is in accordance with the form of settlement which Lord *Chelmsford* adopted in *Spirett* v. *Willows* (1), and which the Vice-Chancellor *James* adopted in *Croxton* v. *May* (2). If there have been orders made in a different form, I should conclude that they were so made because the attention of the Court was not drawn to the particular point.

The fund here is not a reversionary interest, and the husband has a right to reduce it into possession, which is intercepted by the wife's equity to a settlement. The only question is, therefore, whether that equity is to go beyond making a provision for the wife and her children.

In my opinion that point was virtually decided by Lord *Cranworth* in *Carter* v. *Taggart* (3), though down to that time a practice had crept in of giving the wife a power of appointment.

In *In re Suggitt's Trusts* (4), Lord *Cairns* held it inconsistent to interfere with the right of the husband any more than was necessary, and that to give a power of appointment to the wife did go beyond what was necessary.

It appears to me, upon the same principle, that the Court would go beyond the necessity of the equity to a settlement if it in fact placed the fund in the position of a reversionary interest. The husband has a right to any interest in possession, except so far as may be necessary to provide for the wife and children.

Several Judges, who have especially directed their minds to this subject, have come to the same conclusion, and I have no doubt that it is correct. The same form must be used as was used in *Spirett* v. *Willows*.

SIR G. MELLISH, L.J., concurred.

Solicitors: Messrs. *Chinery & Aldridge*; Messrs. *R. M. & F. Lowe*; Messrs. *Waller & Son*.

(1) Law Rep. 1 Ch. 520. (3) 1 D. M. & G. 286.
(2) Ibid. 9 Eq. 404. (4) Law Rep. 3 Ch. 215.

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1873

Feb. 17, 18;
March 5.

EARL OF AYLESFORD *v.* MORRIS.

[1871 A. 67.]

Expectant Heir—Unconscionable Bargain—Injunction.

The doctrines of equity as to the relief of expectant heirs from unconscionable bargains have not been affected by the repeal of the usury laws, or by the alteration of the law as to sales of reversionary interests.

A young nobleman in his twenty-second year, entitled to large property in the event of his surviving his father, was largely indebted. The creditor pressed for payment, and recommended the young nobleman to apply to a certain money-lender. The money-lender advanced enough money to in part pay off the creditor, and made a further advance to the young nobleman, taking by way of security his acceptances at three months for the sum advanced with interest and discount together exceeding the rate of 60 per cent. The acceptances became due, and the process was repeated, the young nobleman receiving a small advance. The young nobleman had no professional assistance in these matters, and no application was made to his father or to the solicitors of the father. The father died before the second set of bills became due, and the money-lender commenced actions upon them:—

Held (affirming the decree of *Wickens*, V.C.), that the actions would be restrained; and a decree made for delivery up of the bills on payment of the sums actually advanced and interest at 5 per cent.

THE Earl of *Aylesford* (then Lord *Guernsey*) attained his majority on the 21st of February, 1870. He was then entitled, as tenant in tail expectant upon the death of his father, who was in bad health, to large estates in *Warwickshire* and elsewhere, producing an annual rental of £20,000, or thereabouts. He had no income of his own, and depended entirely upon the allowance made to him by his father, which did not, in any year, exceed £500.

He was stated to have been extravagant, and before he came of age he had borrowed money from one *John Graham*, a solicitor; and *Graham* made him a further advance after he came of age. The result of his dealings with *Graham* was that soon after he came of age his acceptances for £4000 were held by *Graham*. The Plaintiff was unable to meet these acceptances, and was by *Graham* introduced to the Defendant *Robert Morris*, who paid *Graham* £3000, and advanced £3800 to the Plaintiff, taking his acceptance at three months for £8000. The difference, £1200, was

retained by *Morris* as discount, at the rate of 1s. in the pound per month. At the same time, an insurance for £6000 on the Plaintiff's life was effected, and the first premium was paid by the Plaintiff out of the money advanced. *Morris* alleged that he considered *Graham* to have acted as the solicitor for the Plaintiff in this transaction; but, as will be seen from the judgment of the Lord Chancellor, that allegation was not established.

The acceptance for £8000 became due on the 4th of October, 1870, and *Morris* applied for payment. The Plaintiff, through the agency of one *Addison*, who received from *Morris* 5 per cent. on the transaction, arranged with *Morris* to have the acceptances cancelled, giving *Morris* bills dated 19th December, at three months, for £11,000, and receiving a balance of £207 only; the rest of the money beyond the £8000 being for discount, extra payment on the policy of insurance, and £275 commission paid to *Addison*.

The further circumstances under which these advances were made are stated by the Lord Chancellor in his judgment.

The father of the Plaintiff died on the 10th of January, 1871, and on the 24th of March, 1871, *Morris* applied for payment of the £11,000. The solicitors of the Plaintiff thereupon proposed to pay the sum actually advanced with interest at 15 per cent. This proposal was not accepted by *Morris*, who brought an action on the bills against the Plaintiff; and the Plaintiff then filed the bill in this suit against *Morris* and *Addison*, praying that the bills of exchange and the policy of assurance might stand as securities only for the sums actually advanced and interest at 5 per cent., and that the actions might be restrained.

The Vice-Chancellor *Wickens* granted an injunction; and on the 9th of December, 1872, made a decree for the delivery up of the bills and the policy on payment by the Plaintiff of the sums actually advanced, and interest at 5 per cent. No costs as between the Plaintiff and *Morris* were given; and the bill as against *Addison* was dismissed with costs.

The Defendant *Morris* appealed.

Mr. *Karslake*, Q.C., and Mr. *Holl* (Mr. *F. T. White* with them), for the Appellant:—

There is not one case in which, when no security is given, high

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interest has been held bad; nor has it ever been held that a man may not, without consulting the family solicitor of the borrower, lend money to the son of a peer. The whole matter has been well considered in *Benyon* v. *Fitch* (1); *Tottenham* v. *Emmet* (2). To hold that this security is bad would be to go beyond *Earl of Chesterfield* v. *Janssen* (3). Many of the cases where sales of or loans on reversionary interests have been set aside, would not even have been discussed if this was the law. *Morris* did not come to the Plaintiff, but the Plaintiff went to him, and that not until *Addison* had tried to get the money from other persons. He could not have got it advanced on better terms. No doubt the repeal of the usury laws has not affected the doctrine of the Court as to dealings with expectant heirs; but apart from the usury laws it has never been held that a high rate of interest was of itself invalid. *Croft* v. *Graham* (4) was a case of actual fraud. In *Webster* v. *Cook* (5) the question was, whether the property was reversionary. In *Miller* v. *Cook* (6), in *Wyatt* v. *Cook* (7), and *Tyler* v. *Yates* (8), there was security. *Morris* took none, and could not with ordinary prudence, in the regular course of his business, make an advance for the relief of Lord *Guernsey* without taking a high rate of interest, in order to cover the losses he must in some of these cases incur. If Lord *Guernsey* had died in the lifetime of his father, *Morris* would have lost his money. His only security would be an insurance on the life of Lord *Guernsey*, and there was nothing out of which he could pay the premiums for insuring the life of Lord *Guernsey*. What rule can be laid down in such cases as to the proper rate of interest? It must be left to the borrower and lender. To give *Morris* 5 per cent. when he recovers the money he lends, and to leave him a loser of the whole when he does not, is absurd and unjust in the extreme. If the young man had bought racehorses or jewels on credit at an extravagant rate that would have been good, and by this very loan he may have been enabled to buy at a cheaper rate the things he wanted.

(1) 35 Beav. 570.
(2) 12 L. T. (N.S.) 838; 14 W. R. 3.
(3) 2 Ves. Sen. 125; 1 Wh. & T. L. C. 3rd. Ed. 483.
(4) 2 D. J. & S. 155; 5 Giff. 1.
(5) Law Rep. 2 Ch. 542.
(6) Ibid. 10 Eq. 641.
(7) 16 W. R. 502.
(8) Law Rep. 6 Ch. 665.

There is no pretence of any fraud, or that Lord *Guernsey* did not know what he was about, as in *Baker* v. *Monk* (1). If the Plaintiff has any such defence, it is open to him at law: *Preston* v. *Dania* (2). As to the argument that Lord *Guernsey* would be obliged to go on paying this high rate of interest until his whole estate was swallowed up, the answer to that is, that if he found he was paying more than a fair rate, he could at any time get money elsewhere and relieve himself. Nor is this a bargain which can be set aside as made for inadequate consideration as in *Tennent* v. *Tennents* (3). Nor was he under such pressure as not to be a free agent. Nor was *Morris* in a fiduciary position, as was the case in *Barrett* v. *Hartley* (4).

The old cases were all of sales of reversions or of loans on security, and it is only lately that the doctrine has tacitly been extended to personal loans: *Bromley* v. *Smith* (5) is the first case. In *Peacock* v. *Evans* (6), *Bowes* v. *Heaps* (7), and *Tottenham* v. *Green* (8), there was security. The only case where there was no security is *Curwyn* v. *Milner* (9).

The only grounds on which the Court has been asked to stay these actions are that the Plaintiff had just attained the age of twenty-one years, and that the Defendant claims 60 per cent. But these by themselves have never been held enough to justify the interference of the Court. The Defendant is not coming here to ask the assistance of the Court in enforcing a security, but merely wishes to be left to his legal rights.

Mr. *Dickinson*, Q.C., and Mr. *Jones-Bateman*, for the Plaintiff:—

The reason why 5 per cent. is taken as the rate of interest is, that the Court sets aside the original contract, and decrees repayment of the sum advanced and of interest at a rate fixed upon by analogy to the legal rate. It is a technical rule universally adopted. The principle on which the Court has interfered in these cases is, that the parties are in such a position that no real bargain

4 Ves. 388.

(1) 10 Jur. (N. S.) 691.
(2) Law Rep. 8 Ex. 19.
(3) Ibid. 2 H. L., Sc. 6.
(4) Ibid. 2 Eq. 789.
(5) 26 Beav. 644.
(6) 16 Ves. 512.
(7) 3 V. & B. 117.
(8) 32 L. J. (Ch.) 201.
(9) 3 P. Wms. 293, n.

1 Jac. & W. 483.

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could be made between them. Lord *Guernsey* was foolish and extravagant, and the Plaintiff helped him in his folly in a manner which cannot be countenanced in a Court of Equity. The Roman law protected such young men by the Macedonian Decree; and the French law also protected them: *Domat, Lois Civiles*, L. I., T. 6, s. 4 (1). The evil has existed in all times, and in all times it has been the policy of the law to counteract it. There is no analogy between this case and that of a merchant in difficulties. This young man was under no necessity to be extravagant.

Miller v. *Cook* (2) was decided on that principle. The only case which seems opposed is *Benyon* v. *Fitch* (3), but there the rate of interest was not discussed. In *Tottenham* v. *Emmet* (4) the reasons of the Judges were against the lender. The abolition of the usury laws does not affect this question, and that alteration was made for the benefit of men in trade, not to promote extravagance. It was argued that the second transaction, at all events, was good, as the Plaintiff was already under these liabilities; but that was merely a continuation of the former transaction, and the Plaintiff was never a free agent. He was never clear of these money-lenders. In *Crowe* v. *Ballard* (5) there was an actual confirmation. For advances of about £7000 the Plaintiff is liable to £11,000, and the interest is, in fact, compound interest, which the Court always considers unconscionable: *Gwynne* v. *Heaton* (6). The Plaintiff could never have escaped the accumulation of interest at this enormous rate except by becoming bankrupt, and then he would equally lose the whole of his estate.

Mr. *Karslake*, in reply:—

There is no legislation against extravagance, and this young man had full legal right to be extravagant and to borrow money. There is no pretence of fraud, or haste, or pressure. He had already borrowed money at the same rate from *Graham*. The whole of modern legislation is against these attempts to stop folly and extravagance, as the only result of such attempts has always

(1) Page 239.
(2) Law Rep. 10 Eq. 641.
(3) 35 Beav. 570.
(4) 12 L. T. (N. S.) 838; 14 W. R. 3.
(5) 1 Ves. 215.
(6) 1 Bro. C. C. 1.

been to make the borrowers pay still more in order to compensate the lenders for their additional risk. Since the usury laws have been abolished, and sales of reversionary interests have been made valid, there is no rule against any rate of interest, which was the only ground on which such transactions were formerly held invalid: *Wiseman* v. *Beake* (1); *King* v. *Hamlet* (2). No attempt was made to have these securities set aside until the Plaintiff came into possession of his estates. If his father had not died, *Morris* would have been left to lose his money. The Plaintiff has played fast and loose, and if these actions are stayed, *Morris* must be a loser and the Plaintiff a gainer in either contingency.

March 5. LORD SELBORNE, L.C.:—

There is hardly any older head of equity than that described by Lord *Hardwicke* in *Earl of Chesterfield* v. *Janssen* (3) as relieving against the fraud "which infects catching bargains with heirs, reversioners, or expectants, in the life of the father," &c. "These (he said) have been generally mixed cases," and he proceeded to note two characters always found in them. "There is always fraud presumed or inferred from the circumstances or conditions of the parties contracting—weakness on one side, usury on the other, or extortion, or advantage taken of that weakness. There has been always an appearance of fraud from the nature of the bargain."

With respect to the first of these two characters he had spoken just before, when he said of that kind of fraud which might be presumed from the circumstances and condition of the parties contracting (4)—"This goes further than the rule of law, which is, that it must be proved, not presumed; but it is wisely established in this Court to prevent taking surreptitious advantage of the weakness or necessity of another, which knowingly to do is equally against conscience as to take advantage of his ignorance; a person is equally unable to judge for himself in one as the other." To a certain extent, protection against this class of transactions was afforded by the laws against usury, now repealed, which (as Lord

(1) 2 Vern. 121.
(2) 2 My. & K. 456.
(3) 2 Ves. Sen. 125, 157.
(4) Ibid. 155.

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Hardwicke also said) were made, "not for want of power in this Court to give relief in many of these contracts, but to make them void in law, to give the party a short remedy against them" (1).

Other forms of similar extortion, although they kept clear of usury, were defeated by a fixed rule of this Court, which grew up out of the general equity. Post-obit securities and sales of reversions, or of annuities, or gross sums charged upon reversions, with or without some element of risk, were held redeemable in every case in which the purchaser could not prove that he gave full value for his bargain. "In the earlier cases," said Sir *J. Leach* in *Shelly* v. *Nash* (2), "it was held necessary to shew that undue advantage was actually taken of the situation of such persons: but in more modern times it has been considered not only that those who were dealing for their expectations, but those who were dealing for vested reversions also, were so exposed to imposition and hard terms, and so much in the power of those with whom they contracted, that it was a fit rule of policy to impose upon all who dealt with expectant heirs and reversioners the onus of proving that they had paid a fair price, and, otherwise, to undo their bargains, and compel a reconveyance of the property purchased."

The usury laws, however, proved to be an inconvenient fetter upon the liberty of commercial transactions; and the arbitrary rule of equity as to sales of reversions was an impediment to fair and reasonable, as well as to unconscionable, bargains. Both have been abolished by the Legislature; but the abolition of the usury laws still leaves the nature of the bargain capable of being a note of fraud in the estimation of this Court; and the Act as to sales of reversions (31 Vict. c. 4) is carefully limited to purchases "made *bonâ fide* and without fraud or unfair dealing," and leaves under-value still a material element in cases in which it is not the sole equitable ground for relief. These changes of the law have in no degree whatever altered the *onus probandi* in those cases, which, according to the language of Lord *Hardwicke*, raise "from the circumstances or conditions of the parties contracting—weakness on one side, usury on the other, or extortion, or advantage taken of that weakness"—a presumption of fraud. Fraud does not here mean

(1) 2 Ves. Sen. 159. (2) 3 Madd. 232, 235.

deceit or circumvention; it means an unconscientious use of the power arising out of these circumstances and conditions; and when the relative position of the parties is such as *primâ facie* to raise this presumption, the transaction cannot stand unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been in point of fact fair, just, and reasonable.

This is the rule applied to the analogous cases of voluntary donations obtained for themselves by the donees, and to all other cases where influence, however acquired, has resulted in gain to the person possessing at the expense of the person subject to it. Lord *Cranworth*, in a recent case in the House of Lords (*Smith* v. *Kay* (1)), said that no influence can be more direct, more intelligible, or more to be guarded against than that of a person who gets hold of a young man of fortune, "and takes upon himself to supply him with means, pandering to his gross extravagance during his minority, and extorting from him, or at least obtaining from him, for every advance that he has made, a promise that the moment he comes of age it shall all be ratified, so as to make the securities good." The circumstances of the particular case in which these words were spoken differed widely from those of the case now before us; the element of personal influence is here wanting. But it is sufficient for the application of the principle, if the parties meet under such circumstances as, in the particular transaction, to give the stronger party dominion over the weaker; and such power and influence are generally possessed, in every transaction of this kind, by those who trade upon the follies and vices of unprotected youth, inexperience, and moral imbecility.

In the cases of catching bargains with expectant heirs, one peculiar feature has been almost universally present; indeed, its presence was considered by Lord *Brougham* to be an indispensable condition of equitable relief, though Lord *St. Leonards*, with good reason, dissents from that opinion (2). The victim comes to the snare (for this system of dealing does set snares, not, perhaps, for one prodigal more than another, but for prodigals generally as a class), excluded, and known to be excluded, by the very motives and cir-

(1) 7 H. L. C. 750, 771.

(2) Sug. V. & P. 11th Ed. p. 316.

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cumstances which attract him, from the help and advice of his natural guardians and protectors, and from that professional aid which would be accessible to him, if he did not feel compelled to secrecy. He comes in the dark, and in fetters, without either the will or the power to take care of himself, and with nobody else to take care of him. Great Judges have said that there is a principle of public policy in restraining this; that this system of undermining and blasting, as it were, in the bud the fortunes of families, is a public as well as a private mischief; that it is a sort of indirect fraud upon the heads of families from whom these transactions are concealed, and who may be thereby induced to dispose of their means for the profit and advantage of strangers and usurers, when they suppose themselves to be fulfilling the moral obligation of providing for their own descendants.

Whatever weight there may be in any such collateral considerations, they could hardly prevail, if they did not connect themselves with an equity more strictly and directly personal to the Plaintiff in each particular case. But the real truth is, that the ordinary effect of all the circumstances by which these considerations are introduced, is to deliver over the prodigal helpless into the hands of those interested in taking advantage of his weakness; and we so arrive in every such case at the substance of the conditions which throw the burden of justifying the righteousness of the bargain upon the party who claims the benefit of it.

To apply these observations to the present case: the Plaintiff is a young man, who had attained his majority less than six months before the first, and less than nine months before the second, transaction (the second being the sequel of the first) which this bill seeks to set aside. The bill states, and the evidence proves, that he was without any professional advice or assistance. He was the eldest son of a large landowner, and was entitled as tenant in tail in remainder immediately expectant on the death of his father (a man in ill-health, though not advanced in years), to estates stated to be worth £20,000 a year. But he had no actual income for the present from those estates, or from any other source, and he was dependent on his father, who made him only a variable allowance, in no year exceeding £500. This young man, while still in his minority, had contracted expensive and extravagant habits, and

had borrowed money from one *Graham*, by profession a solicitor (but towards the Plaintiff a money-lender only), for which he gave promissory notes at twelve months' date, about nine months before he came of age. The terms of these transactions with *Graham* (for there were several of them) do not distinctly appear; but, in May, 1870, soon after the Plaintiff came of age, *Graham* obtained from him acceptances for £4000, at some very short dates, in lieu of the promissory notes, and on these acceptances coming to maturity he pressed the Plaintiff for payment, declined to renew or make any further advance, and recommended him to apply to the Defendant *Morris*, as a money-lender and discounter, to discount for him bills amounting to £8000, payable at three months, and bearing after their maturity sixty per cent. interest. To this suggestion the Plaintiff acceded, and the transaction was accordingly carried through with *Morris* by the agency of *Graham* himself, the person chiefly interested in getting the money for his own benefit, the terms being, of course, arranged between him and *Morris*. For these bills £6,800 only was paid by *Morris*, the rest being retained by way of discount; so that, if the discount is taken into account, and the rate of interest calculated from the date of the advance upon the sum actually advanced, the interest was really much greater than 60 per cent. Out of the £6800 *Graham* received £3000, remaining a creditor of the Plaintiff for £1000, in respect of which (he tells us) he "shortly afterwards commenced proceedings in bankruptcy against the Plaintiff." The rest of the money went to supply the (real or imaginary) wants of the Plaintiff. This first transaction was the parent of the second. The bills for £8000 became due on the 4th of October, 1870, the circumstances of the Plaintiff then remaining the same. The usual application for payment was made; and the Plaintiff was introduced by Mr. *Curtis*, a hotel-keeper, with whom he was acquainted, and who seems about that time to have been endeavouring to raise money for him, to one *Addison*, with whom *Curtis*' own acquaintance appears to have been of the slightest description. *Addison*, who had formerly been an officer in the army, was at that time by profession a procurer of loans for spendthrifts from money-lenders. He styles himself a "monetary agent," or "the intermediate person bringing the capitalist and

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the borrower together;" expecting for that service a brokerage of 5 per cent. "on the amount of the bills, and not on the money lent;" and so having a direct interest in every such case in swelling the amount of the bills. By this person's agency the terms on which the £8000 bills were to be raised were arranged with *Morris* on the 19th of December, 1870, on which day the Plaintiff gave *Morris* another set of bills for £11,000, bearing that date, and payable three months afterwards, with 60 per cent. interest from maturity; no money passing from *Morris* for these new bills except a sum of £275, which he paid to *Addison*, and £207, which went into the Plaintiff's pocket. *Morris's* account of the payment to *Addison* is in these words: "After I had discounted the £11,000 worth of bills, I said, 'I suppose you will want 2½ per cent., *Addison?*' he said, 'Yes, I am perfectly satisfied.' I then sat down and wrote him a check for £275." In this manner the Plaintiff, having received in June, £6800 (treating the whole payment to *Graham* as a receipt by the Plaintiff) and in December £207—in all £7000—was made a debtor to *Morris* within a space of nine months for £11,000, carrying 60 per cent. interest. All these transactions were carefully concealed from the Plaintiff's father. The Plaintiff says in his affidavits in support of his case, speaking of debts contracted during his minority, that "he feared to divulge them to his father, or the other members of his family," In his cross-examination, he says that he wished to conceal from his father that he was in debt; adding, with respect to the second transaction, that his father was then ill, and just on the point of death, and he did not like the fact divulged to him. He states that he asked *Addison* to get him some money at 5 per cent.; but that, "instead of doing that, he went and distributed my bills to *Morris* and different people," explaining afterwards, not that he was ignorant of the terms imposed upon him, but that he "wanted money, and felt obliged to submit to any terms which might be dictated to him; and did not very much care what the rate of interest was." When 5 per cent. was spoken of, the object was to obtain an advance on the Plaintiff's reversionary interest in the family estates; and with this view the Plaintiff seems to have been in communication, in November, 1870, through Mr. *Curtis*, with Mr. *Bonner* a solicitor, and a friend of *Addison*.

But for this purpose access to the title deeds of the estate was necessary, and these were in the possession of *Bennett*, the family solicitor. The Plaintiff informed *Curtis* and *Addison* that he "could not procure the deeds without going to Mr. *Bennett*;" and he afterwards said that, although he thought Mr. *Bennett*, if asked, would not have refused to procure the deeds, he never asked Mr. *Bennett*, being "afraid it would come to his father's ears."

The Plaintiff, therefore, entered into these transactions, not only without any competent and disinterested advice or assistance, but without that accurate information as to his own means and circumstances which could only be obtained if his fears had been overcome and the veil of secrecy between himself and his family removed.

Assuming, as I do assume, and am prepared to decide, that this is a state of circumstances which, coupled with the nature and terms of the bargains themselves (bargains which are in my judgment *primâ facie* oppressive and extortionate) casts some *onus probandi* upon the Defendant *Morris*, what evidence has he given to discharge himself of that burden? In my judgment, none whatever. On the contrary, he admits facts from which, if it were necessary, inferences unfavourable to him might be drawn. As to the first transaction, he says, indeed, that he looked upon Mr. *Graham* as the Plaintiff's solicitor. But he admits that neither Mr. *Graham* nor the Plaintiff ever told him so. He made no inquiry as to Mr. *Graham's* authority, and he cannot say whether Mr. *Graham* shewed him any letter or authority of any kind. He says also that Mr. *Graham* never told him that he was himself a creditor of the Plaintiff; and that he did not then know that Mr. *Graham* held the Plaintiff's acceptances; and he is certain that Mr. *Graham* did not tell him that the Plaintiff's father was then labouring under a fatal disease. But the fact appears to be that Mr. *Morris* purposely abstained from making any of those inquiries which every man would have made who was entering into a business transaction fairly and in good faith, without either an irrational disregard of his own security, or a design to make his market of another man's weakness. He looked at the Peerage and ascertained the age of the Plaintiff's father, and, no doubt, the age of the Plaintiff himself also. "I naturally inferred," he

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says, "that he would in time succeed to the family estates; but his father was then a young man." But he expressly says that he asked Mr. *Graham* no question about the Plaintiff's prospects, although at the very first interview he made the Plaintiff welcome to £8000 or £10,000; and he adds that if Mr. *Graham* had told him that the earl was suffering under some fatal disease "he should not have taken any notice of it." Whatever hazard there might be in dealing with the Plaintiff, it is clear that the hazard did not present itself as a very substantial risk to the mind of Mr. *Morris*, who did not care even to know whether the Plaintiff was in a condition to give anything more than personal security; and he avows in plain terms—"I exacted 60 per cent., because I get the best price I can; we all do that." He admits that the Plaintiff had no professional adviser in the second transaction; and he also admits, as I have already mentioned, the payment by himself of a bonus or commission of £275 to Mr. *Addison*, without, as far as I can see, supposing, or having any reason whatever to suppose, that the Plaintiff would ever be informed of that payment, or would derive, directly or indirectly, any benefit therefrom.

No attempt has been made to shew by any independent evidence (if such a thing could be conceived possible) that the terms thus imposed upon the Plaintiff were fair and reasonable, having regard to the nature and degree of the risk run by the lender, or to any other criterion. The difficulty of such an attempt, in the face of the admitted facts that there was no real bargaining at all, and that no inquiry was made into the exact nature or value of the Plaintiff's expectations, would have been great. It is stated, indeed, by Mr. *Addison* that before arranging with *Morris* to take £11,000 in lieu of the £8000 bills he applied to two or three other members of the same fraternity without success; and the project of raising money at 5 per cent. had failed on account of the Plaintiff's unwillingness to approach the family solicitor upon the subject, though on this latter subject there is no evidence beyond the Plaintiff's own statements and a letter from a Mr. *Bonner*, proved by Mr. *Curtis*, in which Mr. *Bonner* states that he had procured copies of certain documents of title anterior to the existing family settlement, which were acces-

sible in the Registry of the Court of Probate and the Inrolment Office; but that nothing further could be done without reference to the family solicitor.

But this does not prove that the transactions with Mr. *Morris* were fair and reasonable; and I agree with what was said in one of the recent cases, that a bargain (even if the terms offered had been shewn to be the same, which is not here the case,) hawked about among members of the money-lending fraternity, and declined by several of them, is not thereby proved to be one which this Court ought to uphold.

It may well be that, under the circumstances in which the Plaintiff's bills were offered, it might not suit the interest of those gentlemen to advance money upon them on any terms which would be safe in a Court of Equity, or to run the risk of advancing them on terms which would be unsafe. This caution on the part of others cannot prove the righteousness of the bargain made by the Defendant, who was less scrupulous.

It was contended by the Appellant's counsel that the equity as to catching bargains with expectant heirs was not applicable to this case—first, because the Plaintiff was entitled to a vested remainder in the family estates, and had not a mere expectation of succeeding, as heir or devisee, to his father; and, secondly, because there was no dealing with that estate in remainder. There is, in my judgment, no weight in either argument. All the cases shew that remaindermen and reversioners are expectant heirs, within the meaning of the doctrine. And, whatever form these transactions might assume, the fact was, and it was well understood by the Appellant, that the Plaintiff was trusted upon the credit of his expectations, that is, of his prospect of succeeding on the death of his father to the family estates. He had no property in possession, but he had this property and anything else besides which he might get from his father, in prospect. As Lord *Hardwicke* said in *Earl of Chesterfield* v. *Janssen* (1), "the creditor knowing the fund for payment must depend on the debtor's surviving the father or grandfather, whether it is said so or not." It is suggested that if an immediate security on the estate in remainder had been given, that estate might have been foreclosed,

(1) 2 Ves. Sen. 125, 158.

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or forced to sale at an enormous loss, while it was still reversionary. But the same thing might have happened in a case like the present (since non-traders have become subject to the law of bankruptcy) by the creditor making the debtor bankrupt.

The truth is, that such terms as those imposed on the borrower in the present case are not less, but are more onerous and unconscionable than if a deferred security upon the reversionary interest had been taken. It was certain that the debtor, until his reversionary interest fell into possession, would never have any means of his own to make payment. By taking from him bills at short dates, with large discount and enormous interest, he was kept under a perpetual pressure, which fell upon him as often as his bills might arrive at maturity. He must either be made bankrupt, or be forced to take up money elsewhere in the market (a process which in such a case would be only shifting the burden from one shoulder to another, and in no way alleviating it), or he must renew with the original creditor, in which case the accumulations of the debt would be rapid and enormous.

In the present case this was actually done, not at the end of the three months, when the bills for 8000*l.* matured, but after the lapse of more than five months; and yet it was done at a rate which, if repeated at like intervals, would have about doubled the debt in the course of every year. It is, indeed, sufficiently probable that the lender would prefer (as Mr. *Morris* says he should have preferred) to realize his enormous profits and terminate his risk at as early a period as practicable, and that he might use his power over the debtor for that purpose. But if the debtor could only pay him off by going through a similar process in some other quarter, the consequences of the transaction would be to him very much the same.

Upon the whole case, my judgment is the same as that of Vice-Chancellor *Wickens*. The form of the decree must be corrected by adding a direction in the usual form for dismissing the bill with costs, if the Plaintiff does not within a time to be limited after the date of the certificate (I presume it should be one month) pay what may be found due from him; but the Appellant must pay the costs of the appeal.

I have felt some doubt as to the costs in the Court below, but,

on the whole, I am not disposed on that point to disturb the decree. The Appellant is not alleged or proved to have been guilty of deceit or circumvention, and the Plaintiff has no merits of his own to plead. He comes into Court to be relieved from the consequences of a course of very wilful and culpable folly and extravagance. I think him entitled to the relief which he asks; but I think it is not unjust that he should obtain it at his own expense.

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SIR G. MELLISH, L.J.:—

I entirely concur.

Solicitor for the Appellant: Mr. *E. G. Lawrence.*
Solicitors for the Plaintiff: Messrs. *Bennett, Dawson, & Bennett.*

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[1872 C. 199.]

Exceptions—Scandal—Relevancy.

L. C. and L. J. M. 1873 *March* 18, 20.

The Plaintiffs, who carried on an extensive and well-known business as auctioneers under the firm of "*Christie, Manson, & Woods*," filed their bill to restrain the issuing of the prospectus of a limited company to be "formed for the purpose of acquiring and working the well-known and rapidly-increasing auction and general land, estate, and house agency business of Messrs. *Christie & Christie.*" The bill alleged that the business of the Plaintiffs was the only well-known business of auctioneers connected with the name of *Christie*, and that the description in the prospectus of the business therein mentioned was inapplicable to any business of the Defendants the *Christies*, and was inserted to induce the public to believe that the business was that of the Plaintiffs. The bill then alleged that *C. J. Christie*, one of the Defendants, was adjudicated bankrupt in 1869 and paid no dividend, and had obtained his order of discharge in 1870; that in 1869 he was committed for trial at the *Marylebone* Police Court on a charge of fraud by means of false cheques; that a report in the *Times*, which was set out in the bill, was a correct report of what took place at the committal; and that the money in respect of which the charge was made was subsequently paid by a relation, and the prosecution abandoned. The Defendants the *Christies* excepted for scandal to the allegations as to the criminal proceedings in 1869:—

Held (reversing the decision of *Malins*, V.C.), that the allegations were

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scandalous and must be expunged, for that the Defendant's having committed, in 1869, a fraud wholly unconnected with the subject matter of this suit would have been irrelevant, and that, *à fortiori*, an allegation that he had been committed for trial on a charge of having been guilty of such fraud, without any allegation that he had been guilty of it, was irrelevant.

On a successful appeal from an order overruling exceptions for scandal, the Appellant was allowed his costs of the appeal, as well as his costs in the Court below as between solicitor and client.

THIS was an appeal by the Defendants *William H. Christie* and *Charles John Christie* from an order of Vice-Chancellor *Malins* overruling exceptions for scandal.

The bill was filed on the 30th of October, 1872, by the persons constituting the well-known firm of *Christie, Manson, & Woods,* auctioneers, against the above-named Defendants and several other persons. The bill stated that the Plaintiffs had for many years carried on business as auctioneers; that the business was commonly known in the trade and among the public as *Christies,* and was very extensive, well known, and of high reputation. The bill then set out a printed paper, which the senior partner in the Plaintiffs' firm had received on the 23rd of September, 1872, being a prospectus of "*Christie, Christie, & Co.'s Great West End Auction Mart, Limited.*" For the present purpose it is enough to state that it was the prospectus of a limited company to be "formed for the purpose of acquiring and working the well-known and rapidly-increasing auction and general land, estate, and house agency business of Messrs. *Christie & Christie,*" the auction-rooms of which were stated to be at 7, *Argyle Street,* and the offices at 19, *Brook Street.* The Defendants *W. H. Christie* and *C. J. Christie,* and some of the other Defendants, were named in this prospectus as directors, and the other Defendants as trustees. The bill alleged that the prospectus was prepared by the Defendants, and that it was calculated and designed and was likely to mislead the public into the belief that the business therein referred to was the business of the Plaintiffs. That the Plaintiffs' business was the only well-known business of auctioneers in connection with the name of *Christie.* That the description of the business mentioned in the prospectus as a well-known and rapidly-increasing business was inapplicable to any business of the Defendants *W. H. Christie* and *C. J. Christie,* and was inserted in the prospectus to

induce the public to believe that the business was that of the Plaintiffs.

The bill went on to allege circumstances as to the Defendants and their business as follows:—That *C. J. Christie* was, on or about the 2nd of November, 1869, adjudicated bankrupt. Debts unsecured, £464 12*s.* 1*d.*; debts secured, £400; property held by secured creditors, £300; assets—good debts, £18 16*s.* 6*d.*, and doubtful, £23 12*s.* That no dividend ever was paid, and that the bankrupt obtained his order of discharge on the 18th of February, 1870. That in these proceedings *W. H. Christie* appeared as a creditor, and was described as of *Leghorn.*

That *C. J. Christie,* for some time before his bankruptcy, was secretary of the *St. Marylebone Female Charity School.* Then followed the allegations which formed the subject of the exceptions.

"This situation he lost in consequence of the charge which formed the subject of the criminal proceedings next hereinafter mentioned.

"On 11 November, 1869, the Defendant *C. J. Christie* was committed for trial at the *Marylebone* Police Court on a charge with intent to defraud Mr. *J. D. Smith,* of, &c., of the sum of £32 5*s.* 6*d.* by means of false cheques. The proceedings in the said committal were reported in the *London* daily papers of the following day. The following report thereof appeared in the *Times London* daily newspaper of the 12th of November, 1869. This report is a correct report of what occurred in the said committal.

"The said report is as follows:—

"'At *Marylebone, C. J. Christie,* aged 22, of *Melbourne House, Acton,* described as of no occupation, but lately holding the situation of secretary of *St. Marylebone Female Charity School,* 34, *Marylebone Road,* was charged on a warrant, and brought up by *Kirby,* 233 D., charged with intent to defraud Mr. *J. D. Smith,* of *High Street, Marylebone,* hosier, of the sum of £32 5*s.* 6*d.* by means of false cheques. The Court was crowded by tradesmen of the district, who had taken cheques from the prisoner thinking he was a man of good position. Mr. *Metcalfe* prosecuted, and Mr. *Kelly* defended. After hearing the evidence, Mr. *Mansfield* committed the

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prisoner for trial, but said he would accept substantial bail. This was not forthcoming, and he was removed in the van.'

"The money in respect of which the said charge was made was subsequently paid by a relative of the said *C. J. Christie*, and the said Mr. *Smith* withdrew from the said prosecution."

The bill then stated that the Defendants the *Christies* had taken the ground floor of No. 19, *Brook Street*, about March, 1871, and the building, 7, *Argyle Street*, in May, 1872, and after various other allegations, to which it is not necessary particularly to refer, shewing that the Defendants' business was frequently mistaken for that of the Plaintiffs, prayed for an injunction to restrain the Defendants from circulating the prospectus or any like prospectus, and from permitting or being concerned in the formation of the said company or any like company, and from carrying on or being concerned in carrying on the business of auctioneers under the name of the said company or any like name; and that the Defendants the *Christies* might be restrained from carrying on the business of auctioneers under the style of "*Christie, Christie, & Co.*," "*Christie & Christie*," or "*Christie*," or any other name or style not clearly distinguishing their business from that of the Plaintiffs.

The Defendants the *Christies* filed exceptions for scandal to so much of the bill as related to the above criminal proceedings against *C. J. Christie*, and the exceptions were overruled by Vice-Chancellor *Malins* (1).

(1) 1873. Jan. 15. WM 1873 D

SIR R. MALINS, V.C.:—

Unless I can come distinctly to the conclusion that statements calculated to give so much offence and cause so much injury to the Defendants are pertinent to the matter to be decided between the parties, I must unhesitatingly order them to be expunged, with the usual consequences to the parties introducing them, namely, that they should pay the costs as between solicitor and client. The question is, are or are not these statements pertinent? The case made by the bill is that the Defendants are setting up business as auctioneers in a way calculated to lead the public to believe, and which has actually led many people to believe, that it is the business of the Plaintiffs. Now, as these young men have thought fit to set themselves up as great auctioneers long established, with a great and increasing business, thereby attracting the public, I cannot say that it is wholly irrelevant to the issues between the parties to ascertain who they are, what they are, where they have been, and how they have been employed. The exceptions, therefore, must be disallowed.

Mr. *Glasse*, Q.C., and Mr. *Cookson*, for the appeal, referred to *Gilb.* For. Rom. (1), *Wyatt's* Pr. Reg. (2), and *Ex parte Simpson* (3).

Mr. *Higgins*, Q.C., and Mr. *Marten*, for the Plaintiffs:—

The allegations in question are relevant as tending to shew that the representations in the prospectus are false. To prove personation two things are to be made out—that the description is applicable to the business of the Plaintiffs, and that it is not consistent with an honest representation of the circumstances of the Defendants.

[The LORD JUSTICE MELLISH:—Are you not endeavouring to prove fraud by evidence that the man committed a fraud before?]

That is not the object of the allegations, but to shew that the circumstances of the Defendants the *Christies* were such that the statements relating to them in the prospectus must have been wilfully false.

LORD SELBORNE, L.C.:—

We are of opinion that this appeal must be allowed. If, on the one hand, it is important and necessary, as I think it is, to adhere to the rule that everything relevant to the issue between the parties must be admitted to be averred however it may bear on the character of the parties, it is no less important to keep scandal off the record. The sole question in such a case is whether the matter alleged to be scandalous has a tendency, or, in other words, would be admissible in evidence to shew the truth of any allegation in the bill that is material with reference to the relief that is prayed.

The bill in the present case is filed by a well-known firm of auctioneers and picture-dealers, alleging that certain proceedings which are being taken by the Defendants have a tendency to cause a business advertised by them to be confounded with the Plaintiffs' business, and so to injure the Plaintiffs, and that is the real issue. If the allegations in question had any tendency to prove, or if the facts alleged could be admitted in evidence for the purpose of proving, that a business is being advertised or set up by the De-

(1) Page 207. (2) Page 383.
(3) 15 Ves. 476.

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fendants in such a way as to lead the public to confound it with the business of the Plaintiffs, however scandalous they might be they would be material, and therefore must stand. But in my judgment they have no tendency, direct or indirect, to shew anything of the kind, and, if offered in evidence for that purpose, must be rejected.

In what way can the matter which is excepted to be relevant? Mr. *Higgins* says it tends to prove fraud. If it does it still is irrelevant unless it tends to prove fraud connected with the fraud alleged by this bill; therefore it is necessary to go further and shew how this matter tends to shew that the Defendants are advertising this business in such a way as to make it liable to be confounded with the business of the Plaintiffs. I am totally at a loss to understand how the circumstance of a charge having been made nearly three years before the advertisement of the present business against one of the Defendants in the Police Court at *Marylebone*, and which has nothing to do with the business now advertised or with any other matter whatever mentioned in the bill or in the prospectus, can have any tendency to prove anything relevant to the case made by the bill. It is argued that it may tend to prove misrepresentation in the prospectus. If the meaning of that argument is that because a man committed a criminal offence two years ago he is to be presumed likely to commit a fraud now, the answer is, that our law does not admit of any such mode of proof. I can find no allegation whatever in this prospectus, the truth of which might not stand with the truth (even though that is not alleged) of the charge said to have been made three years before at the police office. The argument, as I understood it, that has been offered is this: If we can prove that the description given by the Defendants in their prospectus of their own business at 7, *Argyle Street, Regent Street*, and 19, *Brook Street, Grosvenor Square*, is so false that the public must have supposed, notwithstanding the mention of these places, that the business is really the Plaintiffs' business, which is not carried on at those places; if that be the argument, then I am prepared to admit that anything connected with the history of the business at 7, *Argyle Street, Regent Street*, and the business at 19, *Brook Street, Grosvenor Square*—in other words, the narrative in the bill which begins with

the 17th and follows in the subsequent paragraphs—may be material, because by shewing the inapplicability of the general statement in the prospectus to this business, one step might be made to shew its inapplicability to the business of the Plaintiffs. But those businesses, it appears by the bill, were commenced at a later date than the date of this charge, said to have been made at the Police Court on the 11th of November, 1869; and I must say that the allegations excepted to seem to me to be not only scandalous but oppressive; for the bill does not even allege the truth of the charge. To put into a bill a statement that at some time or other a serious charge was made against a Defendant at a police office, and reported in certain terms in a newspaper, without alleging that the charge was true, cannot be justifiable, even if the charge, being true, would have been material. But even if it had been true, here it would have been utterly immaterial, and in my opinion the whole history of the life of this Defendant from the day he was born might have been introduced into the bill with as much justification and reason as the allegations now in question. I therefore think that the order of the Vice-Chancellor must be reversed and the exceptions allowed.

SIR G. MELLISH, L.J.:—

I am entirely of the same opinion. The case made by the bill is that the Defendants are personating the Plaintiffs: that is to say, are holding out their business as the Plaintiffs' business, and are doing this fraudulently. Such a fraudulent representation, by which the Plaintiffs are injured, gives a right of action, and but for this, that in this Court the suit is brought to restrain the acts before they are committed, whereas in a Court of Common Law the Plaintiffs could only seek damages after the acts had been done, the proceedings might have been taken at common law. The case to be made out here is the same as the case which would have to be made out in an action, and the rules of evidence are the same in this Court and at common law. If, then, an action were brought, would the Plaintiffs' counsel be allowed to produce and read in evidence a report from the *Times*, stating that one of the Defendants had been brought before a Police Court on a particular charge? The question is absurd. No

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counsel for a moment would dream of offering such evidence. Nor would evidence that the charge was well founded be admissible. Our law does not allow you to prove that a man has a bad character for the purpose of shewing that because he has a bad character it is probable he will have committed a certain crime. I therefore entirely agree that this appeal must be allowed.

Mr. *Cookson* asked for costs as between solicitor and client, including the costs of the appeal.

The LORD CHANCELLOR:—It is not our practice to give the costs of a successful appeal, except on very special grounds; but it is perfectly well settled that we have jurisdiction to give them. We will hear Mr. *Higgins* on the point.

Mr. *Higgins*, for the Plaintiffs:—

The case is governed by the general rule that the party who succeeds in the Court below is not to be saddled with the whole expenses of two hearings, and thus pay for the error of the Court. No reason can be given for making an appeal from the disallowance of exceptions for scandal an exception from the general rule.

Mr. *Cookson, contrà*:—

A reason is to be found in the remarks of Lord *Eldon* in *Ex parte Simpson* (1), where he says that no application by any person is necessary, for that the Court itself ought to take care that its records are kept clear of scandal.

LORD SELBORNE, L.C.:—

The existence of a rule that in a case of this sort costs are to be given as between solicitor and client, goes far to shew that costs of the appeal ought to be given also. I think the reason is this: first of all, that the Plaintiff is responsible for the introduction of matter foreign to the suit, and which is of such a nature that it ought to be expunged at once, in which case it would not be right

(1) 15 Ves. 476.

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that the costs should be left to be dealt with along with the other costs. Secondly, the Court has a duty to discharge towards the public and the suitors, in taking care that its records are kept free from irrelevant and scandalous matter. The principle appears to be that the offending party must pay to the other parties the whole expense to which they have been put by his introduction of libellous matter. I think, therefore, that we ought to give the Appellants their costs of the appeal.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

Solicitors: Mr. *Augustus Beddall;* Messrs. *Dod & Longstaffe.*

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March 24, 25.

In re MONARCH INSURANCE COMPANY.

GORRISSEN'S CASE.

Company—Winding-up—Contributory—Agreement to place Shares—Conditional Agreement to take Shares.

An agreement to place shares in a company is not equivalent to an agreement to take shares, and the person making it is not liable to be placed on the register as a member, although he may be liable to an action for damages if he fails to perform his contract.

G. agreed with the directors of a company that he would place 1000 shares in consideration of his being appointed their agent at *Hamburg.* The directors placed his name on the register of shareholders for 1000 shares; but did not inform him of it, and sent him no letter of allotment. It was afterwards proposed that there should be a second issue of shares, and in October, 1869, *G.* wrote a letter to the manager promising to keep for himself the 1000 shares which he had undertaken to place, and to pay for them out of his commission on the second issue. The second issue of shares was never made, by reason of the failing credit of the company. In February, 1870, *G.* was called upon by the directors to pay the calls on 1000 shares, and in reply he repudiated the shares on the ground that no second issue had been made, but took no measures to have his name removed from the register. About a month afterwards the company was wound up:—

Held (reversing the decision of *Malins*, V.C.), first, that *G.* could not be put on the list of contributories in respect of his undertaking to place the 1000 shares:

Secondly: That his subsequent agreement to keep the shares for himself

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was conditional on the second issue of shares being made, and that as the condition failed through no fault of his, he was not bound to take the shares:

Thirdly: That he was guilty of no laches in not applying to have his name removed from the register before the company was wound up.

THIS was an appeal from a decision of Vice-Chancellor *Malins*.

The *Monarch Insurance Company, Limited*, was registered in May, 1869, with a capital of £100,000 in 20,000 shares of £5 each. It was established for the purpose of effecting fire and marine insurances in *England* and abroad.

Mr. *A. W. Gorrissen* was a merchant and insurance agent at *Hamburg*. Soon after the formation of the company, being in *England*, he applied to Mr. *Hodges*, the general manager, to be appointed agent of the company at *Hamburg*. The manager, after laying the matter before the directors, told *Gorrissen* that the directors would be willing to appoint him their agent on condition of his taking 1000 shares in the company. *Gorrissen* replied that in that case he could not consider the business further, as he had no fixed capital of his own. On the 28th of June he wrote from *Hamburg* to *Hodges* a letter, in which he said:—

"I find I shall be enabled to place a good number of the shares of your company, if you will appoint me your agent here."

After some further correspondence, he wrote again to *Hodges* on the 31st of July as follows:—

"In reply to your favour of the 28th inst., I have good prospects of placing here about 1000, or even more, shares of the company; but in order to set to work to do so I require your authorization and your promise that after obtaining that amount signed I shall be appointed agent of the company for the North of *Europe*."

In reply to this offer, *Hodges* wrote a letter to *Gorrissen* on the 2nd of August, 1869 as follows:—

"I am duly favoured with yours of the 31st ult., contents noted. In reply I beg to say your proposal to place one thousand or more shares is satisfactory, always assuming they will be distributed well, because our object is to make your countrymen feel an interest in the company beyond the mere question of insuring

their property. If you undertake to do this, I will undertake to get you appointed for a certain district; but I can hardly say to North of *Europe*, because we are in treaty with a gentleman at *Stettin*, whom we shall, in all probability, appoint for that neighbourhood. Your reply in course will oblige."

On the 12th of August, 1869, *Gorrissen* wrote to *Hodges*, asking that the power of attorney appointing him the agent of the company might be at once sent to him, and engaging to return it if he did not succeed in placing at least 1000 shares.

The required power of attorney was accordingly sent on the 23rd of August, but at first *Gorrissen* did not consider himself authorized to commence the general business of insurance until he had placed the shares which he had undertaken to place.

On the 9th of September *Hodges* wrote to him a letter, in which he said:—

"We are much obliged for the very perfect manner in which you carry out your agreement; at the same time our confidence in you is so great that we shall be happy for you to go on with the general business *pari passu* with the share arrangement, if you consider it necessary or desirable to do so."

On the 16th of August the directors allotted to *Gorrissen* 1000 shares, and he was accordingly entered in the register for that number of shares; but he denied that he had ever received a letter of allotment, or that he had consented to accept the shares. Nor was there any evidence that any notice of the allotment had been sent to him.

Gorrissen was not successful in placing the shares as he expected, in consequence of the want of confidence of the people of *Hamburg* in the company; and some correspondence took place between him and *Hodges* respecting a proposition for establishing a branch of the company in *Germany*, with a second issue of shares, before placing the rest of the first issue, for which purpose a new prospectus was proposed to be issued.

On the 25th of October, 1869, *Hodges* wrote a letter to *Gorrissen* in which, after expressing his satisfaction with the proposed prospectus, he added the following postscript:—

"P.S.—Am I to understand that you have dropped your original

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idea of proposing the 50 per cent. of first issue? because you have not said so in so many words. My directors are anxious that you should complete your agreement as to placing the 1000 shares as you agreed. These stand in our register blank, with merely your name as reference, which consequently has an unsatisfactory appearance."

In reply, *Gorrissen*, on the 27th of October, wrote:—

"If you consent to my bringing out the second issue, the original idea of proposing the 50 per cent. of first issue must be dropped, at least for the present, and I was of opinion that in my letter of the 23rd inst. I plainly expressed this. For the very same reason, I have not continued any steps in the application for the remainder of the 1000 shares of the first issue. The names figuring on that list must form the heading of subscriptions on the spot for the second issue, and I think it would be decidedly against your interest to divide the attention which I have already directed to the possibility of my getting the order from you for the larger negotiation. In order not to disturb the entry on your register, leave my name where it is placed, and I engage to keep that amount myself out of the commission I make on the second issue."

The second issue of shares was never made, and the prospects of the company became worse and worse.

On the 10th of February, 1870, *Hodges* wrote to *Gorrissen* a letter, in which he said:—

"I may suggest that our directors continually ask why you do not pay on the 1000 shares which you agreed to take as a qualification for the agency; and whether you have quite failed in placing capital. It will be best to be quite open on this matter."

In reply to this, *Gorrissen*, on the 12th of February, wrote:—

"As regards the 1000 shares, I beg to remind you that it was agreed that I would pay for them out of my commission on the intended issue of the second series of shares destined for the continent. That plan having fallen to the ground, for reasons sufficiently enlarged upon between us, released me from all obligation, and public advertising for shares would add fuel to the fire,

and remove the last chance of obtaining further assurance orders here."

In March, 1870, a petition was presented, under which the company was ordered to be wound up; and *Gorrissen* was placed on the list of contributories in respect of 1000 shares. He took out a summons to have his name removed, but the Vice-Chancellor held that he was rightly placed on the list, being of opinion that his agreement to place the shares was equivalent to an agreement to take them, and that, under the circumstances, it was immaterial that the allotment of the shares was not communicated to him (1). From this decision *Gorrissen* appealed.

(1) 1873. Jan 25. WN(1873)18

SIR R. MALINS, V.C.:—

The only question is, has Mr. *Gorrissen* agreed to become a member of the company? I am sorry to be obliged to come to the conclusion that he has done enough to constitute himself a member. The company was a bubble company, calculated to attract foreigners, but one in which there was no *bona fides* whatever. It was a mere attempt to make money by getting shares to a premium. Mr. *Gorrissen* was an insurance agent in *Hamburg*, who was apparently in the habit of frequently visiting *England*, and who speaks and writes English perfectly well. He applied for the agency of this company, and then occurred a circumstance on which I have often had occasion to remark: they required that he should take shares. In my opinion agents ought to be indifferent persons, not shareholders; and any man who has experience in these matters, directly he was asked to take shares as the condition of his being appointed agent, would turn away from it as a thing not likely to do him any good. Mr. *Gorrissen* was a foreigner, and was not aware of these things. [His Honour then referred at some length to the correspondence between the parties, and continued:—] It appears, according to the statement of Mr. *Hodges*, that an allotment was made to Mr. *Gorrissen* on the 16th of August, and it is said that a letter of allotment was sent to him. The evidence on this point is disputed. Mr. *Gorrissen*, who is a man of honour, says he did not receive any letter of allotment, and I think it is doubtful whether one was ever sent. But there remains the fact that there was a contract made by him for valuable consideration, whatever the meaning of that contract was, which valuable consideration he received on the 23rd of August, when the power of attorney was forwarded to him. I will consider afterwards what was the meaning of that contract. Then we come to the letters of the 25th of October from Mr. *Hodges* to Mr. *Gorrissen*, and Mr. *Gorrissen's* reply of the 27th of October. There can be no doubt that the latter letter was an engagement by Mr. *Gorrissen* to keep the 1000 shares himself, and to pay for them out of the commission he expected to make out of the second issue of shares. Therefore, if the original agreement to place shares did not amount to an engagement to take shares, he now puts his own interpreta-

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Mr. *Bristowe*, Q.C., and Mr. *Cohen* (Mr. *Yool* with them), for the Appellant:—

There is no evidence that the Appellant originally agreed to

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tion upon it, and agrees to keep the shares, and pay for them in a particular manner. Here, therefore, is, at all events, an agreement to take the shares.

If the original contract to place shares was the same as a contract to take shares, this case is identical with *Davies' Case* (41 L. J. (Ch.) 659). In that case, *Davies* and his partners contracted with the company that if they were appointed agents they would take 250 shares between them, and it was contended that, as there was no formal allotment, and no letter of allotment forwarded to them, they could not be made contributories. But I decided, and my decision was affirmed by the Lords Justices, that an application for shares and an agreement to take shares for a valuable consideration, followed by the receipt of the consideration, amounted to a binding contract, which authorized the company to put the name on the register as a shareholder. If, therefore, in the present case, the agreement to place shares was the same as an agreement to take shares, it was a continuing contract, and it was immaterial on what day the directors placed the name of Mr. *Gorrissen* on the list. It appears to have been placed there in the month of August, up to which time he had not attempted to withdraw the authority, even if he had been able to do so.

The only question, therefore, that remains, is, what is the meaning of agreeing to place shares? Now there was some force in the argument that there must be a distinction between taking and placing shares; because, according to the evidence, Mr. *Gorrissen* had agreed to place the shares, but had refused to take them. That might mean, "If I agree to place, I am to have time." Therefore he got time by it. But surely, when it is said, "I agree to place these shares," that is an agreement between Mr. *Gorrissen* and the company that these shares shall be off the hands of the company; and that, whereas they had 20,000 to dispose of, after this transaction they had only 19,000. It appears to me a guarantee that, if other people do not take them, he will. It is like a guarantee that *A. B.* shall pay money. No doubt *Gorrissen* had persuaded himself that there was a difference, otherwise he would not have said, "I will not take 1000 shares, but I will place 1000 shares." I am very sorry that a foreigner should have been involved in such a transaction as this. It is very unfortunate for him that he did not ask advice of some one competent to advise in these matters, whether he would run any risk in undertaking to place these shares. I think if he had consulted any lawyer he would have said that was a very doubtful question, and would have advised him to have nothing to do with it. He, however, interprets the transaction himself; for, having agreed to place the shares, he gives his view of the effect of the agreement to be that, if other people will not take them, he will. If the argument of Mr. *Bristowe* and Mr. *Yool* is right, he has set the company at defiance; he has got the valuable consideration of an agency, and refuses to pay that which he has undertaken to pay for it. I think it is impossible to maintain that, in the face of his

take 1000 shares as a qualification for his agency; he always refused to take them. The agreement was that he should place 1000 shares; that is, that he should use his best endeavours to find allottees within a reasonable time; that is a very different thing from an agreement to take shares. If he did not succeed in placing the shares, and that happened through his own fault, he would be liable to an action for damages; but he did not thereby become a member of the company, or liable to the creditors. The directors, therefore, had no right to place him on the register on the 16th of August. Up to that date there was nothing to fix him as a shareholder. The only question is as to the effect of his letter of the 27th of October; that letter was not an acceptance of the shares, but a repudiation of them; and, at the utmost, it was a conditional agreement to take shares of the second issue, and to pay for them out of his commission. But the second issue was never made, through the want of credit of the company, and the condition did not take effect before the winding-up of the company: *Shackleford's Case* (1); *Pellatt's Case* (2); *Simpson's Case* (3); *Sahlgreen & Carrall's Case* (4); *Black & Co.'s Case* (5).

Mr. *Higgins*, Q.C. (Mr. *Glasse*, Q.C., with him), for the official liquidator:—

Gorrissen, in undertaking to place 1000 shares, made himself responsible for them. It was an agreement to find allottees within

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letter of the 27th of October, in which he says, "In order not to disturb the entries on your register, leave my name where it is placed, and I agree to keep that amount myself out of the commission I make on the second issue." I therefore come to the conclusion that the agreement to place is an agreement to take; but if not that, *Gorrissen* has by his own letter put his own interpretation upon it, and agreed to take the shares, and consequently there was a contract entered into for valuable consideration, and there was a continuing authority to the company to put his name on the list. It is not necessary that there should be an allotment, nor that it should be communicated. Therefore, on all these grounds, I am of opinion that his name should be on the list. I do not propose that Mr. *Gorrissen* should pay the costs.

(1) Law Rep. 1 Ch. 567. (3) Law Rep. 4 Ch. 184.
(2) Ibid. 2 Ch. 527. (4) Ibid. 3 Ch. 323.
(5) Law Rep. 8 Ch. 254.

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a reasonable time, and if not to take them himself. If the shares had gone up he might have insisted that they should be allotted to him or his nominees, and he cannot escape his responsibility now that the company is insolvent. But whatever the original agreement was, his letter of the 27th of October, 1869, was an agreement to take 1000 shares. It is not necessary that there should be in all cases a formal application, allotment, and acceptance. He was informed that he was held responsible for the shares, and he expressly promised to keep them and pay for them. It is true that he added that he would pay for them out of his commission, but that condition was void as against the creditors. The directors had no power to accept such a conditional promise. In February, 1870, he had express notice that his name was on the register, and was called upon to pay the calls. The onus was therefore on him to get his name removed, if it had been improperly entered; but he did not do so before the company was wound up. He was, therefore, guilty of laches, and it is now too late to escape his liability: *Levita's Case* (1); *Davies' Case* (2).

Mr. *Bristowe*, in reply.

SIR G. MELLISH, L.J.:—

This is an appeal from an order of Vice-Chancellor *Malins*, by which he held Mr. *Gorrissen* to be a contributory for 1000 shares in the *Monarch Insurance Company*.

Mr. *Gorrissen* is a gentleman living at *Hamburg*, and being in this country some negotiations took place between him and the directors of the *Monarch Insurance Company* as to his becoming agent for the company in *Hamburg*. It is probable that there was some mention made in the course of conversation that he was expected to take 1000 shares, and that Mr. *Gorrissen* declined to take them. But it appears to me that it is unnecessary to consider what really passed at this conversation, because it is quite clear from the letters that no agreement of any kind had been made during the time that he was in *England*.

(1) Law Rep. 3 Ch. 36. (2) 41 L. J. (Ch.) 659.

On the 28th of June, 1869, when Mr. *Gorrissen* had returned to *Hamburg*, the correspondence begins. He then writes in these terms:—"I find I shall be able to place a good number of the shares of your company, if you will appoint me your agent here." It appears from the correspondence that it was at first arranged that he should procure persons to take the 1000 shares, and that on his doing so he should be appointed agent; but afterwards, by a letter dated the 9th of September, Mr. *Hodges* informs him that the directors would not insist on his obtaining the 1000 shares to be taken by other persons before they appointed him their agent, but that they wished him to commence acting as their agent immediately. To that Mr. *Gorrissen* assented. It appears to me that from that time he, having consented and begun to act as agent, was under an obligation to place 1000 shares. Indeed the material letters in question, the letters of the 25th and the 27th of October, clearly admit that there was an agreement on his part that he would place that number of shares.

The first question which, as it appears to me, ought to be determined is, whether the Vice-Chancellor was correct in holding that an agreement to place is practically the same thing, when a company comes to be wound up, as an agreement to take shares.

Now, I cannot agree with that opinion of the Vice-Chancellor. It appears to me that an agreement to place shares, even although the person making it binds himself that within a specified time, or within a reasonable time, he will place a certain number of shares, is a materially different thing from an agreement to take a certain number of shares. If a person agrees to take shares, then by agreeing to take shares he does at that moment become a shareholder, and the company are entitled, and are indeed bound, at that moment to put him on the register. But if he agrees to place shares, he does not agree to become a shareholder, nor are the company entitled to put him on the register as a shareholder, but he simply agrees that he will procure other persons to take the shares. Then supposing that he breaks that contract, and that, contrary to his bargain, he does not procure persons to take the shares, still it appears to me that there would be a very material difference between his position and that of a person who has

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entered into a contract to take shares. In the first place, he has not become a shareholder. It may be that he has broken his agreement to place shares, and under certain circumstances, though not necessarily under all circumstances, the damages for the breach of his contract in not placing the shares might be the same, after the company was ordered to be wound up, as they would be for breach of an agreement to take shares. If the shares had never been allotted to any one else, the damages for a breach of an agreement to get them taken up by solvent persons might be the amount of the calls which those persons would have had to pay if they had become shareholders. But still there would be a great variety of defences open to the person who had agreed to place shares which would not be open to a person who had agreed to take shares. In the first place, it would always be open for the person who had agreed to place shares to allege that it was through the fault of the company that he had been prevented from placing them, and if the company had done any act which prevented him from placing the shares, or if by their own misconduct they had lost credit in the world so that it was impossible to place the shares, it might very well afford a defence to an action on such an agreement. So, also, if he had been induced to enter into the contract to place the shares by fraud, in my opinion he would not be prevented from raising that defence even after the winding-up. If he has become a shareholder, and is a shareholder at the time of the winding-up, then, although he may have been induced to take the shares by fraud, he is liable to the calls according to the express provisions of the Act of 1862. But if a person has entered into an agreement with the directors of a company, and has broken it, and an action has been brought against him for the breach, I know of no reason why it is not open to him, even after the winding-up, to plead by way of defence that he was induced to enter into the contract by the fraud of the directors. There is also another material difference, namely, that the liability of a person under such a contract could not be properly tried under the winding-up. It would be necessary that an action should be brought in order to try the question at law. I therefore think that the judgment of the Vice-Chancellor cannot be supported on the ground on which he put it, namely, that Mr. *Gorrissen* had agreed to place 1000 shares, and

that that agreement was the same thing as an agreement to take 1000 shares.

Then we come to the next question, whether he had not really agreed to take the shares. That entirely depends upon the true construction to be put upon the letter of the 25th of October, 1869, and the answer of the 27th of October, 1869. Now the postscript of the letter of the 25th of October was in these words:— [His Lordship read the passage, and continued:—] That clearly states that the agreement between them was not an agreement that he should take the shares, but an agreement that he should place the shares. Then what do these words mean: "They stand in our register blank, with merely your name as reference, which, consequently, has an unsatisfactory appearance"? Do those words mean that he has been registered as the holder of those shares, or do they mean that he has not been registered, but that the names of the holders of those shares are left blank in the register?

Now, as a matter of fact, he had been registered, and he had been returned to the office as a shareholder before this. I cannot help saying that, in my opinion, this postscript contains a direct falsehood, and that it was intended to deceive him; and that the meaning, and only meaning, which can be put upon it is that the names of the holders of the 1000 shares were left blank in the register, and that his name was put merely as the person to be referred to respecting those shares, that is to say, as the person who had agreed to procure some other persons to become shareholders.

Then he answers that letter on the 27th of October, 1869. [His Lordship read the letter of that date, and continued:—] Now what is the meaning of these words (and these are the material words), "In order not to disturb the entry on your register, leave my name where it is placed, and I engage to keep that amount"? I quite agree that there is an ambiguity about these words, possibly arising from the circumstance that although Mr. *Gorrissen* seems to write English very well, yet he may not be so accurately acquainted with the exact meaning of every word as a native Englishman would be; but, upon the whole, I think we ought not, without some very good reason, to depart from the plain meaning

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of his words, or to treat Mr. *Gorrissen* as saying anything more than what he really does say. He having been told that the names of the shareholders were left blank, and that his name was only put as reference, certainly the plain meaning of the words, "Leave my name where it is placed," is not, "Leave it as a shareholder," but, "Leave your register as it is, with the names of the shareholders in blank, and my name as the person to whom reference is to be made about these shares, but not as the actual shareholder." If that is the meaning of those words, then I think there is not much difficulty in seeing what is the meaning of the further words, "And I engage to keep that amount myself out of the commission I make on the second issue;" that is to say, "Do not put me down as a shareholder at present, but nevertheless when I receive the money out of the commission, then I will take up the shares myself." I am more inclined to put that construction upon them, because it is impossible not to see that if the contrary construction is put upon them Mr. *Gorrissen* would be driven into an agreement which he had not the slightest intention of entering into; as it is quite clear that he did not intend to bind himself absolutely in all events to pay the £1000 to take up the shares, but he only intended to bind himself to take them up if the event should happen which he contemplated, namely, his getting £1000 out of his commission.

That being so, it appears to be admitted on all hands that the event contemplated never did happen. It has not been contended, and no evidence has been brought before us to shew, that it failed to happen through the fault of Mr. *Gorrissen*. On the contrary, it appears to be admitted that it failed through the fault of the company, because the company lost credit so much that it was impossible for the second issue of shares to take place.

Then there was reference made to some later letters, but in my opinion they do not carry the case further. Mr. *Hodges*, in his letter of the 10th of February, asks why he did not pay on the 1000 shares which he had agreed to take as a qualification for the agency; thus alleging that there was an absolute agreement by Mr. *Gorrissen* to take 1000 shares. Mr. *Gorrissen*, in his reply, puts his defence exactly upon the same ground on which it is now

put. He says he never agreed to take the shares absolutely, but only agreed to take them conditionally upon the second issue of shares taking place, and his obtaining his commission by the second issue of shares, which, through the fault of the company, had never taken place. Mr. *Hodges* nowhere alleges that the failure of the second issue of shares had been through *Gorrissen's* fault, but asserts that *Gorrissen* had agreed to take the shares as a qualification. That ground is now abandoned. It is admitted that it cannot be proved, and, indeed, there can be no doubt, looking at the letters, that there never was any foundation for the assertion.

Mr. *Higgins* argued that the Appellant is bound, because he did not, before the day when the application was made for winding-up, take out a summons to strike his name off the register of shareholders. But I cannot agree to that. If a person has never agreed to become a shareholder, and is then told that he is one, it appears to me that it is quite sufficient for him to deny that he ever became a shareholder, and to challenge the company to prove it if they can. That is quite sufficient repudiation on his part, and he is not bound to file a bill in equity or to take any other steps to get his name removed from the register.

Therefore, upon the whole, I am of opinion that Mr. *Gorrissen's* name ought not to be upon the list of contributories.

LORD SELBORNE, L.C., concurred.

Solicitor for the Appellant: Mr. *Manning*.
Solicitor for the Respondent: Mr. *J. Tucker*.

Applied. Re FOX. [1943] 1 All E.R. 849.

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Ex parte WATKINS. *In re* COUSTON.

Bankruptcy—Reputed Ownership—Order and Disposition—Purchaser's Goods in Vendor's Bonded Warehouse—Customs of Particular Trade—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 15, *sub-s.* 5.

At the time of the presentation of a petition for liquidation by arrangement there were lying in the bonded warehouse of the debtors, who were wine and spirit merchants in *Liverpool*, certain butts of whisky which they had sold to the Appellant. The goods were left there for the convenience of the purchaser, to whom a delivery warrant had been given by the vendors, in which they stated that they held the goods to his order as warehousemen. The vendors did not carry on business as general warehousemen, but it was proved to be the usual custom of the wine and spirit trade, in *Liverpool*, for goods sold in bond to remain in the possession or under the control of the vendors, in the bonded warehouse in which they were at the time of sale, until they were required by the purchaser for use.

Held (reversing the decision of the Chief Judge), that the existence of a custom of this nature, shewn to be well known among persons concerned in the wine and spirit trade, excluded the doctrine of reputed ownership, and that the goods did not pass to the trustee.

Hamilton v. *Bell* (1), *Priestley* v. *Pratt* (2), and *Prismall* v. *Lovegrove* (3), approved. *Knowles* v. *Horsfall* (4) observed upon.

THIS was an appeal from a decision of the Chief Judge, who had reversed a decision of the Judge of the County Court at *Liverpool*.

Couston, Thomson, & Co. were wine and spirit merchants at *Liverpool, Leeds*, and *Leith*. On the 16th of February, 1872, the Appellant, Mr. *A. P. Watkins*, a wine merchant at *Worcester*, who traded as *Watkins & Co.*, contracted with them for the purchase of three butts, two hogsheads, and four quarter-casks of whisky. In due course he received from *Couston, Thomson, & Co.* an invoice for these goods, in which they were described by mark and number, and a bill of exchange at six months for the price, which bill he accepted and duly paid at maturity. At the date of the contract the two hogsheads were in *Scotland*. The three butts and four quarter-casks were in a bonded warehouse at *Liverpool*, known as

(1) 10 Ex. 545.
(2) Law Rep. 2 Ex. 101.
(3) 6 L. T. (N. S.) 329.
(4) 5 B. & A. 134.

"*Gills*, No. 163," which was rented by *Couston, Thomson, & Co.* On the completion of the purchase the goods were transferred, in the stock and bond book of the vendors, into the name of *Watkins*, and delivery orders in respect of the two hogsheads were sent to him. On the 23rd of February *Watkins* received a warrant dated the 15th of February, which, after describing the three butts and four quarter-casks by mark and number, proceeded as follows:—

"We hold the above-mentioned goods, to the order of *Watkins & Co.*, or assigns by indorsement hereon.

"*Couston, Thomson, & Co.*,
"Warehouse-keepers.

"All charges must be paid before delivery of goods."

Watkins was to pay a small warehouse rent from the 15th of April following.

On the 26th of February, 1872, *Couston, Thomson, & Co.* filed a petition for liquidation by arrangement. The creditors resolved on a liquidation, and *Henry Bolland* was appointed trustee. When the petition was filed the above-mentioned goods still remained as above stated.

Mr. *Watkins* applied to the trustee for delivery up of the goods, and this having been refused the matter was brought before the County Court Judge.

Evidence was adduced to shew that it is the usual custom in the wine and spirit trade, in *Liverpool*, for a purchaser to allow his goods to remain in the vendor's bonded warehouse, or in a neutral bonded warehouse, to the order of the vendor, after they have been paid for, till they are required by the purchaser for use. The evidence of Mr. *Thomson* on this point was as follows:—

"I have been in business as a wine and spirit merchant for twenty years. It is the custom and usual practice in the wine and spirit trade, in *Liverpool*, for goods sold in bond (that is, upon which the Government duty has not been paid) to remain in the bonded warehouse in which they are stored at the time of sale, in the possession or under the control of the vendor, after they have been paid for by the purchaser; the vendor giving to the purchaser,

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when required by him, an authority to receive the goods from him or the warehouse-keeper, called a delivery order or warrant. These delivery orders, if they are not applied for by the purchaser, are rarely if ever given to him at all, but the goods sold remain in the possession or under the control of the vendor, who charges warehouse rent for them to the purchaser. When the goods are required by the purchaser for use he generally sends to the vendor the amount of duty payable, and the vendor pays the duty to the Government, and forwards the goods to the purchaser or his order, making a small charge for so doing. In all cases, on the sale of goods, the same are transferred, in what is called the bond book of the vendor, into the name of the purchaser, the same being struck out of the stock book of the firm as assets of the firm. According to the custom of the trade, in *Liverpool*, the giving of the delivery orders before referred to is equivalent to delivery of the goods, and a person holding any such delivery order would be in a position to raise money thereupon or obtain credit as a purchaser. In fact it is frequently done, I myself having been party to similar transactions. The customs so spoken to by me are notorious, and practically known to every person dealing with the late firm of *Couston, Thomson, & Co.*, and have been well known to the wine and spirit trade for the last fifty years."

This evidence as to the custom was confirmed by a number of other witnesses.

The County Court Judge ordered the three butts and four quarter-casks to be delivered up to *Watkins*, but made no order as to the two hogsheads. From this order, so far as it related to the three butts and the four quarter-casks, the trustees appealed to the Chief Judge; but before the appeal came on to be heard, the trustee found among the papers of *Couston, Thomson, & Co.* a letter from *Watkins*, written prior to the commencement of the liquidation, in which he requested that the four quarter-casks might be sent to him. Thereupon the trustee, acting on the decision of the Lords Justices in *Ex parte Ward* (1), delivered the four quarter-casks to *Watkins*, and the appeal was consequently

(1) *Ante*, p. 144.

limited to the three butts. The Chief Judge reversed the order appealed from, and held that the trustee was entitled to retain them (1).

(1) 1873. Feb. 1. W N (1873) 29

SIR JAMES BACON, C.J. :—

This case has been argued at great length, but not at greater length than it required. More than two hundred years ago a certain law in bankruptcy, a special peculiar law applicable to bankruptcy only, was established; and although the enactment is in terms not inconvenient or improper in any degree, yet from that day to this it has been a source of fruitful litigation, and counsel in the Courts have been perpetually occupied in endeavouring to prevent the application of that law. The law is this : [His Lordship read sect. 15, sub-sect. 5.]

Now, without for the present moment touching the arguments which have been addressed to me, let us only look at the main facts of this case, and see whether they come within the plain words of this section. A trader, a wine merchant, having a large stock, all of which is in his undisturbed possession, and of which he must possess the reputation of being the owner from the very nature of the thing itself, contracts to sell a part of that stock to another trader. He enters the sale in his book, and gives a delivery-warrant to the purchaser. Therefore the bargain and sale as between the two is perfect and complete. But what is done in that transaction which protects these goods which were once his, and remain in his possession? There is no sort of identification. There are three butts of whisky——

Mr. *Wheeler* :—Your Lordship will pardon my interrupting you, but that is not the fact; they are marked and numbered in the various books of the firm, and sold with that mark and number in the delivery-warrant.

SIR JAMES BACON, C.J. :—So I suppose. They are distinctly marked and numbered in the book, and themselves bear the same mark and number, and as between vendor and purchaser the transaction is complete. But that does not disturb the actual possession, the order or power of disposition, and the reputation which must of necessity arise from the vendor's having been the owner. What has happened to disturb that apparent ownership? Nobody disputes that the man who bought the goods is in that sense the owner of them; but is there any fact against the words of the Act of Parliament? There is no fact proved or suggested which takes out of the possession, order, or disposition of this trader this part of his stock which he has contracted to sell to another. If it stood only on that, the case would be clear. But this particular case in which a custom is set up is covered by the distinct authority of *Knowles* v. *Horsfall* (5 B. & A. 134), and, as I understand it, of every other case which has been referred to. No case has been referred to in which it has been held that such a custom can have any operation against the plain words of the statute. The hop merchant's case (*Thackthwaite* v. *Cock*, 3 Taunt. 487) is very much like this. The cases that have been referred to as to hire of furniture and other things belong to a separate class altogether, and have no application whatever to the present case. It is notorious, not in the trade only but to all the world, that some commodities are matter of hiring, not of purchase. Barges are an instance; horses too are

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Watkins appealed.

Mr. *Herschell*, Q.C., and Mr. *Wheeler*, for *Watkins*:—

The possession of the bankrupts in this case did not raise a reputation of ownership, for the evidence shews that they were

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another instance; furniture, as in *In re Hawkins* (20 W. R. 110) is another instance. All that shews that there is a separate and distinct branch to which the reputed ownership clause does not apply.

In this case it is said there is a custom in *Liverpool* known to all the dealers in wines and spirits, which must have the effect of preventing the application of this clause, because the person who is the apparent owner of goods would not therefore have the reputation of ownership. Even if there was not the plain and distinct authority of *Knowles* v. *Horsfall* (5 B. & A. 134) against it, how could a certain limited number of persons come and say, "We know that by the practice in our trade certain consequences may follow or certain inferences may be drawn from the possession of goods, and all the rest of the community who know nothing at all about this practice are to be deprived of the benefit of this clause because we know that the reputation of ownership did not exist among us in this case"? What sort of reasoning is that? Is it possible to admit that as a reason for excluding the operation of the clause? There is the authority of *Knowles* v. *Horsfall* against it, and then there is the case of the lambs and pigs, *Priestley* v. *Pratt* (Law Rep. 2 Ex. 101), in which the jury took the matter into their own hands and said, "The matter is notorious, we do not want evidence about it; the world knows it." Could anything like that be said in this case? The case is a hard one, it may be readily admitted; indeed all the cases the Act of Parliament is aimed at may be said to be hard cases, except those which are fraudulent. It may be inconvenient, considering the way this limited number of persons have come here to speak of it, that their course of trade should be affected, that they should have to take other precautions than they have hitherto adopted; but that cannot alter the rule of law.

The facts of this case seem to me to bring it clearly within the words of the statute; the reason and sense of the transaction bring it within the words of the statute. What single fact is alleged in this case to disturb the reputation of ownership that must of necessity have arisen from the bankrupts having been the original owners of these goods? Reputation of ownership may be said to be not a fact but an inference. That inference was in this case irresistible from the fact of their having been the original owners of the goods. When I consider how much mischief might arise if I were to fritter away the provisions of this statute, I should be unwilling to exercise such a power, if I had it. Suppose these bankrupts had gone into a banking office and asked the manager to discount some bills for them, and the manager had said, "Have you any property? What sort of credit have you?" and they had said, "There are our warehouses; we are owners of all that." The manager would see the barrels in the warehouse, and the bills would be

[11 SC WN (1871) 210]

in the habit of storing in their warehouse goods which they had sold to their customers, and the delivery warrant which they gave to *Watkins* shews that they held the goods for him as warehouse-keepers. The trustee has to prove, first, that the goods were in the possession, order, or disposition of the bankrupts at the commencement of the bankruptcy, with the consent of the true owner, and secondly, that the bankrupts were the reputed owners. The true test is this: was the possession such that persons dealing with the bankrupts would have inferred, and would have been reasonably justified in inferring, that the goods were theirs? Each case must be dealt with according to its own particular facts. That which fifty years ago would have shewn that a man was the reputed owner of goods may, by reason of the length of time during which a custom in the trade has prevailed, have now a different effect. In many cases persons have been held bound by a trade custom of which they knew nothing. The Chief Judge proceeded entirely

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discounted. That is a practical illustration of what might happen, though I do not say that such a thing was actually done in this case. It is of the utmost importance that laws of this kind, which have been established for so many years, and which so many unsuccessful attempts have been made to narrow and fritter away, should not in a plain case, as I take this to be, be allowed to suffer any injury.

I have attended to the judgment of the learned Judge in the Court below, who says that upon the evidence before him and from the proof of the dealings of these parties he is satisfied that there was no such reputation of ownership as the statute requires. It is said this is a question of fact, to be properly determined by a jury. So it is; although in terms the section is in some degree changed, the essence of it remains the same. But a Judge who had directed a jury to find upon such evidence of a partial custom that there was a wholesale universal custom would, as I cannot help thinking, with the greatest respect to the learned Judge, have misdirected the jury. If I find that is mixed up with the conclusion he draws from those facts which have only a partial application to the case, I am unable to adopt the finding (if it is to be called by that name) or the conclusion drawn from the facts. In my opinion all the cases at law which have been referred to are perfectly uniform in their adherence to the principles of the statute. The cases of hiring, as I have said, are a separate class. The case of the clockmaker (*Hamilton* v. *Bell*, 10 Ex. 545) is no exception, because it is plain it does not raise the question suggested in this case. In my opinion the order of the County Court Judge is wrong, and the appeal must be allowed. The Appellant must have his costs in the Court below, so far as they relate to the three butts of whisky which have been the subject of this appeal. There will be no costs of the appeal given.

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upon *Knowles* v. *Horsfall* (1). In *Hamilton* v. *Bell* (2) Baron *Alderson* said: "*Knowles* v. *Horsfall* merely sets forth a particular state of facts from which the Court were to draw their own conclusion, and for that reason I regret that I reported it."

In *Watson* v. *Peache* (3) it was held that it was not necessary to direct the jury to inquire whether the custom was notorious to the world at large. In the present case the evidence is that the custom was well known to all the persons dealing with the firm. That is enough. Under these circumstances a jury would have found that the bankrupts were not the reputed owners of these goods. The principle is well laid down in *Storer* v. *Hunter* (4). *Hamilton* v. *Bell*, which was the case of a clockmaker, is exactly in point. Clocks were left by a customer with the tradesman after purchase, and they were to be sent to him when they had been cleaned and repaired; it was held that they did not pass to the tradesman's assignees. Baron *Parke* said: "As it is a common practice for clockmakers to expose for show in their shops clocks which have been left by their customers to be repaired or cleaned, it is not to be inferred that all the clocks in the shop are the shopkeeper's, and consequently the fact of these clocks being left in the bankrupt's shop does not afford any evidence of reputed ownership; and no false credit is gained thereby, for the shopkeeper may, or he may not, be the owner of such clocks as are exposed in the shop." *Mutatis mutandis*, that exactly meets our case. *Prismall* v. *Lovegrove* (5), shews that the question of reputed ownership is really one of fact; *Priestley* v. *Pratt* (6) is an authority in our favour. If the decision of the Chief Judge be upheld, the course of dealing in the wine trade will have to be altered.

[They also referred to *Joy* v. *Campbell* (7); *Badger* v. *Shaw* (8); *Dickinson* v. *Valpy* (9); *Lingard* v. *Messiter* (10); *Ex parte Marrable* (11); *Acraman* v. *Bates* (12).]

(1) 5 B. & A. 134.
(2) 10 Ex. 545.
(3) 1 Bing. N. C. 327.
(4) 3 B. & C. 368.
(5) 6 L. T. (N. S.) 329.
(6) Law Rep. 2 Ex. 101.
(7) 1 Sch. & Lef. 328, 336.
(8) 2 E. & E. 472.
(9) 10 B. & C. 128.
(10) 1 Ibid 308.
(11) 1 Gly. & J. 402.
(12) 2 E. & E. 456.

Mr. *Benjamin*, Q.C., and Mr. *W. Potter*, for the trustee :—

The decision of the Chief Judge in this case is according to his former decision in this bankruptcy: *Ex parte Bolland* (1). That decision was, it is true, afterwards reversed by the Lords Justices, but only upon the ground that the consent of the true owner to the goods remaining in the order or disposition of the liquidating debtors had been revoked before the commencement of the liquidation. In the present case there has been no such revocation with regard to the three butts to which the present appeal relates. We do not dispute the existence, as a matter of fact, of the custom which is relied upon by the Respondent, but we say that it is only shewn to be a custom in this particular trade; it is not shewn to be notorious to the world at large. It cannot therefore exclude the application of the reputed ownership clause, sect. 15, sub-s. 5, of the *Bankruptcy Act*, 1869 (2); *Knowles* v. *Horsfall* (3). In *Priestley* v. *Pratt* (4) the custom relied on was proved to be notorious to all persons dealing with the seller in his business, just as every one knows that the watches in a watchmaker's shop do not all belong to him, as he has in his possession other people's watches to repair. Here the people not in the trade who dealt with the debtors knew nothing about the custom. In *Ex parte Marrable* (5) precautions had been carefully taken to distinguish the sold goods.

In *Watson* v. *Peache* (6), and in many of the other cases cited, the bankrupt had not been the original owner of the goods, and the case of his having been so is the case against which the provisions as to reputed ownership were originally aimed: 21 Jac. 1 c. 19, s. 10. Here this whisky was part of the bankrupt's stock-in-trade. In most of the other cases the custom was one notorious to the world at large. *Thackthwaite* v. *Cock* (7) is a case in

(1) 20 W. R. 981.

(2) By sect. 15 the property of the bankrupt divisible among his creditors is to comprise (*inter alia*),

5. All goods and chattels being at the commencement of the bankruptcy in the possession, order, or disposition of the bankrupt, being a trader, by the consent and permission of the true owner, of which goods and chattels the bankrupt is reputed owner, or of which he has taken upon himself the sale or disposition as owner.

(3) 5 B. & A. 134.

(4) Law Rep. 2 Ex. 101.

(5) 1 Gly. & J. 402.

(6) 1 Bing. N. C. 327.

(7) 3 Taunt. 487.

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point. There the purchaser of hops, in accordance with a custom in the trade, left the hops which he had bought in the merchant's warehouse, and it was decided that they passed to the assignees of the merchant upon his bankruptcy. The case of the clockmaker is the only one in which the title of the real owner prevailed where the goods had originally been the property of the bankrupt.

LORD SELBORNE, L.C.:—

3 Ch D. 799.

The principle of the law on this subject is well expressed in the preamble of the statute (21 Jac. 1, c. 19, s. 10), to which reference has been made in the argument, and which particularly contemplates the case of persons selling goods and permitted to remain in possession of them, so that they can obtain credit as if the ownership had not been changed. That being the principle, two things are necessary to bring any case within it. First, that there should be what is called the order and disposition of the property; and secondly, that there should be, in point of fact, reputed ownership arising from the circumstances. There is no inflexible rule of law that because a man who was once the owner of goods and has sold them remains in possession of them he must therefore be held to be the reputed owner. The statute does not say that. If he remains in possession with the reputation of ownership, and in those circumstances which create a reputation of ownership, then the property will pass to his assignees; but it is always a question of fact whether or no the circumstances are such as to create that reputation.

9 Ch 605.

What, then, are the principles applicable to the determination of that question? Much of the argument seems to me to have proceeded on a fallacious application of the expressions "knowledge of the world" and "known to the public." The doctrine of reputed ownership does not require any investigation into the actual state of knowledge or belief, either of all creditors, or of particular creditors, and still less of the outside world, who are no creditors at all, as to the position of particular goods. It is enough for the doctrine if those goods are in such a situation as to convey to the minds of those who know their situation the reputation of ownership, that reputation arising by the legitimate exercise of

reason and judgment on the knowledge of those facts which are capable of being generally known to those who choose to make inquiry on the subject. It is not at all necessary to examine into the degree of actual knowledge which is possessed, but the Court must judge from the situation of the goods what inference as to the ownership might be legitimately drawn by those who knew the facts. I do not mean the facts that are only known to the parties dealing with the goods, but such facts as are capable of being, and naturally would be, the subject of general knowledge to those who take any means to inform themselves on the subject. So, on the other hand, it is not at all necessary, in order to exclude the doctrine of reputed ownership, to shew that every creditor, or any particular creditor, or the outside world who are not creditors, knew anything whatever about particular goods, one way or the other. It is quite enough, in my judgment, if the situation of the goods was such as to exclude all legitimate ground from which those who knew anything about that situation could infer the ownership to be in the person having actual possession. Now, if those be the sound principles, how stands the present case? It is and must be conceded, that if the bankrupts had carried on the business of general warehousemen no persons dealing with them would have had a right to say that goods were in the reputed ownership of the bankrupts because they were in the bankrupts' warehouse; for if they troubled themselves to inquire into the matter, the information they would have received must have been that the goods were in a warehouse which was kept by the bankrupts for the reception of other people's goods as well as their own, so that no inference whatever as to the ownership of the goods could be drawn from their situation. In such a case it will not be disputed that it would have made no difference if some of the goods in that warehouse, and actually warehoused there for the real owner for the time being, had been previously the goods of the bankrupts, and had been sold by them to the real owner. Now it is, I think, clear, on the evidence, that these bankrupts were not general warehousemen; but when we look at the custom of their business it seems to me to be clearly proved, that though not general warehousemen, they were warehousemen for such of their customers as purchased wines and spirits from

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them, and that this was the ordinary course and usage of their business, which was carried on upon a very large scale. Is there anything in such a course of business tending to mislead the general public or the persons having dealings with the traders, provided it be known? Suppose the bankrupts had made this course of dealing known by putting up a board over the door, saying, "This warehouse is kept by *Couston & Co.* for the purpose of warehousing their own goods and the goods which their customers have bought from them," I suppose it would not seriously have been contended that anybody would have been entitled to say that the fact of goods being in that warehouse carried with it a reputation of ownership in the bankrupts. Though the notice would not distinguish the goods, or go into their history, yet everybody being aware that there were goods of other people there, would be bound to know that any particular goods might be the goods of other people and could not possibly say that all the goods were in the reputed ownership of the bankrupts. It was accordingly laid down by Sir *James Mansfield,* in *Thackthwaite* v. *Cock* (1), that if the facts are such that those who deal with the bankrupts may see and know that the goods may not be the property of the bankrupts, that is enough to exclude the doctrine of the reputation of ownership.

That being so, the sole question is, whether that custom or course of trade is so well known as to make the reputation applicable to these goods the reputation of goods subject to such a custom and course of trade; for in that case the knowledge of that custom is equivalent to the knowledge of the announcement which the board over the door would have given in the case I have supposed. If there had been such a board over the door, all the world would not have gone to read it, but any one who had troubled himself to ascertain the facts would have ascertained the character of that warehouse, and he must ascertain the facts relating to it before he can be heard to say that he is to have any benefit of a reputation arising from the fact of goods being warehoused there. A custom known to the whole trade and to all persons dealing with the trade surely is as well advertised, perhaps better advertised, than it would be by a notice over the door. Now the evidence in this case is distinct that this particular custom is an old well-established

(1) 3 Taunt. 487.

custom, not of this individual firm merely, but of the trade which is carried on by this firm in common with others. It has been long established, and is well known to all the persons in the trade, and also in point of fact, in this particular case, known to all the parties who had been dealing with this particular firm. It seems to me that no evidence could be more completely sufficient, if we are not bound by any contrary authority, to shew that every person who took the trouble to acquire any knowledge of those facts on which the reputation of ownership connected with the lying of goods in this bonded warehouse depends must have become informed of this custom. On the evidence I think we ought to take it that everybody was informed. And it is to be observed that this is not in the least like a case of goods in a retail shop. They are goods in a bonded warehouse, which can have no reputation of ownership at all connected with them in a general way, except such reputation as is to be inferred from the character of the bonded warehouse and the business carried on in it. An individual might indeed have been deceived, but only by one of the bankrupts taking him into the warehouse and shewing the goods as goods of the firm; and the possibility of this being done cannot enter into consideration upon the question of reputed ownership.

With regard to the authorities cited, I do not propose to dwell much upon them. The cases most directly in point are, first of all, *Knowles* v. *Horsfall* (1), which has been evidently regarded with a certain degree of dissatisfaction by Judges of later date. The learned Judge who reported it expressed regret that he had done so, because it turned on the particular manner in which the facts were stated in the special case. There was a custom stated in the special case, but—perhaps intentionally and with a view of covering not only the case of goods in the warehouse of the vendor, but also goods in the warehouse of a third party which were left in the vendor's name without any notice to the warehouseman—the statement of the custom was left vague and general. It was not stated as a custom applicable to the business of the vendor considered as a person who kept a bonded warehouse himself, and there was no statement to the effect of the evidence in this case as to the particular course of the business of wine and

(1) 5 B & A. 134.

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spirit merchants having bonded warehouses of their own. It may be said that the custom was stated so generally that it might have been inferred that it would extend to those cases, but it was not stated specifically with reference to them, and that has been pointed out in subsequent cases, as in *Watson* v. *Peache* (1), where it was stated that no usage was proved in *Knowles* v. *Horsfall* (2). *Thackthwaite* v. *Cock* (3) is not only not an authority for the respondents here, but just the reverse, as it appears to me. The actual usage proved there, was a usage the purpose and intention of which was to continue reputation of ownership in the vendor. It is not wonderful that under those circumstances it was held that the reputation of ownership did continue. What was said by Sir *James Mansfield* shews, as I understand him, that on such evidence of custom as we have here he would have held the reputation of ownership to have been displaced. I am unable to distinguish the present case from *Hamilton* v. *Bell* (4) and *Priestley* v. *Pratt* (5), unless there be a difference between the principles to be applied to wine on the one hand and clocks and watches on the other, which nobody can seriously suggest. There are other cases in which the Courts have shewn a decided inclination to reduce within limits more consistent with a sound and reasonable view of the doctrine some of the *dicta* or views which are to be found in the earlier cases. I should not indeed like to commit myself to the strong language of Sir *Frederick Pollock* in the case of *Prismall* v. *Lovegrove* (6), in which he said that the old doctrine of reputed ownership was completely out of fashion, and had been so for at least forty years. It would be more in accordance with my opinion to say that the doctrine of reputed ownership has been the same from first to last, but that the Courts have of late years looked more narrowly and closely to the real value and weight of the circumstances which tend on the one hand to confirm and on the other hand to exclude the reputation of ownership. In so doing they seem to me not to be going against the policy of the statute, but merely to be carrying it into effect in accordance with sound principle.

(1) 1 Bing. N. C. 327.
(2) 5 B. & A. 134.
(3) 3 Taunt. 487.
(4) 10 Ex. 545.
(5) Law Rep. 2 Ex. 101.
(6) 6 L. T. (N. S.) 329.

Taking that view, I am of opinion that the present appeal must be allowed.

SIR G. MELLISH, L.J. :—

I am of the same opinion. As far as the authorities go I think that the later cases are very strongly in favour of the proposition that a custom of this kind is sufficient to exclude reputed ownership. As, however, none of them appear to have been decided in a Court of Error it is open to us to consider whether they be correctly decided on principle; but I am of opinion that they are correct in principle, and particularly the last case of *Priestley* v. *Pratt* (1).

The question to be decided is very simple: whether the bankrupts, at the date of their bankruptcy, were the reputed owners of these goods? Now it is proved as a matter of fact that according to the ordinary custom of their business and according to the ordinary custom of the business of all persons in the same trade, goods sold are allowed to remain, and remain for years, in the bonded warehouse of the vendor. That being so, and being known to all persons in their business, can they be held to be the reputed owners of goods so left in their possession, which surely must mean reputed to be the owners by the persons who have dealings with them, and who might be deceived by the goods remaining in their possession? If we are to look at the case simply on principle it appears to me clearly that they are not the reputed owners; and I may observe that the present *Bankruptcy Act* makes the reputed ownership clause still apply exclusively to traders; it has not been applied to non-traders, therefore it clearly is for the protection of trade creditors that the section is intended.

I cannot agree with what Mr. *Benjamin* said, that persons who buy bills or discount bills for wine and spirit merchants do not know the custom of the trade. I rather think the real truth is that persons who are in the habit of discounting bills of persons in particular trades are better acquainted than any one else with the customs of those trades. You will find that bankers in country towns, who discount bills of farmers and advance them money, are

(1) Law Rep. 2 Ex. 101.

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acquainted with farming customs; and similarly I have no doubt that bankers in *Liverpool*, who discount bills of cotton brokers and merchants, know the customs of the cotton trade, and that bankers who discount bills in the wine trade acquaint themselves with the customs of that trade. If the case is to be decided by us as a jury trying a pure question of fact I am clearly of opinion that the bankrupts were not the reputed owners of these goods at the time of the bankruptcy.

I must also say I think it extremely desirable that as far as can be done reasonably and consistently with the rules of law, the law should be so interpreted as to be in accordance with the customs of trade. To make the law needlessly conflict with the custom of any trade causes the greatest inconvenience and injustice to persons in that trade. If *Knowles* v. *Horsfall* (1) proves nothing else it proves that the custom relied on in the present case is an ancient custom, which, in spite of that unfavourable decision, has continued during the fifty years which have elapsed since that case was decided.

It would, in my opinion, be most unjust that a number of wine merchants in different parts of the country, who have allowed the goods which they have purchased from the bankrupts to remain in the warehouse of the bankrupts, according to the ordinary practice of the trade and the ordinary course of business of this particular firm, which were known, in all probability, to every single creditor of these bankrupts (for no one has come forward to deny such knowledge), should have their goods taken for the purpose of being divided among a number of persons who were not deceived, and could not be deceived, by those goods remaining in the possession of the bankrupts.

Solicitors: Messrs. *Chester, Urquhart, & Co.; W. W. Wynne.*

(1) 5 B. & A. 134.

Ex parte MACREDIE. *In re* CHARLES.

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1873
March 21.

Bankruptcy—Double Proof—Bankruptcy Act, 1869, *s.* 39—*Outstanding Bills—Cross Acceptances.*

The bankrupts had large mercantile dealings with *P.*, and at the time of the bankruptcy they owed him a cash balance of £11,000. Bills had, however, been accepted by the bankrupts and negotiated by *P.* in part payment of the balance, and these bills had been proved by the holders against the bankrupts' estate. There was evidence that bills had been accepted by *P.* in favour of the bankrupts for an independent consideration which had failed, and these bills also had been discounted. *P.*'s estate was also in liquidation, and his trustee claimed to prove in the bankruptcy for the whole amount of the cash balance :—

Held (affirming the decision of *Bacon*, C.J.), that *P.*'s trustee could only prove for the difference between the cash balance and the amount of the bills given in part payment thereof.

Ex parte Walker (1) distinguished.

THIS was an appeal from an order of the Chief Judge in Bankruptcy discharging an order of the County Court Judge at *Sheffield.*

The bankrupts, *W. T. Charles* and *J. A. Charles*, carried on business in iron and steel at *Sheffield* under the firm of *Charles & Co.*, and, in the course of their business, had extensive dealings with *Joseph Parkin*, also of *Sheffield.*

Charles & Co. were adjudicated bankrupts on the 22nd of January, 1872, and *Parkin* filed a petition for liquidation by arrangement on the 5th of December, 1871, and *Macredie* was appointed the trustee of his estate. *Parkin* stated in his affidavit that previously to the bankruptcy he had advanced cash and given bills, which had been duly met, to *Charles & Co.* to the amount of £11,823 8*s.* 8*d.*, on account of contracts for the supply of iron, to be performed by them, and that on their failure to perform the contracts he pressed for repayment of the money, or for bills in lieu thereof, and the bankrupts accordingly handed to him bills of exchange accepted by them to the amount of £7487 10*s.*, which bills were discounted by *Parkin*, and were at

(1) 4 Ves. 373.

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the time of the bankruptcy in the hands of third parties, who proved in respect thereof against the bankrupts' estate.

Besides the advances so made by *Parkin* to the bankrupts, *Parkin* had also accepted bills in favour of the bankrupts upon other contracts for the supply of iron which had never been completed. These bills were discounted by the bankrupts, and were, at the time of *Parkin's* liquidation, in the hands of third parties, who had proved for them against *Parkin's* estate under the liquidation. These outstanding bills amounted to £13,500 15*s.* 1*d.*

Under these circumstances the trustee under *Parkin's* liquidation claimed to prove against the estate of the bankrupts for the sum of £11,823 8*s.* 8*d.*, the amount of the cash balance due to *Parkin* at the time of the bankruptcy, without making any allowance for the bills for £7487 10*s.* which had been discounted by him. The County Court Judge allowed the proof, but the Chief Judge in Bankruptcy reversed his decision, and allowed the proof for £4335 18*s.* 8*d.*, being the amount of the cash balance after deducting the amount of the bills. The trustee of *Parkin's* estate appealed from this decision.

Mr. *Little*, Q.C., and Mr. *Winslow*, for the Appellant:—

We admit that if there had been no mutual bill transactions, and if this had been a simple case of the creditor receiving and discounting acceptances in reduction of his cash balance, he could not have proved for the cash balance without deducting the amount of the bills. But in this case there were mutual credits, and bills had been accepted on both sides which were outstanding in the hands of third parties at the time of the bankruptcy. In such a case the ordinary rule against double proof does not apply, because it has been laid down that where there are cross bill transactions between two persons, both of whom become bankrupt, the unpaid bills on both sides are to be put out of the account: *Ex parte Walker* (1); *Ex parte Laforest* (2); *Ex parte Rawson* (3). In the present case it was all one account, and the bills in question were given in consideration of the whole balance due to *Parkin*, which consisted partly of cash advances and partly of outstanding bills accepted by *Parkin* for the accommodation of the bankrupts.

(1) 4 Ves. 373. (2) 2 D. & Ch. 199; Mont. & Bl. 363. (3) Jac. 274.

If, therefore, the bills are taken into account at all, one set ought to be set off against the other under the 39th section of the *Bankruptcy Act*, 1869.

Mr. *De Gex*, Q.C., and Mr. *Marten*, for the trustee in the bankruptcy, were not called on.

LORD SELBORNE, L.C.:—

The true principle to be applied in these cases is, that proof should only be admitted for that sum for which an action could have been maintained by the one party against the other if the bills had remained in the situation in which they are actually found and there had been no bankruptcy. Supposing that the bills in question in the present case had been given in payment for goods delivered, and the bills had been negotiated by the seller of the goods and were still outstanding, and there had been other transactions as to other bills in respect of which the person who had bought the goods and so paid for them was in the situation of one who practically received accommodation as between the same parties, could an action at law have been maintained for the goods as goods sold and delivered and not paid for? If it could, then perhaps the argument upon the present appeal may be right. If it could not, I apprehend the argument is clearly wrong. But I conceive that no such action could possibly have been maintained upon the facts which I have supposed, because the goods would have been actually paid for by these acceptances, which would not have been returned to the vendor and taken up by him, but would then be outstanding in the hands of third parties.

The mode by which it is attempted to escape from this conclusion is by seeking to shift the transaction from its real basis to an imaginary one, and to ascribe acceptances given on one account to a totally different account, making them not acceptances given in payment of a debt, or in payment, as in the case which I have supposed, for goods, but treating them as if they were that which they were not, cross-acceptances, as against certain other acceptances which the acceptor of these particular bills ought to have paid. But, as I conceive, you must look at every case according

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to the real facts, and not alter the legal rights arising out of those facts by any considerations *ex post facto* for the purpose of increasing or diminishing a proof in bankruptcy in favour of or against any particular person.

Now, looking at the facts of this case, the supposition which I put to Mr. *Winslow* in the course of his argument seems to me a fair test. Supposing these particular acceptances had remained in the hands of *Parkin*, and had not been discounted by him, could he, upon the facts stated in his affidavit, have proved against Messrs. *Charles* upon those acceptances, and at the same time have proved for the whole £11,823? If he could have done so, then the argument of the Appellant might be sustained. If he could not, it is certainly wrong. In both cases it would violate the rule against double proof. If it would have been a double proof for the same debt, supposing these acceptances to be in *Parkin's* own hands, it is equally a double proof, the debt being the same, although the acceptances may be in another hand. If, indeed, those acceptances had really been given as cross-acceptances in respect of the £13,500, it might have been possible, on the case which I have supposed, to prove upon them as well as upon the balance of the cash account mentioned in *Parkin's* affidavit. But in that affidavit he tells us expressly that he paid in cash, or by acceptances which he had taken up and paid, certain sums in respect of which, by means of those payments, he had become a creditor of *Charles & Co.* Then he says: "I requested the bankrupts to return to me the money I had so paid, either by cash or by giving me their acceptances for the balance which was due from time to time in respect of the payments made by me to them as aforesaid, and I received from them several acceptances accordingly." Then how could he, after so receiving those acceptances, have at once claimed to prove for the whole amount of the cash payments in respect of which he would otherwise have been creditor, and also to prove upon those very acceptances if they had been in his own hands? I think it is clear that he could not, and if so, neither can he prove for them while in the hands of third parties. I entirely agree with the Chief Judge that this is a case of an attempt to make a double proof. The appeal must be dismissed with costs.

SIR G. MELLISH, L.J.:—

I am of the same opinion. If the transaction relating to the £7487 10*s.* were the only transaction between the parties it would be perfectly plain that that debt could not be proved, because it is the simple case of a debt having been due from *Charles & Co.* to *Parkin*, and this acceptance having been given in respect of that debt, and subsequently discounted by the creditor and remaining outstanding. It is quite clear that in that state of things that debt could not be proved for. But it is said that it can be proved for, because it so happens that, besides those acceptances *Parkin* had accepted some bills for *Charles & Co.* the consideration for which had wholly failed; and therefore it is said, because there are cross-acceptances, the debt, which otherwise could not be proved for, can be proved for. In my opinion there is no authority for that argument, and I cannot understand how the fact of there being two different transactions between the parties can make any difference. In my opinion the rule in *Ex parte Walker* (1) only applies where there are cross accommodation acceptances, or at any rate only applies where the acceptances are given by the one party in consideration of the acceptances given by the other party. In that state of things, in taking the account, the acceptances and bills on both sides are to be rejected, and I do not think that any of the authorities which have been cited establish the principle that where a debt has been paid by giving an acceptance, and the creditor has discounted the bill and it remains outstanding, although no action at law could be maintained for it, yet nevertheless, if the acceptor becomes bankrupt, there could be a proof. In my opinion, to admit that would be, as the Chief Judge has said, to admit a double proof.

Solicitor for the Appellant: Mr. *H. A. Maude*, agent for Messrs. *Broomhead, Wightman, & Moore, Sheffield.*

Solicitors for the Respondent: Messrs. *Johnson & Weatheralls*, agents for Messrs. *Burdekin & Co., Sheffield.*

(1) 4 Ves. 373.

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March 3, 10.

In re EMPIRE ASSURANCE CORPORATION.

DOUGAN'S CASE.

Amalgamation of Companies—Power to sell Business—Ultrà Vires—Personal dealings by Shareholders in the Selling Company with the Purchasing Company.

16 Eq 424
8 Ch 1009

The *S. Insurance Company*, which was a Scotch company, was empowered by its articles of association to sell and dispose of its business to any other company; but the articles contained no express power to amalgamate with another company. By an agreement between the *S. Company* and the *E. Company*, the *S. Company* agreed to transfer its business to the *E. Company* on the terms that the shareholders in the *S. Company* should receive shares in the *E. Company* in exchange for their shares in the *S. Company*. The agreement was approved by the shareholders of the *S. Company* at a general meeting, and a deed of transfer was executed by the company and sent to the *E. Company*, but before its execution by the *E. Company* had been completed according to the formalities of the Scotch law a petition was presented under which the *E. Company* was wound up.

D., a shareholder and director of the *S. Company*, sent in his share certificates to the secretary of his company to be exchanged, and certificates of shares in the *E. Company* were forwarded to him in exchange, but he did not answer the letter or sign the receipt for the shares; and after the petition for winding up the *E. Company* had been presented he returned the certificates and refused to accept the shares:—

Held (affirming the decision of *Wickens*, V.C.), first, that the amalgamation was *ultrà vires*, not being a sale within the powers of the *S. Company*:

Secondly: That if it had been *intrà vires*, it was never completed:

Thirdly: That although *D.* had taken a prominent part in the negotiations, his sending in his certificates was conditional on the amalgamation being valid and finally completed; and that, having entered into no personal negotiation with the *E. Company*, he was not bound to be a shareholder in that company. His name, therefore, was removed from the list of contributories.

Alabaster's Case (1) approved.

THIS was an appeal from a decision of Vice-Chancellor *Wickens* made in the winding-up of the *Empire Assurance Corporation, Limited.*

The *Empire Assurance Corporation* was established in *London* in

(1) Law Rep. 7 Eq. 273.

1865, under the *Companies Act*, 1862, for the business of life assurance in all its branches.

The 67th clause of the articles of association was as follows :—

"The directors may purchase or accept a transfer of, or otherwise acquire, the whole or any part of the business or property of any society or company, whether incorporated or not, and the estate or interest of any shareholder or shareholders therein, or of any person or persons, on such terms as the directors shall determine; and for all or any of the purposes aforesaid may enter into agreements, contracts, or undertakings, and give indemnities and securities for the due performance of such agreements, contracts, undertakings, and indemnities, or such other assurances in the law as the directors shall determine."

The *Scottish Industrial Insurance Company, Limited*, was established for similar purposes in the same year in *Glasgow*. The 40th clause of the articles of association contained the following power for disposing of the business of the company :—

"It shall be lawful for a special general meeting of the shareholders, called for the purpose in manner hereinbefore mentioned, to consider, and by resolution determine upon, the propriety of selling, disposing, or otherwise dealing with the business, goodwill, property, and effects of the company, or of purchasing or otherwise acquiring the business of any other company or companies, or society or societies, of a similar nature, or any interest therein, and the terms, conditions, stipulations, and agreements relating thereto respectively, as the said meeting shall think fit; and also to authorize and empower the board of directors to carry such resolution or resolutions into effect; and thereupon such resolution, if relating to a sale and disposal as aforesaid, and confirmed at a subsequent general meeting, to be called for the purpose not less than two nor more than four weeks after such preceding meeting, shall be binding upon the shareholders of the company."

Dr. *John Dougan* was one of the directors of the *Scottish Industrial Company*, and the holder of twenty-five shares in it.

In the month of October, 1866, negotiations took place between the directors of the *Empire Corporation* and the directors of the

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Scottish Company for the sale of the business of the latter to the *Empire Corporation.*

On the 11th of October, 1866, a provisional agreement was signed by Dr. *Dougan* on behalf of the *Scottish Company*, and by Mr. *Price*, one of the directors, on behalf of the *Empire Corporation*, by which it was agreed that the amalgamation of the two companies should take place as from that day, and that the *Empire Corporation* should take all the assets and liabilities of the *Scottish Company*, the latter company guaranteeing that all their liabilities, except the liabilities on policies, should not exceed £200.

The 5th clause of the agreement was as follows:—

"The *Empire Corporation* shall issue shares of their company to the shareholders of the *Scottish Industrial Insurance Company* to the amount of £1050 on the same terms with reference to the amount paid up as their shareholders at present stand in the *Scottish Industrial Insurance Company.*"

The 7th clause provided that the members of the board of the *Scottish Company* present that day should continue as a local committee of the amalgamated company, together with Mr. *Alexander*, the present secretary, who would also take a seat on the local committee.

This agreement was confirmed by the board of directors of the *Empire Corporation* at meetings of the 12th and 14th of October, and by the shareholders of the *Scottish Company* at general meetings of the 2nd and 19th of November, 1866, at both of which meetings Dr. *Dougan* took the chair. A deed was accordingly prepared to carry out the amalgamation, which received the seal of the *Scottish Company* on the 19th of December. It was then sent to *London* to be executed by the *Empire Corporation*, but their seal was not affixed till the 19th of March, 1867, as hereafter stated.

In the meantime the *Scottish Company* ceased to transact business, and the secretary, Mr. *Alexander*, sent round a circular to the shareholders requesting them to send in the certificates of their shares "for exchange." It was not proved that Dr. *Dougan* received one of these circulars, but in fact he sent in his certificates to the secretary and the secretary forwarded them, together with those of the other shareholders, to the *Empire Corporation.*

On the 13th of March, 1867, Mr. *Lake*, the manager of the *Empire Corporation*, sent to Dr. *Dougan* certificates of twenty-five shares in the *Empire Corporation*, on each of which £1 had been paid up, accompanied by a form of receipt which he was requested to sign and return. Dr. *Dougan*, however, did not sign or return the receipt, or do any other act accepting the shares.

On the 15th of March a meeting of the directors of the *Scottish Company* was held, at which Dr. *Dougan* was present. At this meeting a resolution was passed "that the law agent be instructed to communicate with Mr. *Towers*, the solicitor, and Mr. *Lake*, the manager of the *Empire Corporation*, and to intimate to them that unless the deed of amalgamation be returned duly executed by the *Empire Corporation* within six days from this date, the board will thereafter refuse to carry out the amalgamation and hold the preliminary agreement cancelled, and will immediately convene a general meeting of the company to ratify this step."

On the 19th of March the deed received the seal of the *Empire Corporation*, and was on that day sent by post to the solicitor of the *Scottish Company*. The deed was complete according to the English form, having the seal of the *Empire Corporation* attached, and being signed by two of the directors and the manager, whose signatures were attested by the solicitor and the chief accountant. But the attestation clause in the body of the deed had not been filled up in the Scotch form with the names and descriptions of the witnesses, so that it was not then complete according to the law of *Scotland*.

The deed was not, for some reason unexplained, received by the solicitors at *Glasgow* till the 26th of March, when they wrote to Mr. *Lake* for further information as to the witnesses in order to fill up the attestation clause.

On the 20th of March a petition was presented for winding up the *Empire Corporation*, and an order to that effect was made on the 4th of May.

On the 17th of April, Dr. *Dougan* returned the certificates of shares to the *Empire Corporation*, with a letter refusing to accept them; but his name being on the register for twenty-five shares, he was settled on the list of contributories for that amount.

He subsequently applied to the Vice-Chancellor to remove

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his name from the list. His Honour was of opinion that the amalgamation, although within the power of the *Empire Corporation*, was not authorized by the constitution of the *Scottish Company*, which gave power to sell and transfer their business for a valuable consideration, but not to amalgamate with another company, and that Dr. *Dougan's* acceptance of the shares was conditional on the amalgamation being carried out, and that, as the amalgamation failed, he was entitled to be relieved by having his name removed from the register. From this decision the official liquidator appealed.

Mr. *Dickinson*, Q.C., and Mr. *Brooksbank*, for the Appellant:—

There was nothing *ultrà vires* in the transaction. Though called an amalgamation, this was, in fact, a sale by the *Scottish Company* of its business to the *Empire*, and as such, in accordance with the articles of the *Scottish*. There is no reason why a company should not take shares as part of the consideration for the sale of its business to another company, nor why the shares so taken should not be allotted directly to the shareholders of the selling company instead of being given to the company as a body: *Hare's Case* (1).

But whether the amalgamation was *ultrà vires* or not, Dr. *Dougan* is bound. It was in fact carried out, for the deed was complete before the petition to wind up was presented, although some of the formalities according to the Scotch law had to be added. He was one of the chief promoters of the amalgamation, and has made himself liable by his own conduct. He sent in his certificate to be exchanged, which amounted to an unconditional application for the shares in the *Empire*: *Challis' Case* (2); *Leeke's Case* (3); *Bank of Hindustan* v. *Alison* (4).

Mr. *Greene*, Q.C., and Mr. *Haddan*, for Dr. *Dougan*, were not called on.

SIR G. MELLISH, L.J.:—

This is an appeal from an order of Vice-Chancellor *Wickens*, directing that Dr. *Dougan's* name should be removed from the list

(1) Law Rep. 4 Ch. 503.
(2) Ibid. 6 Ch. 266.
(3) Law Rep. 6 Ch. 469.
(4) Ibid. 6 C. P. 222.

(a) See W N (1873) 111.

of contributories of the *Empire Assurance Corporation*, which is being wound up.

Dr. *Dougan* had been a shareholder and director of the *Scottish Industrial Insurance Company*, and by one of the articles of association of that company it was provided as follows:—[His Lordship read the 40th article, and continued.] An agreement was entered into between the directors of the *Scottish Company* on the one hand, and the directors of the *Empire Corporation* on the other, the effect of which was that all the property of the *Scottish Company* should be transferred to the *Empire*, and that the *Empire* should indemnify the *Scottish* against all liabilities, and that each shareholder of the *Scottish* should receive shares in the *Empire*, with £1 considered as paid up on them, in lieu of his shares in the *Scottish*.

Then the first question to be decided is, whether this agreement was *ultrà vires*. The Vice-Chancellor held that it was so, on the ground that the power of the *Scottish Company* to sell and transfer their business to another company only authorized them to sell for some money payment or valuable consideration to be given by one company to the other, and did not authorize a transfer on the terms of the shareholders of the selling company receiving shares in the purchasing company in exchange for shares in their own company.

It is observable that there are no special words in the clause giving power to amalgamate with another company; and I cannot help thinking that if it had been intended by the clause that a special general meeting of the *Scottish Company* should have power absolutely to bind all the shareholders and to hand them over to another company—that, in fact, it should have power to effect what is commonly called an amalgamation, that word would have been made use of. Under the 161st section of the *Companies Act*, 1862, under which these cases of amalgamation usually come, it is provided that, if any shareholder objects to the proposed amalgamation, he can have his shares valued and their value paid to him. There is no such provision in the clause before us. On the whole, therefore, I agree with the Vice-Chancellor that this agreement was *ultrà vires*.

But even supposing the agreement had not been *ultrà vires*, I think Dr. *Dougan* would not have been liable as a shareholder in

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the *Empire Corporation*. There have been a great many cases in which, although the amalgamation has been *ultrà vires*, the question has been raised, how far the shareholders of the selling company have become liable as shareholders of the purchasing company. Some of them have been cases of much hardship, because persons found themselves to be liable in both companies when they only meant to exchange their liability in the old company for liability in the new. But I think those authorities establish this proposition—that if the shareholder enters into no personal negotiation, and only acts through his own company, and does nothing but consent to and act on the amalgamation, then, unless the amalgamation is eventually completed, he is not bound. That is shewn by *Alabaster's Case* (1); and I think that case is good law. But in some cases the shareholder has been rash enough to make a personal application to the purchasing company, and then, if the shares are registered in his name, he is bound, although the amalgamation goes off altogether. That was so in *Leeke's Case* (2) and *Challis' Case* (3).

The only question, therefore, is, whether that class of decisions applies to the present case. Dr. *Dougan* took a prominent part in the arrangements for the sale. When the secretary sent round circulars asking for certificates, Dr. *Dougan* sent in his certificates to Mr. *Alexander* to be exchanged. According to *Alabaster's Case* that is not entering into a personal negotiation with the purchasing company; it is only acting in pursuance of the agreement to amalgamate, and he must be taken to have sent in his certificates to be exchanged only on the condition that the amalgamation was completed.

I have already said that I think the amalgamation was *ultrà vires*, and I also think that it was not completed.

The deed of transfer was executed in the Scotch form by the *Scottish Company*, and was sent to the *Empire Corporation* for their execution. They kept it a long time without executing it, and the property was not transferred, and nothing was done to carry out the amalgamation. Nevertheless Mr. *Alexander* sent in the certificates to the *Empire Corporation*, and they sent out the new certificates to the shareholders, and, among the rest, to

(1) Law Rep. 7 Eq. 273. (2) Law Rep. 6 Ch. 469.
(3) Law Rep. 6 Ch. 266.

Dr. *Dougan*, with a form of receipt. Dr. *Dougan* did nothing with them, and he had a very good reason. I do not suppose that he knew that the amalgamation was *ultrà vires*, but he knew that it had never been completed by the *Empire Corporation*. He therefore did not answer the letter, but he attended a meeting of the directors of the *Scottish* on the 15th of March, at which a resolution was passed that, unless the deed was executed by the *Empire* within a week, they should consider the agreement at an end. On the 19th the deed was executed by the *Empire*, and was sent by post to the solicitors of the *Scottish* at *Glasgow*, with the names of the witnesses and directions for filling up the blanks, as required by the Scotch law. This, it must be presumed, was received on the 20th, but before anything was done to complete the deed, the petition to wind up the *Empire* was presented, and an order eventually made. Had, then, Dr. *Dougan* fixed himself as a shareholder on the 20th of March, when the petition was presented? It appears to me that he had not. It may be that he knew that Mr. *Alexander* had sent in the certificates, but he also knew that the amalgamation had not been completed, and therefore he did not sign the receipt or answer the letter. If it had been completed, he would probably have accepted the shares; but knowing that it was not, he did not do so, and the only conclusion to which I can come is that he was pausing and hesitating to consent in order to see if the amalgamation would be completed or not; and then, when a winding-up petition had been presented, he refused to accept them. The result of the evidence is that Dr. *Dougan* never intended to become a shareholder, unless and until the arrangement was finally and effectually completed; and it would, in my judgment, be unfair to hold that he had become a shareholder so as to make him liable for the debts of the *Empire* as well as for those of the *Scottish Company*. The appeal must be dismissed with costs.

SIR W. M. JAMES, L.J.:—

I entirely concur.

Solicitor for the Appellant: Mr. *A. Pulbrook*.

Solicitors for Dr. *Dougan*: Messrs. *Roberts & Simpson*.

L. JJ. 1873 March 10.

In re LA MANCHA IRRIGATION AND LAND COMPANY.

LORD CLAUD HAMILTON'S CASE.

Company—Contributory—Qualification of Directors—Directors appointed by the Memorandum of Association—Resolution altering "future qualification"—First General Meeting—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 39.

By the memorandum of association of a company, *C.* and *H.* were named as directors, without being required to hold any particular number of shares as a qualification. The company was regulated by Table A. of the schedule to the *Companies Act*, 1862, the 58th clause of which provides that at the first ordinary meeting the whole of the first body of directors shall retire. An extraordinary general meeting was held within four months after the registration, at which a resolution was passed (which was duly confirmed) that "the future qualification of a director" should be 100 shares. It was also resolved to postpone the first ordinary general meeting for three years. The company was afterwards ordered to be wound up:—

Held (reversing the decision of *Malins*, V.C.), that the future qualification meant the qualification of future directors, and that *C.* and *H.* were not liable for 100 shares although they continued to act as directors till the company was wound up:

Held, also, that by holding the extraordinary meeting within four months after registration, the company had complied with the *Companies Act*, 1867, s. 39, which provides that the first general meeting shall be held within four months after registration, and that the resolution postponing the first ordinary general meeting, at which the original directors were to resign, for three years, was valid.

THIS was an appeal from an order of Vice-Chancellor *Malins* made in the winding-up of the *La Mancha Irrigation and Land Company, Limited.*

The company was established in 1868 with a capital of £1,000,000, in 50,000 shares of £20 each. By the memorandum of association, which was registered on the 18th of April, 1868, the objects of the company were stated to be to acquire the properties, rights, and privileges of the association constituted in *Spain*, under the style of *Lopez and Eldridge*, by public deed executed in *Madrid* in May, 1867, for the purpose of applying the waters of the *Lagunas de Ruidera* to irrigation.

The memorandum of association contained the following clause:—

"The first directors of the company shall be the Right Hon. Lord

Claud Hamilton, *W. Hope*, Esq., V.C., with power on their part to appoint two other directors resident in *England*, *Don Isidoro Lopez*, *James Eldridge*, and *J. L. O'Sullivan*, Esqrs., resident in *Spain*, and such other additional directors, not exceeding two more, resident in *England*, and two more resident in *Spain*, as they may appoint, so as not to exceed the total number of eleven."

No provision was made as to the qualification of the directors.

The memorandum was signed by the five persons named as directors, and three others. Each of these persons subscribed for one share only.

No articles of association were registered with the memorandum, and consequently the company was governed by the articles in Table A. of the schedule to the *Companies Act*, 1862, so far as they were applicable.

On the 7th of May, 1868, an extraordinary general meeting was held, which was adjourned to the 9th for the purpose of making various alterations in the articles, and these alterations were confirmed at an extraordinary general meeting on the 28th of May.

The 53rd article of Table A. is as follows:—

"Until directors are appointed the subscribers of the memorandum of association shall be deemed to be directors."

This article was struck out by amendment, and the following substituted in its place:—

"The future qualification of a director shall be the holding in his own right of not less than 100 shares in the company."

The 57th article was amended so as to stand as follows:—

"The office of a director shall be vacated if he becomes bankrupt or insolvent, or if he cease to hold the required number of shares to qualify him for the office, unless these conditions shall be dispensed with in any special cases by the vote of two-thirds of the shares represented at a general meeting of the shareholders."

The 58th clause, which provides that "at the first ordinary meeting after the registration of the company the whole of the directors shall retire from office," was amended so as to run thus:—

"At the first ordinary meeting of the company in the year 1871, the whole of the directors shall retire from office."

On the 25th of May, 1868, before these amendments had been confirmed, a meeting of the directors was held, at which a resolu-

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tion was passed "that Mr. *R. C. C. Graham* be elected a director of the company on the same footing as the existing directors."

Shortly after the confirmation of the amended articles, the secretary entered on the register 500 shares against the names of Lord *C. Hamilton* and *W. Hope*, and 100 shares against the name of *R. C. C. Graham;* but these gentlemen denied that they had given any authority to him so to do, and no application for shares was made by them, nor was any formal allotment or transfer of shares made to them.

On the 14th of January, 1871, the company was ordered to be wound up, and Lord *C. Hamilton*, *W. Hope*, and *R. C. C. Graham* were settled on the list of contributories for 100 shares each in respect of their qualification as directors. They applied to the Vice-Chancellor to have their names removed from the list on the ground of their having been directors before the filing of the amended 53rd article, but the Vice-Chancellor refused the application. From this decision they appealed (1).

(1) 1873. Jan. 16. WN(1873) 9.

SIR R. MALINS, V.C. :—

The question in this case is, are these gentlemen properly on the list of contributories on which they have been placed for 100 shares each? That depends upon the fact of their having been directors of the company. There occurs in this case a circumstance which I have never seen before, that the memorandum of association provides for the appointment of directors and nominates the first directors. I am not aware that there is anything illegal or improper in this; and I am inclined to accede to the argument that these gentlemen, being so appointed, and having signed the memorandum for one share, were entitled to act as directors, being holders of one share only. But it occurred, as it might naturally be expected to occur to gentlemen of such respectability as these are, that for men to sit at a board of directors, each holding one £20 share, was a thing not to be contemplated in a commercial country. It could not be right and proper that a company with a capital of £1,000,000 sterling should be governed by directors who had only a single share of £20. If there is one thing necessary above others it is that those who govern a company like this should have a substantial interest in it; because if they have not, they may embark in the wildest speculations without fear of injuring themselves. It is therefore of the greatest importance to the shareholders that they should have directors who have a substantial interest in the concern of which they are the managers.

Acting, therefore, on this principle, these gentlemen pass this resolution, which was confirmed on the 28th of May, 1868: "That the future qualification of a director shall be the holding in his own right not less than 100 shares in the company;" that is, they were to have a stake of £2000, which would be an inducement to them

Mr. *Higgins*, Q.C., and Mr. *E. C. Willis*, for the Appellants:—

The Appellants never made any application for shares, nor to be cautious in the management of the company.

What, then, do the words "future qualification" mean? I can only read them as meaning the qualification henceforth from the day on which this resolution becomes binding. No man, therefore, in my opinion, after that had a right to sit at the board unless he made up his mind to hold 100 shares; and I find that every one of those gentlemen has been sitting at the board down to May, 1871, as it suited their convenience. I adhere to my own decision in *Harward's Case* (Law Rep. 13 Eq. 30), in which I came to the same conclusion as Lord Justice *James* did in *Leeke's Case* (Law Rep. 6 Ch. 469). In that case I decided that no man can by the law of this country be permitted to act as director of a company without holding the number of shares which he knows to be the qualification of a director. There the director had done very little except allowing his name to appear as a director; but I decided the case upon the broad ground that if a man knows that, by the constitution of the company, the qualification of a director is a certain number of shares, it is an implied contract with the shareholders that if he acts as a director he must take, at the least, that number of shares. In *Fowler's Case* (Law Rep. 14 Eq. 316) Vice-Chancellor *Bacon* expressed his opinion quite as distinctly as I have done, that nothing had been said, or could be said, against the obligation of directors to take the minimum number of shares which would qualify them as directors.

Mr. *Higgins* argued that the memorandum of association could not be altered. My opinion is that it can be altered. The 12th section of the *Companies Act*, 1862, which he referred to, says: "Any company limited by shares may so far modify the conditions contained in its memorandum of association, if authorized to do so by its regulations as originally framed, or as altered by special resolution in manner hereinafter mentioned, as to increase its capital by the issue of new shares of such amount as it thinks expedient, or to consolidate and divide its capital into shares of larger amount than its existing shares."

My opinion is that this resolution of the directors was a very proper one, as it was come to in pursuance of their desire to increase the capital by issuing new shares to the directors.

Nothing can be clearer than that any man may renounce a provision introduced for his benefit. These gentlemen were entitled to stand upon their qualification of one share only, but they renounce that benefit by becoming parties to a resolution that each of them should hold, as his future qualification, 100 shares. I think they are bound by their own resolution, and that their names must remain on the list for that number of shares.

I cannot part with this case without again expressing my strong opinion, which ought to be universally known by gentlemen, whether they are commercial men or otherwise, that they will not be permitted by the law of this country to sit at a board of directors upon the understanding that they are to receive their remuneration as directors, and if the affair is profitable, take the profit; but if losses occur, they are not to be liable. The motion must be refused with costs.

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LORD CLAUD HAMILTON'S CASE.

accepted any, except the one share in respect of which they signed the memorandum of association. The only question therefore is, whether they are affected by the resolution that the future qualification of directors should be the holding of 100 shares. But, in the first place, the appointment of the first directors without any qualification was an express provision in the memorandum of association, and formed part of the constitution of the company, which could not be altered even by a general meeting: *Companies Act*, 1862, s. 12. Therefore, whatever was the effect of the amended 53rd rule, it could not affect the Appellants: *Hutton* v. *Scarborough Cliff Hotel Company* (1); *Stock's Case* (2); *Marquis of Abercorn's Case* (3); *Austin's Case* (4); *Chapman's Case* (5); *Tothill's Case* (6); *Ex parte Cotterell* (7).

In the second place, the amended 53rd rule was never intended to refer to the original directors. "Future qualification" means the qualification of future directors. Mr. *Graham* is on the same footing as the other Appellants, as he was appointed under the power given to the original directors before the amended rule was confirmed.

Mr. *Bristowe*, Q.C., and Mr. *Graham Hastings*, for the official liquidator:—

The 12th section of the *Companies Act*, 1862, forbidding any alteration to be made in the memorandum of association, except as to the issue of fresh shares, only applies to such things as are obliged to be inserted in the memorandum under the 9th section. If matters are introduced into the memorandum which do not properly belong to it, they can be altered. The appointment of the first directors had nothing to do with the constitution of the company, and ought not to have been introduced into the memorandum. The privilege of the Appellants as original directors had in fact ceased, for by the 58th clause of the articles of association (Table A.) they ought to have retired at the first general meeting, which must be held within four months of the registration: *Companies Act*, 1867 (30 & 31 Vict. c. 131), s. 39. They attempted to evade

(1) 2 Dr. & Sm. 514; on app. 13 W. R. 631.
(2) 4 D. J. & S. 426.
(3) 4 D. F. & J. 78.
(4) Law Rep. 2 Eq. 435.
(5) Ibid. 567.
(6) Ibid. 1 Ch. 85.
(7) 11 W. R. 2.

this by calling the first general meeting an extraordinary meeting, and postponing the first ordinary meeting till 1871; but the Act does not sanction this. With respect to the construction of the amended rule, we contend that "future qualification" must mean qualification for the future. The adjective must refer to its own substantive, not to the word "director." Qualification is different from eligibility. If a man is eligible when appointed it is sufficient, but his qualification must be continuous, and that is made clearer by the 57th amended article. There is nothing, therefore, to take this case out of the rule established in *Leeke's Case* (1).

SIR W. M. JAMES, L.J.:—

I am of opinion that the order of the Vice-Chancellor ought to be discharged. It is not necessary to go into the cases as to the liability of directors with respect to the number of shares requisite to form a qualification. The question is, what was the number of shares which these particular directors were to hold? There is nothing to shew that they intended to take any shares except what were necessary for their qualification.

I think there can be no real doubt as to the meaning of the resolution. The company had commenced business under the articles in Table A. in the schedule of the *Companies Act*, 1862. The first directors were appointed by the memorandum of association, and no qualification was required. Before the first ordinary general meeting, at which the original directors would have to resign, they were minded to make further provisions for the constitution of the company, and an extraordinary meeting was held at which resolutions were passed, one of which was that the first ordinary meeting of the members should be postponed till 1871. By calling this extraordinary meeting they have complied with the 39th section of the *Companies Act*, 1867. The only reasonable object in doing this was to provide for the continuance of the original directors in office till 1871. Then, having done so, they insert in their articles these words, "That the future qualification of a director shall be the holding in his own right of not less than 100 shares in the company;" and again, "that the office of a

(1) Law Rep. 6 Ch. 469.

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LORD CLAUD HAMILTON'S CASE.

director shall be vacated if he becomes bankrupt or insolvent, and if he cease to hold the required number of shares to qualify him for the office." There can be but one meaning to these words. The present directors were to remain, but for the future the qualification for a director was to be 100 shares, and if he should cease to have that qualification, his office was to be vacated. How can the word "cease" apply to persons who have never had the qualification? If so, all the seats on the board would have become vacant directly the resolution was passed, which could not have been intended. But, independently of that consideration, I have no doubt that future qualification means that by which in future a man shall be qualified for election; for a qualification is a thing which is required at the time of election. The names of the Appellants must be removed from the list in respect of the 100 shares.

SIR G. MELLISH, L.J.:—

I am of the same opinion. It is clear that by the memorandum of association Lord *Claud Hamilton* and Mr. *Hope* were appointed directors till the first ordinary meeting. The extraordinary meeting did not put an end to their office. No fresh directors were appointed. It would have been an extraordinary thing if the meeting had agreed that all the directors should vacate the offices at once, it being well known that they had never held the required number of shares. It is clear that future qualification means the qualification of any director who may subsequently be appointed, and that is consistent with the 57th article, which says that if he ceases to hold the shares his office is to be vacated. I cannot distinguish this case from *Stock's Case* (1).

Solicitor for the Appellants: Mr. *W. H. Roberts.*
Solicitors for the Respondent: Messrs. *Wedlake & Letts.*

(1) 4 D. J. & S. 426.

Ex parte GORDON. *In re* DIXON.

L. JJ.
1873
May 9.

Bankruptcy—Injunction—Restraining Proceedings in a Chancery Suit—Bankruptcy Act, 1869 *s.* 72.

A suit in Chancery was instituted by legatees under the will of a testator against his executors, and against the continuing partners of a firm of which he had been a member at the time of his death, and *R. S. D.*, another partner who had retired after the testator's death, for the purpose of winding up the affairs of the partnership as they existed at the time of the testator's death, and obtaining payment to his estate of the share of the capital which was due to him. After the bill was filed the continuing partners filed a petition for liquidation by arrangement, and a trustee was appointed. The trustee was made a party to the suit by a supplemental order, but no relief was prayed against him.

The trustee having applied to the Court of Bankruptcy for an injunction to restrain the proceedings in the suit as against him, it was *held* by *Bacon*, C.J., that the Court had no jurisdiction to grant the injunction.

After the order was made *R. S. D.* also filed a petition for liquidation:—

Held, by the Lords Justices, that the Chief Judge was right in refusing the injunction, *R. S. D.* being then solvent.

But *held*, on the production of evidence that *R. S. D.* had also become a liquidating debtor, that all the matters in question in the suit might be properly determined in bankruptcy; and that the trustee was entitled to the injunction asked for.

THIS was an appeal from an order made by the Chief Judge in Bankruptcy, refusing an application made by the trustee in the liquidation of *Peter James Dixon*, *John Dixon*, and *Joseph Forster*, for an injunction to restrain any further proceedings against him in a Chancery suit of *Dixon* v. *Forster*.

The liquidating debtors were the continuing partners of the firm of *Peter Dixon & Sons*, cotton spinners at *Carlisle* and *Manchester*. The partnership originally consisted of five members, namely, *Peter Dixon*, *Peter James Dixon*, *Robert Stordy Dixon*, *John Dixon*, and *Joseph Forster*, and was established with a capital of £128,000, divided into 64 shares, by a deed of partnership, dated the 11th of August, 1872. This deed provided that any partner should be at liberty to retire on giving twelve months' notice to the other partners; that in case any partner should retire from the firm, or die without making a valid bequest of his shares in the

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firm under the provisions for that purpose thereinafter contained, the shares of the retiring or deceased partner should be taken by the continuing or surviving partners; but that any partner might bequeath by will all or any of his shares to any one or more of his sons or brothers, or to any other persons, but such other persons should not be admitted without the consent of all the surviving partners.

Peter Dixon died in April, 1866, having bequeathed his shares between his sons, the said *John Dixon, H. H. Dixon,* and *T. C. Dixon,* and appointed *H. H. Dixon, John Dixon, J. Nanson,* and his brother *George Dixon,* his executors. *George Dixon* and *H. H. Dixon* were both dead.

Peter Dixon's shares in the partnership were valued at £36,000.

In the year 1868 *Robert Stordy Dixon* retired from the partnership.

In the year 1870 two suits were instituted for the administration of *Peter Dixon's* estate, namely, the suit of *Dixon* v. *Dixon,* by his surviving executors, and the suit of *Hamilton* v. *Dixon* by a creditor.

John Dixon was the only member of the firm who was a party to these two suits. On the 3rd of April, 1872, *John Dixon* made an affidavit as to documents in the suit of *Hamilton* v. *Dixon,* in which he said that he was unable to produce certain documents which were in his possession jointly with the other partners in the firm of *Peter Dixon & Sons,* without their concurrence.

On the 26th of June, 1872, the suit of *Dixon* v. *Forster* was instituted in the Court of Chancery by some of the legatees under *Peter Dixon's* will against *Joseph Forster, Peter James Dixon, Robert Stordy Dixon, John Dixon,* and *John Nanson.* The bill prayed that the affairs of *Peter Dixon & Sons,* as existing at the time of the death of *Peter Dixon,* might be wound up under the direction of the Court; that an account might be taken of the dealings and transactions of the firm since the death of *Peter Dixon,* and of the employment therein of his capital, and that a proportionate share of profits or interest might be allowed to his estate in respect thereof; that the business, profits, and assets of the firm might be sold as a going concern,

and the proceeds applied in repayment of the capital which should be found due to *Peter Dixon;* that in the meantime a manager and receiver might be appointed of the assets and business; that *Peter James Dixon, John Dixon, Joseph Forster,* and *John Nanson* might be restrained by injunction from interfering with the profits and assets of the business, and that the proceedings in *Dixon* v. *Dixon* and *Hamilton* v. *Dixon* might (so far as applicable) be adopted.

On the 11th of July, 1872, the continuing partners in the firm filed a petition for liquidation, and *W. B. Gordon* was appointed trustee.

On the 6th of November, 1872, *Gordon,* as trustee under the liquidation, was made a party to *Dixon* v. *Forster* by a supplemental order. *John Dixon* and *John Nanson,* as surviving executors of *Peter Dixon,* proved in the liquidation for £36,000 as a debt due from the firm to their testator's estate, and this proof was admitted by the trustee. On the 27th of December, 1872, *Gordon* applied to the County Court for an order to restrain the Plaintiffs in *Dixon* v. *Forster* from taking any further proceedings in that suit against him as such trustee. This application was refused by the Registrar (sitting as Judge), and his decision was affirmed by the Chief Judge (1). The application was therefore renewed before the Lords Justices.

After the appeal had been set down before the Lords Justices, *Robert Stordy Dixon* also filed a petition for liquidation, and a trustee was appointed.

An affidavit to prove this fact was tendered by the counsel for the Appellant, but was objected to by the Respondents. The Court decided that the affidavit might be received.

(1) 1873. March 3. W.N. 73 56.

SIR JAMES BACON, C.J.:—

I would, if I had the power, do what is now asked with the greatest willingness, because I have not the slightest doubt on the substance of the case that while the Plaintiffs have a Chancery suit which they desire to carry on, yet they might have all the questions which are raised on their part determined by coming into the bankruptcy under a proper arrangement with the trustee. Therefore I am at a loss to imagine why the Chancery suit need proceed. But I cannot see that I have any power under the 72nd section of the *Bankruptcy Act,* 1869, to restrain the proceedings in the suit, constituted as it is, and having regard to the purpose for which it is instituted. The 72nd section, as is well known, is a novelty in the law of

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Mr. *De Gex*, Q.C., and Mr. *Davey*, for the Appellant:—

All the relief that is sought in the suit can be better and more expeditiously obtained in the Court of Bankruptcy. The 72nd bankruptcy. I have done my best upon all occasions to avail myself of the powers which that section gives. I have shewn no reluctance, and I feel none, to extend the power of the Court as far as that section goes. [His Lordship read the section.] In this pending suit *Robert Stordy Dixon* is a person accountable, and from whom in the result it may be necessary to require payment to the Plaintiffs of some sum of money. But what power has the Court of Bankruptcy to decide any such thing between these parties? The suit as it is constituted might (I do not say that it will, nor do I say that I think it will) give to the Plaintiffs the right to a personal decree against *Robert Stordy Dixon*. If that right exists, why should I transfer the Plaintiff's suit from the Court of Chancery, where such relief can be obtained, to the Court of Bankruptcy, in which no such relief can be obtained? It is quite true, as Mr. *De Gex* has reminded me, that as between debtor and creditor any question may be disposed of in bankruptcy; but if *Robert Stordy Dixon* is a debtor at all, he is a debtor to the Plaintiffs, not to the estate of the liquidating debtors, and there is no question between him and that estate according to the tenor of the record. It is because the Plaintiffs, in seeking the relief to which they may be entitled, have summoned *Robert Stordy Dixon* before the Court of Chancery to answer their bill, that I cannot transfer them and him into the Court of Bankruptcy. Nor do I see that there will be any hardship on the trustee, for nothing is prayed against him. He is by the supplemental order simply put in the place of the liquidating debtors; he is there, not to answer, but only to receive what they might have received if they were entitled to it. Nor can I see that the Court of Bankruptcy has any jurisdiction over *Robert Stordy Dixon*. This is a small point, no doubt, but it has been argued; and having before my mind the decision in *Ex parte Rumboll* (Law Rep. 6 Ch. 842), I cannot extend the 72nd section so as to say that, though the Plaintiffs are entitled to relief against *Robert Stordy Dixon*, I will deprive them of that, and make them go into bankruptcy and get such relief as they can against other parties. The 72nd section is extremely valuable, but its words and its meaning must be strictly adhered to, and must not be strained. It appears that the Lords Justices thought it was somewhat strained by the order which I made in *Ex parte Rumboll*, and if I were to make such an order as I am now asked to make, I should expose the case to the very same treatment which my order in that case received from the Lords Justices, and my order would be set aside. I think the Chancery suit must go on for the reasons I have mentioned, if it is worth the while of the parties to go on with it after what has happened, which I doubt extremely. The trustee is not called upon to answer, or to interfere in the slightest degree, except by discharging his ordinary and proper duties with regard to the estate. There may be something else behind, but as to this I do not take upon myself to speculate. But, unless there be some reason much more cogent than any which has been suggested to me on the part of the trustee why the Chancery

section of the *Bankruptcy Act*, 1869, is very wide in its terms, and the Court can decide any question that arises, not only between the estate and the creditors, but between two creditors as to their priorities. The order we ask for is similar to that made by the Lords Justices in *In re White* (1). Our case is made far stronger now by the fact that *Robert Stordy Dixon* is also now in liquidation. The difficulty which the Chief Judge felt with respect to him is now removed.

Mr. *Little*, Q.C., and Mr. *Marten*, for the Plaintiffs in the suit:—

The trustee of the continuing partners is a necessary party to the taking of the partnership accounts in the suit, and we ask no relief against him. We do not seek to interfere in any way with the proceedings in the liquidation. The suit seeks relief against *Robert Stordy Dixon* and *John Nanson*, which we cannot get in the Bankruptcy Court. Questions may also arise as to the construction of the partnership deed. At all events, the order asked for is too wide; the order in *In re White* did not stay proceedings against the trustee generally, but only with regard to the property coming to him in the liquidation. We rely on *Ex parte Lyons* (2) and *Ex parte Rumboll* (3). If this suit is now stayed, it will be impossible to provide for the costs of it.

SIR W. M. JAMES, L.J.:—

This Court has original as well as appellate jurisdiction under the 71st section of the *Bankruptcy Act*, 1869, and we have therefore power to make an original order and to admit fresh evidence.

In the present case we think it right to admit the fresh affidavit,

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suit should be smothered and stopped, I cannot understand why he should think it worth his while to resist the order made in the County Court. I must therefore dismiss this application, but I do so without costs. It will be understood from what I have said that I think *In re White* (Law Rep. 8 Ch. 214) is wholly distinguishable from this case, because that was simply a question between a debtor and a creditor.

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(1) Ante, p. 214.
(2) Law Rep. 7 Ch. 494.
(3) Law Rep. 6 Ch. 842.

L. JJ. 1873 *Ex parte* GORDON. *In re* DIXON.

and upon that evidence we think we may stay the proceedings. If it had not been for that evidence, shewing the insolvency of *Robert Stordy Dixon*, it appears to the Lord Justice even more strongly than to myself that it would have been very difficult to make any order which should prevent the accounts being taken against the solvent party. Assuming him to be solvent, the Court of Chancery would be the proper forum for the solvent party to be brought before to be dealt with. It would be very difficult to say that the accounts were to be taken in the bankruptcy against him, and it would be very inconvenient, and against the spirit of the Act itself, that the accounts should be taken in both Courts at the same time in respect of the same dealings and transactions. But now that it appears upon this fresh evidence that in fact the Defendant is not solvent, that he is subject to the jurisdiction in bankruptcy, and that a trustee of his estate was appointed in bankruptcy, it appears to us that it is brought within the cases that have been cited to us; that it is a matter that relates simply to the administration in bankruptcy of the bankrupts' estates, and that the Court of Bankruptcy was intended by the Legislature, under such circumstances, to have the jurisdiction to determine, not only what is the amount of the claims against the estates, but whether there are any liens or preferential interests connected with those claims. It is for the Court of Bankruptcy to determine it all as speedily as possible, so as to proceed to the distribution of the estates.

Then that being so, the order, as the Lord Justice suggests, will be, not to reverse or discharge the order of the Chief Judge at all, but upon the appeal, and upon reading this affidavit which has been produced to us, to make an order to stay the proceedings as against the trustee in the liquidation of *Peter Dixon & Sons*. The suit will, of course, go on as against any other parties. I do not think there will be any difficulty about that. If the Plaintiffs want to get liberty to use the executors' names for the purpose of discovery, for the purpose of proof, or for the purpose of controlling the matter, that will be a question for the Court of Chancery, if they can make out any case; and we have no jurisdiction, sitting in Bankruptcy, to interfere with what the Court of Chancery may think it right to do, or with the terms on which they may think it

right to give to any person seeking to use the executors' names liberty to do so. With reference to the costs of the suit which were referred to, we cannot keep two proceedings alive, one in the Court of Chancery and the other in the Court of Bankruptcy, for the mere purpose of determining who is to pay the costs of the suit. The order of the Chief Judge will remain, and there will be no costs.

SIR G. MELLISH, L.J.:—

In the case of *Ex parte Mills* (1) there was an action at law against two persons, one of whom had become a liquidating debtor. The trustee might have applied at once, under the 289th Rule in Bankruptcy, to restrain the action against the liquidator, and have allowed the action to proceed against the solvent Defendant under the 112th section of the *Bankruptcy Act*. But he did not avail himself of that provision, and for a considerable time the action had gone on against the two, and we said that it would not be right to bring the matter into bankruptcy, or to do anything which would prevent their trying the action against the solvent party. I am disposed to think that in equity, if there was a *bonâ fide* suit against a solvent person, as an accounting party, and another person who became a bankrupt or a liquidating debtor, it would hardly be right to have the account taken in bankruptcy. Generally speaking, the solvent person is the person really interested in seeing how the account is taken, because he is the person who has to pay what is found due. Therefore, if there had been no evidence of *Robert Stordy Dixon* having become insolvent, I should be disposed to doubt whether it would have been right to prevent the account being taken in the Court of Chancery; but as he has become a liquidating debtor too, and the whole matter substantially resolves itself into the question, what is to be the amount of proof against their estates, it appears to me that it is clearly a thing that ought to be determined in bankruptcy.

Solicitors for the Appellant: Messrs. *James, Curtis, & James*, agents for Messrs. *Nanson & Clutterbuck, Carlisle.*

Solicitors for the Respondents: Messrs. *Pattison, Wigg, & Co.* agents for Messrs. *Andrews, Barrett, & Andrews, Weymouth.*

(1) Law Rep. 6 Ch. 594.

L. J. M.
1873
March 4, 14.

Ex parte WATERS. *In re* HOYLE.

Bankruptcy—Proof—Debt incapable of being fairly estimated—Bankruptcy Act, 1869, *s.* 31—*Unilateral Agreement.*

3 Ch D. 465, 479
5 Ch D 373.
14 Ch D 581

H. entered into a written agreement with *S.* and *A.* that he would supply them with steam-power for any looms that might be put up in their weaving shed for a term of twenty-one years from August, 1858, at a fixed annual rent per loom, payable in advance. In 1865 *S.* and *A.* assigned their weaving shed and the benefit of the agreement to *W.* In 1871 *H.* mortgaged his mill, which contained the steam-power; and in 1872 he filed a petition for liquidation by arrangement, under which a trustee was appointed. The mortgagee then took possession of the mill and repudiated the agreement. *W.* was, in consequence, obliged to obtain steam-power for his looms at a much higher cost; and he claimed to prove in the liquidation for the injury which he had sustained:—

Held (reversing the decision of *Bacon*, C.J.), first, that although the agreement for the supply of steam-power might be put an end to at the commencement of any year by the owners of the weaving shed discontinuing to work any looms, the agreement was not unilateral, and could be sued on at law:

Secondly, that the damages sustained by the owner of the weaving shed were such as could be fairly estimated, and that *W.* was entitled to prove for them in the liquidation.

THIS was an appeal from an order of the Chief Judge in Bankruptcy, refusing to admit a proof for £2835 8*s.* 2*d.*, against the estate of *Robert Hoyle*, a liquidating debtor.

On the 28th of September, 1858, *Robert Hoyle*, who was the owner of a mill at *Hollin* in *Lancashire*, entered into a written agreement with *W. Simpson* and *J. Ashworth*, who were the lessees of an adjoining weaving shed and premises, whereby, in consideration of the proportionate rent thereby reserved, and of the covenants therein contained, *Robert Hoyle* demised and leased unto *Simpson* and *Ashworth*, their heirs, executors, administrators, or assigns, the steam-power requisite for any number of looms that might be put up and erected in the weaving shed situate at *Hollin*, and adjoining *Wood Mill*, the property of *Robert Hoyle*, and also all the steam-power for a warping mill, winding engine, and bearing frame, lathe, and grindstone, and for the due warming of the said premises, to have and to be supplied with the said steam-power from the 7th of August, 1858, for the term of twenty-one

years, yielding and paying for each loom by steam-power in the said shed, yearly, the sum of £1 3*s.* 3½*d.* by equal quarterly payments, the said rent being always due and payable in advance; and the steam-power required for the warping mill and winding engine should be charged as for one loom, but no charge should be made for the steam-power required for the bearing frame, lathe, and grindstone, and for warming the said premises. And it was provided that *Robert Hoyle*, his heirs, executors, administrators, or assigns, would turn the said looms fifty-eight hours in each week (holidays and spaces of time required by Act of Parliament excepted) at the rate of 180 picks per minute. And it was thereby provided that, if the said *W. Simpson* and *J. Ashworth* should at any time during the continuance of the said term become bankrupt or insolvent, or stop business for any like reason, then and in such case the agreement should, if the said *R. Hoyle*, his heirs, executors, administrators, or assigns should think proper, become null and void, as if it had never been made.

Simpson and *Ashworth* erected 188 looms on the premises, and were supplied by *Hoyle* with the steam-power to work them, for which, under the agreement, they paid him a rent of £218 18*s.* 10*d.* a year. This rent they continued to pay until the 10th of November, 1865, when they executed an assignment of their lease and also of the benefit of the agreement of the 28th of September, 1858, to *W. & T. B. Waters*, who afterwards continued to pay the same rent to *Robert Hoyle* for the steam-power supplied by him to the looms.

In 1871 *Robert Hoyle* mortgaged his mill to *Joseph Stansfield*.

In June, 1872, *Hoyle* filed a petition for liquidation by arrangement, under which *William Butcher* was appointed trustee of his property. In September, 1872, *Stansfield* took possession of the mill under his mortgage, and he refused to supply the Messrs. *Waters* with steam-power on the terms of the agreement with *Hoyle*, and in order to keep their looms going they were compelled to enter into an agreement with *Stansfield* to pay him for the steam-power requisite for their looms at the rate of £12 a week, or £624 a year, being an increased rent of £405 1*s.* 2*d.* a year. They then carried in a claim against *Hoyle's* estate for damages resulting from his breach of the agreement, amounting to

L. J. M. 1873 *Ex parte* WATERS. *In re* HOYLE.

£2835 8*s.* 2*d.*, being the amount of the increase of rent for the seven years remaining unexpired of the term of twenty-one years. The trustee refused to admit the claim, and the Messrs. *Waters* applied to the Judge of the County Court that their claim might be admitted to proof. The Judge ordered that they should be admitted to prove upon the estate for such sum (if any) as might, by an issue to be tried before a jury, be ascertained to be due for damages for breach of the agreement. From this order the trustee appealed to the Chief Judge in Bankruptcy, who reversed the order of the County Court Judge, being of opinion that the damages were a liability which was incapable of being fairly estimated (1).

(1) 1873. Feb. 1. W.N. (1873) 30
SIR JAMES BACON, C.J. :—

I am afraid that this objection to the proof must prevail. It is to be observed that this statute introduces a new rule of law. There could formerly be no proof in bankruptcy for unliquidated damages. That was thought to be a defect in the law, and it is cured by sect. 31 of the Act of 1869. But that section can only apply to cases which come strictly within its words. Those words are very plain, and the mode of carrying the new rule into effect is plainly indicated. [His Lordship read the section.] How can I say that the value of this debt which it is now sought to prove is capable of being fairly estimated? How can I tell for what number of looms the steam-power may be in future required? A jury is asked for to decide what damages have been sustained by the claimants by reason of the breach of this contract, which is to supply "the steam-power requisite for any number of looms that may be put up and erected in the weaving shed." This number might be altered at any time, or the Messrs. *Waters* might require no steam-power at all. It never could have been the intention of the Legislature that these gentlemen should be entitled to prove against the bankrupt's estate for these damages, estimated upon the assumption that during the whole remainder of this term of twenty-one years the same amount of steam-power will be required by them as hitherto, when the very next day they might turn their weaving shed to some other purpose for which they would require no steam-power at all. The damages are wholly incapable of being estimated. The consideration of what may be the consequences to the bankrupt, if the proof cannot be admitted, will not assist the argument. Then it is said that some damage has been actually already sustained by the breach of the contract. But the order of the County Court Judge is not based upon that, nor has any such claim been made; and nothing which is now done will prejudice any such claim if it is made hereafter. The damages for which the claim is made are, in my opinion, incapable of being fairly estimated, and without expressing any opinion as to the other part of Mr. *Little's* argument, I think that the order of the County Court Judge admitting the proof must be discharged. It is not, however, a case for giving costs. The trustee will take his costs out of the estate.

Messrs. *Waters* appealed from the decision.

Mr. *Swanston*, Q.C., and Mr. *Jordan*, for the Appellants:—

The agreement was made for good consideration, and could be enforced. The payments for steam-power were made in advance, and *Simpson* and *Ashworth* had to pay throughout the year on account of as many looms as they had at the beginning. The future liability in respect of the agreement is capable of being fairly estimated, and is proveable under the 31st section of the *Bankruptcy Act*, 1869. The past conduct of the parties, and all the surrounding circumstances, must be taken into account. We have had 188 looms in use for fourteen years, and a jury would easily estimate the damage for the future: *Ex parte Llynvi Coal and Iron Company* (1); *Ex parte Jackson* (2). If this claim cannot be proved, the debtor will not be discharged from it, which is contrary to the object of the Act.

Mr. *Little*, Q.C., and Mr. *S. Taylor*, for the trustee:—

This is a unilateral contract, not under seal, and therefore no damages can be claimed for its breach. Messrs. *Simpson & Ashworth* might at any time have given up working any looms at all, and then no rent would have been payable: *Addison* on Contracts (3); *Cooke* v. *Oxley* (4); *Burton* v. *Great Northern Railway Company* (5).

At any rate the liability cannot be estimated. The number of looms at work might continually fluctuate, and the liability was uncertain like that on a guarantee, on which no proof can be sustained: *Merrill* v. *Frame* (6).

SIR G. MELLISH, L.J.:—

This is an appeal from a decision of the Chief Judge reversing an order of the County Court Judge by which a jury was directed to be summoned for assessing the damages for breach of an agreement entered into by the bankrupt before his bankruptcy.

Two questions were argued on the appeal. First, it was said that the agreement was void for want of mutuality. No doubt it

(1) Law Rep. 7 Ch. 28.
(2) 20 W. R. 1023.
(3) 6th Ed. p. 13.
(4) 3 T. R. 653.
(5) 9 Ex. 507.
(6) 4 Taunt. 328.

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is a rule that there must be mutuality in an agreement which is not under seal, and if one party is bound and the other not bound it cannot be enforced. What, then, is this agreement? On the face of it, it appears that *Simpson* and *Ashworth* had erected a weaving shed on a piece of land adjoining the mill owned by *Hoyle*, which they held under a lease for twenty-one years; and this agreement was accordingly entered into for supplying *Simpson* and *Ashworth* with steam-power for the purpose of their looms. [His Lordship read the agreement, and continued:—] Now it is contended that there is no mutuality in the agreement, because the payment is not fixed, but is to vary according to the number of looms, and that if there were at any time no loom, or if *Simpson* and *Ashworth* were to cease from business, they would be no longer bound to make any payment under the contract; though it is to be observed that, by a special proviso at the end of the agreement, *Hoyle* might himself put an end to the agreement if *Simpson* and *Ashworth* entirely gave up business. It is not necessary to say what would have been the effect of the agreement if it had not been stipulated that the payment should be made in advance, though I should be reluctant to hold, even then, that such an agreement was not binding, simply because one party might give up business, and so bring it to a conclusion. If one party is willing to run the chance, feeling confident that in fact the business would not be given up, and so make the agreement with his eyes open, it would be a hard thing if the Court were to hold that the agreement was not binding on him.

But in the present case the rent, as it was there called, is to be paid in advance. There is nothing to shew that there were no looms existing at the time when the agreement was signed; on the contrary, it seems clear that there must have been some; for the first payment of rent became due three days after the date of the agreement. At any rate, the rent in advance for the first year, according to the number of looms, became immediately payable. If a person says, "If you pay me in advance I will supply you with steam-power for a year, and the same arrangement shall go on from year to year," it cannot be said that the agreement fails from want of mutuality, merely because one party may put an end to it at the beginning of any year. I think, therefore, that there is no force in the first objection.

Then comes a question of more importance, whether the agreement having been broken by the insolvent, the party who has sustained an injury can prove against his estate? The agreement has been broken in two ways. In the first place, the liquidation makes it impossible for *Hoyle* to continue to perform it, because the trustee would repudiate it, being an onerous contract; and, in the second place, *Hoyle* had mortgaged the mill, and the mortgagee had entered and taken the mill from him, and so the agreement had been put an end to. The question is, therefore, whether there can be any proof for the breach of that agreement, and that question depends upon the proper construction of the 23rd and 31st sections of the *Bankruptcy Act*, 1869. By the 23rd section (which we had occasion to consider in the case of *Ex parte Llynvi Coal and Iron Company* (1)) it is clear that where a subsisting agreement between the bankrupt and a third party, which may or may not be profitable, is capable of being performed at the time of the bankruptcy, the trustee has an option to repudiate it or to accept it. If he accepts it, he has to perform it, but whether he accepts it or not the bankrupt is absolutely discharged from liability. Then the Act says that any person injured may prove for the amount of injury he has sustained. It appears to me, therefore, that if there had been no mortgage in this case, it would have been wholly within the section. If the contract had been beneficial for *Hoyle*, as it might have been if the price of coals had gone down, I do not see why the trustee should not have taken it up, and if it were broken there would have been a clear right to prove for the injury.

If that be so, it can make no difference that the trustee was prevented from exercising an option because the mortgagee had entered and put an end to the contract. There was then nothing for him to accept, because there were no means of performing the agreement. That throws light on the 31st section of the Act, and shews that these damages are damages capable of estimation, and are such a debt as may be proved for under that section. As was said by Lord Justice *James* in *Ex parte Llynvi Coal and Iron Company*, it was the object of the Legislature to discharge the bankrupt from every possible liability. I entirely concur in that opinion. It is difficult to imagine any kind of

(1) Law Rep. 7 Ch. 28.

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contract (I speak of business contracts) in respect of which, if broken before, or put an end to by, the bankruptcy, a jury could not point out a fair way of estimating the damages under the direction of the Judge. Is there any insuperable difficulty in fixing the amount of proof in this case? *Simpson* and *Ashworth* could have maintained an action against *Hoyle*, and the Judge would have given the jury the necessary directions, and they would have had no difficulty in making all just allowances in estimating the damages, according to the price of coal, whether more or less. Here the contract was actually worked for fourteen years, and the rent was paid for the steam-power. It would be easy to see what the average rent was, and the jury would have to consider what probability there was of its being continued if there had been no bankruptcy, and what was the difference between the price paid for the steam-power under the contract and that which would now have to be paid, the contract being broken. It would be fair to suppose that as the business had gone on for fourteen years it would continue to go on. I therefore think there would be no difficulty in assessing what the damages ought to be, and I hold it to be the duty of the Court to carry out the evident intention of the Legislature, and to bring within the Act all possible contracts that have been broken so as to discharge the bankrupt.

No doubt there are some contracts which could not form the subject of proof, namely, those which are not put an end to by the bankruptcy—such as the liability of a lessee who had assigned his lease. The covenants would not have been put an end to; and no one could properly estimate whether an assignee would at any future period commit a breach, or if he did, whether he would pay for it himself; and many other cases might be suggested. But where the contract has been actually broken, I can conceive of no cases in which damages could not be estimated. At all events they can be in this case. It is clearly in accordance with the Act, and fair to all parties, that the proof should be allowed. The order of the Chief Judge must, therefore, be reversed.

Solicitor for the Appellants: Mr. *J. C. Needham, Manchester.*

Solicitors for the Respondent: Messrs. *Pritchard & Englefield*, agents for Messrs. *Grundy & Coulson, Manchester.*

Ex parte MILLS. *In re* TEW.

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1873
March 15, 22.

Bankruptcy—Proof of Debt—Lender receiving Share of Profits—28 & 29 Vict. c. 86, s. 5.

M. lent certain sums to *T.*, a trader, under a written agreement pursuant to 28 & 29 Vict. c. 86, by which *M.* was to receive in lieu of interest £40 per cent. on the profits of *T.*'s business, and after a certain period was to have liberty to determine the agreement at any time, in which event the money was to be repaid by instalments secured by bills of exchange. While this agreement was in force *M.*, in conjunction with *H.*, lent *T.* other sums of money, for which interest at £10 per cent. was to be paid. *M.* determined the agreement, and *T.* gave *M.* bills of exchange for the moneys advanced under it, except certain profits which were carried over to the £10 per cent. account; but *M.* and *H.* went on advancing to *T.* other sums on the £10 per cent. account. After all the trade debts of *T.* which had been due during the pendency of the agreement had been paid, *T.* became bankrupt. *M.* carried in a proof for the moneys advanced under the agreement, and *M.* and *H.* carried in another for the balance on the £10 per cent. account:—

Held (affirming the decision of the Chief Judge), that *M.* could not prove for the moneys advanced under the agreement, though all other debts existing during its continuance had been paid:

Held (reversing the decision of the Chief Judge), that *M.* and *H.* could prove for all moneys lent at interest without any stipulation as to profits, whether such moneys were advanced before or after the determination of the agreement, and that although there could not have been a proof for the whole of the balance if it had in part consisted of profits, yet as according to the ordinary mode of attributing payments in an account current the profits carried to this account had been discharged by payments made by *T.* on account, the balance could not be treated as in any measure arising from profits, and the proof must be for its whole amount:

Semble, if an advance were made under the Act, with an agreement for a share of profits, and further sums were advanced without any such agreement, with an intention to elude the Act, the lender would be a partner.

THESE were appeals from two orders of the Chief Judge disallowing proofs.

By an agreement dated the 11th of June, 1866, between *Tew* of the one part, and *Thorns & Mills* (trading under the name of *Bosville, Mills, & Co.*), of the other part, reciting that *Tew* had proposed to *Bosville, Mills, & Co.*, to enter into partnership with him in his business of a hosiery manufacturer on the terms of an equal division of profits, which proposal they had declined to entertain, but had, instead of the proposed partnership, agreed to

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advance him money to enable him to develop and extend his business on the terms thereinafter mentioned, which were intended to constitute a contract within 28 & 29 Vict. c. 86, *Tew*, in consideration of *Bosville, Mills, & Co.* advancing him £700, and such further sums to the extent of £300 as they might think needful from time to time for the purposes of his business, the total amount to be lent being limited to £1000, agreed to pay to *Bosville, Mills, & Co.* 40 per cent. of the net profits of his business. It was provided that the agreement should last for ten years from the 1st of July, 1866, after the expiration of which *Bosville, Mills, & Co.*, were to accept 20 per cent. of the profits for the next ten years. Rent and repairs were to be borne out of *Tew's* shares of profits. It was further agreed that in case *Bosville, Mills, & Co.* should wish to withdraw the money lent, it should not be withdrawn before the expiration of eighteen months from the 1st of July, 1866, and if they should be desirous of withdrawing it after that time they might do so by drawing bills on *Tew* at six, nine, and twelve months in three equal proportions, which bills *Tew* agreed to accept. *Tew* also agreed to repay any sum advanced in excess of the £700 on receipt of the cash for the goods on which the extra advances were made. The final clause stated that the agreement was intended to be strictly within 28 & 29 Vict. c. 86, and that if anything contained in it should be or be deemed to be contrary to the provisions of that act, or as constituting *Bosville, Mills, & Co.* partners with *Tew*, the same should be considered as expunged from the agreement and void.

On the 23rd of February, 1871, this agreement was cancelled by mutual consent. The amount due to *Bosville, Mills, & Co.* under it at that time was £1244 10*s.* *Tew* gave them for this three bills for £414 16*s.* 8*d.* each, payable at six, nine, and twelve months respectively, and a memorandum stating these facts was indorsed on the agreement. None of these bills were ever paid, and they formed the subject of the proof by *Mills & Thorns.*

In January, 1870, *Harvie* became a member of the firm of *Bosville, Mills, & Co.* The firm made various advances of money to *Tew*, independently of the agreement, partly before and partly after the 23rd of February, 1871, and this account included sums (*ultra* the balance of £1244 10*s.*) which had become due as profits,

under the agreement, but which had been treated in the accounts as forming part of the new advances as if re-advanced. On the whole of this account *Tew* was to pay £10 per cent. interest, and an account current was kept. *Tew* from time to time made payments in part discharge of his liability on this account, and treating the payments so made as applicable to the earlier items with which he was charged on the other side of the account, the sums with which he was charged as in respect of profits re-advanced were all paid. A considerable sum, however, was due to *Bosville, Mills, & Co.* on the balance of the account, for which *Tew* accepted the following bills, one dated the 1st of January, 1872, for £585, payable three months after date, another dated the 1st of January, 1872, for £686 16*s.* 6*d.*, payable six months after date, and one dated the 1st of February, 1872, for £500, payable three months after date, making together £1776 19*s.* 6*d.* These bills formed the subject of the proof of *Mills, Thorns, & Harvie.*

On the 24th of May, 1872, *Tew* filed a petition for liquidation. *Mills & Thorns* tendered a proof for £1275 8*s.* 6*d.*, being the amount of the above £1244 10*s.* and interest, and *Mills, Thorns, & Harvie* tendered a proof for the £1776 19*s.* 6*d.* The trustees refused to admit either proof. The Registrar of the County Court at *Leicester* sitting as Judge found as a fact that all *Tew's* debts which existed before the 23rd of February, 1871 (on which day the agreement of the 11th of June, 1866, was put an end to) had been paid, and on this ground admitted the proof of *Mills & Thorns*, and he also admitted the proof of *Mills, Thorns, & Harvie.* The trustee appealed, and the Chief Judge reversed the decisions being of opinion that neither of the claims was proveable in competition with other debts of *Tew* (1). *Mills & Thorns* appealed

(1) 1873. Jan. 20.

SIR JAMES BACON, C.J. :—

I will hear counsel for the trustee further if necessary, but I will state at once what I think as to the contention that a partnership was constituted. As Mr. *Roxburgh* truly observed, this is a question between you, the creditors, and the debtor, for the trustee cannot as regards this question rely on any ground on which the debtor himself could not have relied. In the face of this agreement nothing can be more clear than that the contract between the parties was, that there should exist no partnership between them. Not only is that made clear by the recital, but the very paragraph with which the agreement concludes shews plainly that the lender intended to incur no liability against which the

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from the first, and *Mills, Thorns, & Harvie*, from the second of these decisions of the Chief Judge.

Mr. *Roxburgh*, Q.C., and Mr. *Doria*, for the Appellants:—

As regards the first proof, we submit that, as all the debts which

statute protects him. The statute was passed in order to remedy what had been felt to be inconvenient in the doctrine of *Waugh* v. *Carver* (2 H. Bl. 235), which is a long and well-established authority on the subject, and notwithstanding anything we have heard to-day against it, or any observations which have been made upon it by Judges, it still remains the leading authority. Participation in profits was before the statute held to constitute a partnership, and established the liability of the person who received a portion of the profits to pay a portion of the losses incurred. The statute prevents that, and says that the reception of profits shall not by itself alone constitute a partnership between the person lending the money and the borrower. Then in order to do justice to the persons who might not know of the secret agreement between the borrower and the lender the 5th section of the Act provides, in the plainest terms and on the strictest principles of justice that the lender of money who has stipulated for a share in the profits, however great his debt between himself and the borrower may be, shall not demand or seek to recover payment until all the other creditors, in the event of his becoming insolvent, shall have been settled with. Now that position seems to cover this case, because in the case as proved by the parties the facts beyond all question are, that the agreement being such as has been stated moneys were lent by capitalists in *London*, and they were to share according to the proportion which the agreement provided in the profits of the business carried on by *Tew*. That went on up to a certain time, when in February 1871 they agreed to put an end to that agreement, which they were quite competent to do, and which they did effectually by the memorandum indorsed on it. But then at that time of the money which had been lent £1200 remained due, and remains due till this moment. It has never undergone any change. It is in respect of the £1200, the balance on that account on which they had received profits, that the present parties desire to prove. Their right to prove is quite clear. On that question I cannot entertain any doubt, but they cannot have a right to receive a dividend until all the other creditors have been paid. The £1700 stands on precisely the same ground. The £1700 is the balance of a debtor and creditor account between the borrower and the lender. That account was on a drawing loan for a particular period, and the money lent is represented by the debits to the amount there specified, and the lenders give credit for the amount of the profits they had received and were entitled to by virtue of the agreement. The result of that account is, that £1771 is due to the lender. How does that differ from the £1200? In no respect that I can conceive. On these two debts I am of opinion that the present claimants are entitled to claim, but not to prove. They are entitled to have the claim entered for these amounts, limited to so much as they can establish, and make them into proofs when

existed while the contract was in force have been paid, the creditor is in the same position as any other creditor. The Act intended to improve the position of persons advancing money for the purposes of a business; but if the construction of the Act which has been adopted by the Chief Judge is upheld, their position is made worse. If *Mills & Thorns* had been partners with *Tew*, and the partnership wound up, and a balance found due to them, then, if the partnership debts had been paid, and *Tew* had afterwards become bankrupt, they could have proved; yet the Chief Judge has held that, because they were not partners, but lent money under the Act, they cannot prove.

As to the second proof, there is nothing in the Act to prohibit it; and as *Mills, Thorns, & Harvie* were not partners with *Tew*, there is nothing in the general law to prevent it.

Mr. *De Gex*, Q.C., and Mr. *Bagley*, for the trustee:—

The first proof is forbidden by the Act, which does not say that the lender shall not prove in competition with a particular class of creditors, but that he shall not prove. There cannot be a qualified proof to come after other debts: *Ex parte Moore* (1); *Ex parte Bass* (2).

Then, as to the second proof, the Act does not say that the lender shall not recover any part of the amount of the loan specified in the agreement, but that he shall not recover any part of his principal—*i.e.*, of any moneys owing to him from the trader. Suppose a capitalist lent a man £1000 on the terms of receiving half the profits of a considerable business, and then at once ad-

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the creditors under the present insolvency or liquidation shall have been satisfied.

Mr. *Roxburgh* suggested that the creditors mentioned in the 5th clause of the agreement must be taken to be only those persons who were creditors when the loan was made. That would be not only to go against the very words of the statute, but to disappoint the whole policy and intention of the statute. The statute speaks of the insolvency of the debtor and of the persons who are creditors when he becomes insolvent, and says that these creditors shall be satisfied before these persons who have lent their money on the terms of the Act can prove as against the estate. The rights of parties are settled by Act of Parliament.

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(1) 2 Gly. & J. 166.

(2) 36 L. J. (Bky.) 39.

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vanced £10,000 more; could he be allowed to prove for the £10,000?

The Lord Justice Mellish:—I am disposed to think that, in the case of an attempt to elude the Act, the person advancing the money would be treated as a partner.

Mr. *Roxburgh*, in reply on the first proof.

Sir G. Mellish, L.J.:—

These are appeals from two orders of the Chief Judge, reversing orders of the Judge of the County Court of *Leicester* admitting proofs.

On the 11th of June, 1866, *Tew* entered into an agreement with *Thorns & Mills*, by which *Thorns & Mills* agreed to advance to *Tew* £700, and, if required, further sums up to £300, for which they were to receive £40 per cent. of the profits of *Tew's* business; and it was stipulated that *Thorns & Mills* might, at any time after eighteen months, put an end to the arrangement; and in case of their doing so, the money was to be repaid by instalments, which were to be secured by *Tew's* accepting bills payable at six, nine, and twelve months. On the 23rd of February, 1871, a memorandum putting an end to this agreement was indorsed upon it, and three bills were given for £414 16*s.* 8*d.* each, making up the amount of the moneys due from *Tew* under the agreement. These bills are the subject of the first proof.

After the full sum of £1000 had been advanced under the agreement, the firm of which *Thorns & Mills* were members went on advancing further sums, both before and after the agreement had been put an end to. These sums, it is deposed, were advanced under an agreement that the lenders should receive interest at £10 per cent. The sums thus advanced, with interest, form the subject of the second proof.

The first question is, whether *Thorns & Mills* can prove for the first sum. The Chief Judge has decided that they cannot, for that they are prevented from so doing by 28 & 29 Vict. c. 86, s. 5. It is not disputed that, if the bankruptcy had taken place while the agreement was still in force, or while trade debts remained due

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which were contracted while it was in force, they could not have proved. But it is contended by the Appellants that though they are not entitled to prove in competition with creditors who became so before the 23rd of February, 1871, they may prove in competition with other creditors of the bankrupt. I am, however, of opinion that the statute makes no such distinction. *Thorns & Mills* are seeking to prove in competition with other creditors for money advanced under an agreement coming within the statute, and the words of the statute are against this. It was urged, in answer, that the intention of the statute was to alter the law of partnership for the benefit of persons advancing money to traders, and that it cannot have been intended to put a person so advancing money in a worse position than if he had been a partner; and it was said that, if he had been a partner, and the accounts of the partnership had been settled, and all its debts paid, he could have proved against his former partner in competition with subsequent creditors, and that therefore the statute ought to be so construed as to admit a proof in the present case. But it would require very strong reasons to convince me that I ought to depart from the words of the statute, which, as it seems to me, are quite clear. I am not sure that, if the attention of the Legislature had been called to this precise point, it would have modified the enactment in the sense contended for by the Appellants. A trader borrows money under such an agreement as this; he begins to lose; the agreement is put an end to; but no notice of this is given to the world, and the result is that the trader goes on with less capital than he appears to have. This case appears to come within the mischief to be guarded against by this section. In the case of a partnership there are two different estates to be wound up. Here there is only one estate; and how is a distinction to be made between creditors who became such before or after a certain date? An inquiry would have to be entered into as to when all the debts were contracted, for which I can see no ground in the Act. I am of opinion that the enactment must be construed according to the plain meaning of its words, and that the first proof must therefore be rejected.

A more difficult question arises as to the moneys subsequently advanced. As to the sums advanced after the agreement was

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put an end to, I cannot see any reason why there should not be a valid proof. The Chief Judge does not seem to have taken notice of this being the fact. The parties were entitled to put an end to the agreement at any time, and when they had done so I do not see why the lenders should, as to subsequent advances, be in any different position from other persons; but as to advances made before it was put an end to there is more difficulty. The question is whether a person who has made a loan under the Act can prove for further sums which he advances while that agreement is subsisting, such advances not being made under any such agreement as is mentioned in the Act. The statute does not say that he may not prove for such advances, and I am unwilling to import into the statute anything which I do not find there. Mr. *De Gex* contends that the analogy of partnership ought to be followed. But the very object of the statute was to exclude partnership. No doubt, if it were shewn that the whole was one transaction, and that the Act was being abused, as, for instance, if a small advance was made with a stipulation for a disproportionate share of profits, and a large advance was made, nearly at the same time, on the terms of an ordinary loan, the Court might be justified in saying that the whole must be taken together; and though, if the large advance was not made under an agreement in writing, the statute would not apply, it might be held that the ordinary rule of partnership must apply. In the present case these sums were certainly not advanced under the written agreement, for it plainly excludes them. Can the advancing them have the effect of making the lenders partners? The Chief Judge thought not, and I see no substantial grounds for saying that it had that effect. It is urged that when a person who has lent money under an agreement giving him a share of profits advances further sums at interest, that makes him a partner, because under the agreement he gets the benefit of the increase of profits arising from the use of the further advances. No doubt he does, but so he would if the money were borrowed from any one else. I doubt whether it would be for the benefit of creditors to put upon the statute the construction for which the Respondent contends, for when a person has made advances under an agreement of this description, then, if the debtor gets into difficulties, no advances can be made by the person

who is most likely to be anxious to enable him to retrieve his affairs. But my real ground is that the statute only says that the creditor shall not prove for the moneys advanced under the agreement, and does not say that he shall not prove for anything else.

Then it appears that certain sums due for profits under the agreement were brought into the account for the balance of which the second proof is made, and there certainly cannot be any right of proof in respect of these profits. But on looking into the accounts it appears to me that, according to the ordinary rule as to attribution of payments, these sums have been paid. Now a creditor who advances money on an agreement within the Act cannot, indeed, prove in competition with other creditors, but still he is a creditor, and if he has been paid he cannot be called upon to refund. I am of opinion, therefore, that the second proof must be admitted.

Solicitors: Mr. *S. C. H. Sadler;* Mr. *Steinberg.*

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[1871 C. 191.]

Election—Married Woman—Settlement—Reversionary Interest of Married Woman.

After a lady, who had married during her minority, had come of age, a settlement was executed in the year 1850 to which her father was a party, by which, after reciting that on the treaty for the marriage it had been agreed that certain sums of stock belonging to the husband, and a reversionary interest belonging to the wife, should be settled upon the trusts thereinafter mentioned, and that the wife's father had agreed to transfer certain bank shares to the trustees, to be held upon the trusts thereinafter mentioned, and reciting the transfer of the sums of stock and the bank shares to the trustees, trusts were declared as to the sums of stock for the husband for life, and then for the wife for her life; and as to the bank shares, during the joint lives of the husband and wife, to pay half the income to the husband and the other half to the wife for her separate use, and after the decease of either to pay the whole income to the survivor for life, and, subject to the above life interests, the sums of stock and bank shares were to be upon the trusts therein mentioned for the children of the marriage. By another witnessing part the husband and wife purported to assign the wife's reversion to the trustees, to be held, when it came into possession, on the same trusts as the bank shares. In 1865 the marriage was dissolved by a decree of the Divorce Court. In 1871 the wife's reversion fell into possession, and she filed a bill to establish that she was not put to her election under the settlement, and to have the fund transferred to her:—

Held (reversing the decision of the Master of the Rolls), that the wife was put to her election between the interests provided for her by the settlement and her right to receive this fund free from the settlement:

Held, further, that in the event of her electing to take against the settlement, she was bound to account for all income received under it since the date of the order *nisi* for dissolution, and that the parties disappointed by her election had a lien on the fund for what she had so received; but that she was not liable to account for income received during the coverture.

Campbell v. *Ingilby* (1) considered.

THIS was an appeal from a decision of the Master of the Rolls, who held the Plaintiff not put to her election.

On the 9th of April, 1849, a marriage was solemnized between Sir *Henry John Codrington* and the Plaintiff. The Plaintiff was a

(1) 21 Beav. 567; 1 De G. & J. 393.

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minor at the time of the marriage, but attained her majority about a month afterwards.

By indenture, dated the 31st of March, 1850, made between the husband and wife of the first part, and *C. W. Smith* (the wife's father) of the second part, and four trustees of the third part, after reciting a settlement of the 17th of August, 1824, under which the wife was absolutely entitled (but not for her separate use) to a sum of 80,000 S.R., subject to the life interests of her father and mother, and reciting that upon the treaty for the marriage it was agreed that, as well the two sums of £6213 Consols and £4562 Reduced Annuities, belonging to the husband, and which had been transferred by him into the names of the trustees, as also all the interest of the wife or of the husband in her right, under or by virtue of the indenture of the 17th of August, 1824, should be settled upon the trusts and in manner thereinafter mentioned; and that *C. W. Smith* had agreed to transfer nine shares belonging to him in the *Bank of Bengal* into the names of the trustees, and also to make up at the end of each year, as well during the joint lives of himself and the husband and wife as during the joint lives of himself and the survivor of them, such a sum as, together with the dividends of the bank shares, would make the annual sum of £400, such bank shares and annual sums to be settled upon the trusts and in manner thereinafter mentioned; and that, for better effectuating the purposes aforesaid, *C. W. Smith* had agreed to enter into the covenant on his part thereinafter contained, and that, in pursuance of his agreement in that behalf, *C. W. Smith* had, prior to the execution of the settlement, transferred the bank shares into the names of the trustees, It was witnessed that, in pursuance and performance of the said agreement in that behalf thereinbefore contained, and in consideration of the premises, and for divers other good causes and considerations him the said *C. W. Smith* thereunto specially moving, he, the said *C. W. Smith*, covenanted with the trustees for payment to them of the annual sums requisite to make up, with the dividends of the bank shares, the yearly sum of £400. And it was agreed that the trustees should apply those yearly sums in the same way as the dividends on the bank shares were applicable under the trusts thereinafter contained. By another witnessing part it was declared that the

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trustees should stand possessed of the husband's funds and the bank shares upon the trusts therein mentioned, which were, first, the ordinary trust to allow the funds to remain in their actual state of investment, or to vary the investment as therein mentioned, and to pay the income of the husband's funds to the husband for his life, and after his decease to the wife for her life, and to pay, during the joint lives of husband and wife, the income of the bank shares and of the investments substituted for them, as to one moiety to the husband, and as to the other moiety to the wife for her separate use; and after the decease of either, to pay the whole income to the survivor for life, and after the decease of the survivor of husband and wife all the above funds were to be held upon the trusts therein declared for the children of the marriage. And it was lastly witnessed, that in pursuance and performance of the said agreement in that behalf, the wife, with the full privity of the husband, bargained, sold, assigned, transferred, and set over, and the husband assigned, ratified, and confirmed to the trustees, all that the right, title, interest, possibility, property, claim, and demand whatsoever, both at law and in equity, of the wife, or of the husband in her right, under or by virtue of the settlement of the 17th of August, 1824, of and in the 80,000 S.R. thereby settled, and of and in the stocks, &c., in or upon which the same or the produce thereof might be invested, and of and in the income thereof, to hold the same, subject to the life interests of *C. W. Smith* and his wife, to the trustees upon trust to obtain transfer or payment thereof to themselves, and stand possessed thereof upon the same trusts as had been declared of the bank shares.

The marriage between the Plaintiff and her husband was dissolved by a decree of the Divorce Court, made on the 2nd of May, 1865, at the suit of the husband, the order *nisi* having been made on the 17th of November, 1864.

The Plaintiff's father survived his wife, and died on the 18th of January, 1871, whereby the 80,000 S.R. came into possession.

The trustees of the settlement of the 17th of August, 1824, declining to transfer the 80,000 S.R. to the Plaintiff, she filed her bill against the trustees of that settlement, the trustees of the settlement of the 31st of March, 1850, Sir *H. J. Codrington* and the two children of the marriage, and several persons claiming under

incumbrances made by her since the dissolution of the marriage on her interest under the settlement of 1850, stating the above facts, and that Sir *H. J. Codrington* and the children insisted that she was bound to elect between her title to the 80,000 S.R. and the benefits given to her by the settlement of 1850, and had elected to take under that settlement, and praying that the trusts of the settlement of 1824 might be performed; that the assignment of the Plaintiff's interest in the 80,000 S.R., expressed to be made by the settlement of 1850, might be declared inoperative; and that the trustees of the settlement of 1824 might be ordered to pay and transfer that fund to her.

The answer of Sir *H. J. Codrington* set up the case of election, and it was argued at the hearing. The Master of the Rolls held that the Plaintiff was entitled to a transfer of the fund, without giving up anything under the settlement (1).

(1) 1872. July 29.

LORD ROMILLY, M.R.:—

In this case the Plaintiff married Admiral *Codrington* in April, 1849. I presume that she was a minor at the time, but a post-nuptial settlement was executed on the 31st of March, 1850, by which post-nuptial settlement two sums of stock, £6213 consols and £4562 reduced, were settled on Sir *Henry Codrington* for life, remainder to the Plaintiff for life, and after her death to her children as they should appoint, and in default of appointment amongst them equally. By the same deed trusts were declared of *Bengal* Bank shares belonging to the wife's father, the trusts being during the joint lives of the husband and wife to pay half the income to the wife for her separate use, and the other half to the husband; after the decease of either, the whole income to the survivor, and after the death of the survivor, the fund to be held in trust for the children of the marriage. By settlement of the 17th of August, 1824, made on the marriage of the father and mother of Lady *Codrington*, there was a sum of 80,000 S.R. that were settled upon her, so that upon the death of the survivor of her father and mother they would become vested in possession. By the indenture of the 31st of March, 1850, it was also witnessed that Sir *Henry Codrington* assigned and confirmed to the trustees of the settlement all the rights, titles, interest, and possibility of himself in the right of the Plaintiff, under and by virtue of the settlement of the 17th of August, 1824, in the said sum of 80,000 S.R., to be held upon the same trusts as the *Bengal* Bank shares. That, in point of fact, amounts to a covenant on the part of Sir *Henry Codrington* to settle this fund. The marriage of the Plaintiff and Sir *Henry Codrington* was dissolved by a decree of the Divorce Court on the 2nd of May, 1865. *Charles Webb Smith*, the father of the Plaintiff, survived his wife, the mother of the Plaintiff, and he died on the 18th of January, 1871, and thereupon the 80,000 S.R., or the *Bengal* shares and government paper which represented it, fell into possession; and if the coverture had been then subsisting

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Sir *H. J. Codrington* and his children appealed.

Mr. *Southgate*, Q.C., and Mr. *J. W. Chitty*, for the Appellant:—

The Master of the Rolls decided against us on the authority of *Wilkinson* v. *Gibson* (1). We do not dispute the authority of that case, but it decides nothing about election, it only decides that the effect of dissolution of the marriage is to destroy the effect of the husband's assignment of his wife's reversionary fund. We admit this fund not to be effectually settled, but we say that the Plaintiff must elect. Whoever takes a benefit under an instrument must conform to it; he cannot both approbate and reprobate. It makes no difference whether it is by mistake or on purpose that

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this fund would have then become the property of Sir *Henry J. Codrington*, who, under the provisions which I have just stated, would have been compelled to assign the fund to the trustees upon the trusts of the settlement. But the marriage was no longer subsisting, and consequently the fund did not come to Sir *Henry Codrington* at all, and he is not bound, nor indeed able, to transfer it to the trustees of the settlement. The fund came to the wife, Lady *Codrington*, the Plaintiff, and she has entered into no covenant, nor is there anything to bind her in the matter.

The Defendants insist that she must elect either to take under the settlement or against it, which I am inclined to think may be true; but if she elects to take under the settlement, the fund forms no part of the settlement, nor is it in any way bound by the settlement, or in any degree affected by it, unless it fell into possession during the coverture. This is very clearly and fully explained by the Lord Chancellor in the case of *Wilkinson* v. *Gibson* (Law Rep. 4 Eq. 162), which appears to me fully to govern this case. This is as much separate property of hers as if a legacy from a stranger had been given her after the coverture was over. If given during the coverture it belonged to the husband, and if after coverture, it belonged to the lady who had been his wife, but who had ceased to be so; if the husband took it, it belonged to him, and he was bound by the covenant to settle; but if it fell due when the coverture was over the husband had nothing to do with it, and it belonged to the wife and to nobody else.

In my opinion, if she elects to take under the settlement, this is no portion of the settlement; there is no covenant which compels her to settle this, or to give it to Sir *Henry John Codrington*. It is her own absolutely, and in my opinion she can do with it as she pleases; and the deeds in evidence, which have been so much commented upon with regard to the manner in which the Plaintiff has raised money and secured it, have nothing at all to do with the question whether this fund of 80,000 S.R., or what represents it, is or is not the property of the wife. I shall, therefore, make a declaration and decree accordingly, as in *Wilkinson* v. *Gibson*, but without costs, as I think it required this suit to settle the matter.

(1) Law Rep. 4 Eq. 162.

the instrument includes property with which it cannot deal: *Green* v. *Green* (1).

[The LORD CHANCELLOR:—The parties must be taken to have known that the deed could not bind this fund beyond the extent of the husband's interest in it. If, then, the provisions made by the father and husband were intended to be conditional on this fund being brought into settlement in every event, why was not the condition expressed?]

That question applies in all cases of election; the answer is, that the law implies a condition.

[The LORD JUSTICE JAMES:—Suppose the divorce had been occasioned by the husband's misconduct, do you say that the children could have put him to his election because the fund had, through his misconduct, been lost to the settlement?]

No; the husband would not be claiming against the settlement, and would have no power to bring in the fund. The Plaintiff has the power. The principle of election is shewn in *Story* Eq. Jur. (2); *Moore* v. *Butler* (3); *Thellusson* v. *Woodford* (4); *Whistler* v. *Webster* (5).

[The LORD CHANCELLOR referred to *Campbell* v. *Ingilby* (6).]

In the Court of Appeal the case turned on the negligence of the husband. It is to be observed, too, that there the husband asked that the appointees who claimed under the settlement might make compensation to him, because the wife's heir-at-law claimed against it. How could such an equity as that be established?

[The LORD JUSTICE JAMES:—They both claimed through the wife.]

The wife had never in any way repudiated the settlement. If she had been asked to levy a fine, and had refused, there might have been some case. She never in any way claimed against the

(1) 19 Ves. 665; 2 Mer. 86.
(2) § 1077, and § 1093, n.
(3) 2 Sch. & Lef. 249, 266.
(4) 13 Ves. 209.
(5) 2 Ibid. 367.
(6) 21 Beav. 567; 1 De G. & J. 393.

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settlement, and had she not died under disability there probably would have been an equity against her heir on the ground that she had elected to take under it. *Willoughby* v. *Middleton* (1) is very near the present case.

[The LORD CHANCELLOR:—Is there not this distinction, that here we have a void assignment, there a contract which was only voidable?]

In *Anderson* v. *Abbott* (2) there was a contract not binding the wife, just as here there is an assignment not binding her, but she was put to her election. *Brown* v. *Brown* (3) and *Savill* v. *Savill* (4) are also in our favour.

[*Per curiam*:—In *Savill* v. *Savill* the husband was the legal owner of the fund. Here the trustees of the 80,000 S.R. have nothing to do with the settlement.]

The Plaintiff, by her bill, brings them before the Court, and asks to have the question of election decided.

Mr. *Roxburgh*, Q.C.:—We wish to have it decided whether there is any reason, on the ground of election, to interfere with our receipt of this fund. We say that, unless the Appellants can shew that the Plaintiff has elected to take under the settlement, the question whether she is put to her election or not has no bearing on the question whether she has a right to receive this fund.

The LORD CHANCELLOR:—After the course the proceedings have taken, we should be very sorry to be obliged to give the Plaintiff this fund without deciding the question whether she is put to her election or not; and we think that it may properly be decided, for if the Plaintiff is put to her election, and elects to take against the settlement, she has up to this time been receiving income which she is bound to pay back, and there is an equity to stop it out of this fund. It is only a question whether the Appellants are to be put to file a bill to enforce that equity.

[The objection was then withdrawn.]

(1) 2 J. & H. 344.
(2) 23 Beav. 457.
(3) Law Rep. 2 Eq. 481.
(4) 2 Coll. 721.

Mr. *Roxburgh*, Q.C., and Mr. *Jolliffe* (Mr. *W. C. Harvey* with them), for the Plaintiff:—

The Master of the Rolls considered that in the events which have happened the settlement must be treated as if the 80,000 S.R. had not been mentioned in it: *Wilkinson* v. *Gibson* (1). In all cases in which the doctrine of election has been applied somebody has been affecting to deal with property which belonged to somebody else; in such a case a condition may reasonably be implied. Here you cannot imply a condition on the part of the father that the daughter should not take an interest in what he settled unless she brought her property into settlement. What he meant to guard against was the husband's getting the money absolutely by his marital right. If the father's contract was conditional, the result is that if the wife elected to take against the settlement he could claim his money back—a proposition for which no party contends. In *Anderson* v. *Abbott* (2) the reversion of the wife was intended to be settled if it fell into possession during the coverture. That reversion was not the only property settled, and the Master of the Rolls did not hold the income of the other funds affected.

[The LORD CHANCELLOR:—I do not see the reason for that distinction, and I doubt whether the Master of the Rolls intended to make it.]

In *Willoughby* v. *Middleton* (3) the property came into possession during coverture; here nothing did. The Appellants say that the Plaintiff is taking this fund out of the settlement. We say it never was in the settlement, the case being like that of a will not attested by three witnesses, which, under the old law, did not put an heir-at-law to his election. Except in cases of gifts to volunteers, the doctrine of election is not to be applied unless it be clearly shewn that the parties intended the agreement to be conditional.

Mr. *Kekewich*, for the trustees of the fund.

Mr. *Parke*, for some of the incumbrancers.

(1) Law Rep. 4 Eq. 162. (2) 23 Beav. 457. (3) 2 J. & H. 344. 3 Jur. N.S. 1055. 3 Jur. N.S. 883.

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Mr. *Marrack*, for other incumbrancers.

Mr. *Chitty*, in reply :—

I rest the case on the broad principle that a person cannot claim both under a deed and against it. The argument that if there is a condition the father could claim his money back, is not sound. That is making the question one of rescinding a contract, not of election. The analogy to a will not attested by three witnesses is unsound. The case is more like that of a will under the old law expressly devising after-purchased estates, and such a will put the heir to his election : *Hance* v. *Truwhitt* (1).

The LORD CHANCELLOR :—May not the principle of election be this, that a person claiming under a deed shall not interfere by title paramount to prevent another part of the deed from having effect according to its construction ? Can you apply that principle to an assignment by a person under personal disability, and known to be so ?

Dec. 18. LORD SELBORNE, L.C. :—

After great consideration of this case I have arrived at the conclusion that it resolves itself into the single question whether the Plaintiff, by refusing (as is her right) to allow the 80,000 S.R. to become vested in the trustees of the deed of the 31st of March, 1850, for the purpose of the settlement thereby made, will be withdrawing a part of the consideration for and in respect of which the *Bank of Bengal* shares, and the £6213 consols, and £4562 reduced stock ought, upon the true construction of that instrument, to be deemed to be thereby settled.

The Divorce Court has left the settlement of 1850 to its legal and equitable operation without change ; and I conceive that this must now be the same (as between the Appellants and the Respondent) as if the husband had died leaving the wife surviving, and as if the children were the Appellants.

I lay aside, as not directly relevant to the present question, the whole of that large class of cases of election upon wills as to

(1) 2 J. & H. 216. 8 Jur. N.S. 430

which Lord *Eldon* (in *Dashwood* v. *Peyton* (1)) and other authorities have said that "a clear intention" on the part of the testator "to give that which is not his property is always required." If this criterion were to be literally understood and applied here, it might be said with much shew of reason that the Appellants must fail, for nothing was done here or expressed to be done as to the 80,000 S.R., except upon the footing of the true state of the Plaintiff's title, which both her father and her husband well understood; neither of them assumed by this deed to deal with it as if it had been his own property. But I conceive the true rule for the decision of this case to be that which is so well stated by Lord *Redesdale* in *Birmingham* v. *Kirwan* (2): "The general rule is, that a person cannot accept and reject the same instrument, and this is the foundation of the law of election, on which Courts of Equity particularly have grounded a variety of decisions in cases both of deeds and of wills, though principally in cases of wills, because deeds being generally matter of contract, the contract is not to be interpreted otherwise than as the consideration which is expressed requires." The application of this rule is illustrated as to cases of voluntary deeds by *Llewellyn* v. *Mackworth* (3) and *Anderson* v. *Abbott* (4); as to cases of contract for valuable consideration resting in articles, by *Savill* v. *Savill* (5) and *Brown* v. *Brown* (6); and as to contracts for value completely executed by conveyance and assignment, by *Bigland* v. *Huddleston* (7), *Chetwynd* v. *Fleetwood* (8), *Green* v. *Green* (9), *Bacon* v. *Cosby* (10), *Mosley* v. *Ward* (11), and *Willoughby* v. *Middleton* (12). In two of those cases—*Green* v. *Green* and *Willoughby* v. *Middleton*—the husband's father was a party to an ante-nuptial settlement, and part of the consideration proceeded from him. Another, *Chetwynd* v. *Fleetwood*, was a case of settlement for value, not between husband and wife at all, nor in consideration of marriage. In all of them the party who, claiming by a title not bound by the deeds, thereby withdrew part of the consideration for which the deeds were

(1) 18 Ves. 41.
(2) 2 Sch. & Lef. 444, 449.
(3) Bar. 445.
(4) 23 Beav. 457.
(5) 2 Coll. 721.
(6) Law Rep. 2 Eq. 481.
(7) 3 Bro. C. C. 285, n.
(8) 4 Bro. P. C. 435, Ed. 1784.
(9) 2 Mer. 86.
(10) 4 De G. & Sm. 261.
(11) 29 Beav. 407.
(12) 2 J. & H. 344.

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intended to be made, was held obliged to give up, by way of compensation, what he or she was entitled to under the deeds, or *ex converso* (as in *Chetwynd* v. *Fleetwood* (1)), was held bound, if taking the benefit of the deeds, to adopt and make good the contract forming the consideration for those benefits, as to matters by which, without such election, he would not have been bound.

What, then, are the considerations for the settlement of the *Bank of Bengal* shares, and the £6213 consols, and £4562 reduced stock, expressed on the face of the deed of the 31st of March, 1850? First, I find in it an express recital "that upon the treaty for the marriage it was agreed" (which I take to mean agreed between the Plaintiff's father and her husband), that as well the two several sums of £6213 consols and £4562 reduced stock (which had been then actually transferred into the names of the trustees of the deed), as also all the interest of the Plaintiff or of her husband in her right under the settlement of the 17th of August, 1824 (*i.e.* her interest in the 80,000 S.R.) "should be settled upon the trusts and in the manner thereinafter mentioned." This recital cannot, as against any person not a party to it, alter the consideration or the true character of the deed, or supply the want of other evidence of a binding antenuptial contract: *Warden* v. *Jones* (2). But I apprehend it is good evidence as between the father and the husband, at all events, of the terms of and the considerations for their agreement *inter se*. The deed then recites the agreement of the father to transfer the *Bengal* Bank shares, and the performance of that agreement by actual transfer of those shares to the trustees of the deed; and it contains a covenant by the father "in consideration of the premises, and for divers other good causes and considerations him thereunto specially moving," to make up the income from those shares to £400 per annum. Then the trusts are declared as to the £6213 consols and £4562 reduced stock for the husband for life, with remainder to the wife for life; and as to the *Bank of Bengal* shares, one moiety of the dividends is made payable to the husband for life, and the other moiety to the separate use of the wife for life without power of anticipation, with remainder (as to the whole) to the survivor of the husband and wife for life, the ulti-

(1) 4 Bro. P. C. 435, Ed. 1784. (2) 2 De G. & J. 76, 85.

mate trust of all the funds being for the children of the marriage, who (as well as the husband) are Appellants before us. Then follows the part of the deed relative to the 80,000 S.R., which purports to be an immediate assignment by the Plaintiff, with her husband's privity, and an assignment, ratification, and confirmation by the husband to the trustees of the deed of all the Plaintiff's reversionary interest in the 80,000 S.R., and all her husband's interest therein in her right upon the same trusts which are declared of the *Bank of Bengal* shares, this assignment being expressed to be made "in pursuance and performance of the agreement in that behalf herein stated to have been entered into, and in consideration of the premises." Applying to the words of this deed the ordinary principles of construction, I cannot but say that the assignment upon these trusts of the wife's reversionary interest in the 80,000 S.R. is part of the consideration expressed in the deed for the provisions thereby made for the wife on the part both of her father and of her husband. It is true that the wife herself, notwithstanding the form of the deed, was not and could not be during her coverture a contracting party, and that she was not estopped by any of the recitals, and did not really (and could not during her coverture) assign or bind her reversionary interest in this fund; and it is also true that the insufficiency of the deed for these purposes must be taken to have been known and understood both by the father and by the husband, who were the real parties to the contract. But in these circumstances there is nothing, as it seems to me, substantially different from what often occurs in ordinary cases of election. The person who has to make the election is in no such case originally bound. If the contract, so far as it is for the benefit of that person, has been made by the parties to it from whom the other considerations proceeded upon the footing of the interests which they could not bind, being subjected to trusts for the benefit of those parties themselves, or of others for whose benefit they contracted, I conceive it to be the true result of the principle of election and of the authorities generally, that no such person can claim any benefit from that contract, when *sui juris*, except upon the footing of adopting and ratifying it as far as it does not already bind him, and that all equitable interests which such person takes under it stand in equity as

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a security for his adoption and performance in those respects of the agreement between the actual parties, as it is expressed in the deed. If in the present case the Plaintiff had not been expressed to be made a party to the deed; if the deed between the father and the husband had been expressed to be that they, in consideration of the settlement of certain property by each of them, and of the wife's reversionary interest in this outstanding fund, being also subjected to the same trusts, would declare trusts of the property settled by them respectively beneficial in part to the wife; and if the deed had then contained absolute covenants by the father and the husband with the trustees that the wife's reversionary interest in the outstanding fund, whenever it might fall into possession, should be effectually transferred to and vested in the trustees upon the trusts of the settlement, I should have been of opinion that the wife surviving her husband could not refuse to perform those covenants of her father and her husband, and at the same time receive the benefit expressed to be given her out of the property brought by them, or by either of them, into the settlement. For this conclusion, if authority be necessary, the case already mentioned of *Chetwynd* v. *Fleetwood* (1), cited with approval by Lord *Redesdale* in *Moore* v. *Butler* (2) seems to me to be authority; as also *Anderson* v. *Abbott* (3), decided by the present Master of the Rolls. If this reasoning is correct, I do not think that the actual case before us is distinguishable in principle from that which I have put, although the form (and in some respects the legal effect) of the deed is different. I am unable also to distinguish *Willoughby* v. *Middleton* (4), upon any grounds satisfactory to my own mind, from the present case. The facts of *Willoughby* v. *Middleton* are imperfectly stated in the report. I have therefore referred to the record, and I find that an ante-nuptial settlement had been executed when the wife (afterwards Lady *Middleton*) was an infant, to which her husband and her husband's father, as well as herself, were parties. The husband and his father both covenanted to charge certain family estates in the wife's favour with rent-charges amounting together to £4000, of which £1000 was to be a charge during the father's life on the father's interest in those estates;

(1) 4 Bro. P. C. 435, Ed. 1784.
(2) 2 Sch. & Lef. 266.
(3) 23 Beav. 457.
(4) 2 J. & H. 344.

and this covenant on their part was duly performed upon a subsequent re-settlement of the family estates. The intended wife was, at the date of the deed, absolutely entitled, under a contemporaneous appointment in her favour by her mother, to certain specified trust funds in reversion expectant upon her mother's death; and as to these reversionary trust funds, and also as to all other personal estate to which the wife might become entitled during the coverture, it was expressed to be covenanted and agreed by the husband and the wife that they should be settled on trusts for the benefit of the wife, the husband, and the children, under which trusts the wife was to take the first life interest for her separate use without power of anticipation. On the death of the wife's mother during the coverture the specified trust funds became vested in the wife in possession, though they had not been transferred to the trustees of the antenuptial settlement before the bill was filed, and at the same time, and by the same event, the wife became also entitled to certain valuable legacies for her separate use without restraint on anticipation under her mother's will. It was decided by Vice-Chancellor *Wood* that, although she was at liberty to refuse to bring those legacies into the settlement, she must in that case give up (so far as might be necessary for compensation) her life interest in the specified fund, which her husband had then power to reduce into possession, and which was therefore effectually bound by the deed. The only material difference which I am able to see between that case and the present (and it did appear to me during the argument to be a difference of some moment) is, that the wife there, while she was an infant, entered into a contract voidable on her part, but not absolutely void. I cannot, however, perceive that this distinction exercised any influence over the Vice-Chancellor's decision, which proceeded upon broader grounds, applicable, in my judgment, to the present case.

My conclusion is that the decree of the Master of the Rolls ought to be so far varied as to declare the Plaintiff entitled to the transfer of the 80,000 S.R. which she asks by the bill, upon the footing of her being bound to elect between that sum and the benefits given to her by the deed of the 31st of March, 1850, and now electing (as I assume she does elect) to take against that deed.

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SIR W. M. JAMES, L.J.:—

I concur with the Lord Chancellor's judgment in this case.

During the argument I had a strong impression that the property brought into settlement by the wife's father could be considered as a separate and distinct act of his, viz., that he was giving on the marriage a distinct and additional dowry to his daughter, and that it would be against the common-sense view of the transaction to imply that he meant to make his gift to her, her husband, and children, dependent or conditional on her ratifying, if and when discovert, the disposition expressed to be made of her own fortune, if events should require such ratification. But I am unable to find any legal propositions the soundness of which I am satisfied of, in which I can express grounds for that impression.

In marriage contracts and marriage settlements, not only the husband and wife are parties, but their respective parents or persons *in loco parentis* are equally parties contributing to and providing that which is considered to be a proper provision, not only for the husband and wife, but for the issue of the marriage. Each person bringing anything into settlement is not only giving that, but contributing part of the consideration for everything else brought into settlement, and purchasing it for and on behalf of each of the objects of the settlement. It is impossible to say that the wife's father could not have meant to purchase benefits for the husband, who becomes his son-in-law, and who may become the father of his grandchildren, or to purchase benefits for those grandchildren. In fact, the main object of all settlements is to provide for the issue, so that they may not be altogether exposed to the consequences of their parents' possible improvidence or caprice.

It seems to me, therefore, that the only safe rule to guide the Court in dealing with marriage settlements is to consider everything that is brought or expressed to be brought into settlement by anybody from any source as one aggregate trust fund. So considering it, it seems to me very easy and very right to read all the trusts thus: Out of the aggregate property settled, *A.* is to have so much and no more, *B.* is to have so much and no more, the issue are to have such interests and no more or other. Then, if by paramount title *A.* or *B.* or any of the issue takes out of the aggregate something other than the share or interest expressed to be given,

he or she must take that in full satisfaction of the expressed share or interest. This would seem to me to give a very simple rule to which every one of the cases can be referred (except *Campbell* v. *Ingilby* (1), which I more than doubt the propriety of), and which is sufficient for the solution of the problem in this case. And it is really not adding anything to say "and no more." And it is far safer to adopt without qualification the rule that a person cannot claim under and against the same instrument than in a particular case to divide the instrument into parts, and to find that in legal construction the one part is not made clearly dependent on the other part or parts.

SIR G. MELLISH, L.J., concurred.

It was then stated on behalf of the Plaintiff that she desired time to consider whether she should elect to take against the settlement. The case stood over for that purpose, and was mentioned again on the 15th of January, the 14th of March, and the 5th of May, 1873; and, the Plaintiff having elected to take against the settlement, a discussion took place as to the time from which the income received by the Plaintiff under the settlement should be accounted for, she contending that the account ought to go back only to the time when the 80,000 rupees fell into possession, and the Appellants contending that if she was not bound to account for everything she had received under the settlement, she must at all events account for everything received under it since the dissolution.

THEIR LORDSHIPS held that the Plaintiff must account for the income received under the settlement from the date of the order *nisi* for dissolution of the marriage.

The substance of the material part of the order was as follows:—

May 5. The Plaintiff waiving all questions as to the form of the suit, and

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(1) 21 Beav. 567; 1 De G. & J. 393.

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submitting that the question as to election should be determined in this suit, let the decree be varied, and as varied be as follows:—

Declare that the Plaintiff, in reference to her claim to the funds representing the sum of 80,000 sicca rupees, was, on 17 November, 1864, the date of the order *nisi*, and still is, bound to elect whether she will take under or against the settlement of 31 March, 1850.

Declare that the Plaintiff is entitled to the funds representing the 80,000 sicca rupees, subject to her making good thereout, and in priority to the incumbrances hereinafter mentioned, for the benefit of the persons interested under the trusts of the said indenture, the income of the funds remaining subject to the said trusts of the said indenture, received by her, or by her order, or for her use since the said 17th November, 1864; and subject also to the incumbrances created by her on the said 80,000 sicca rupees, or on the funds representing the same.

Directions as to payment of costs and return of deposit.

Adjourn further consideration and subsequent costs.

Liberty to apply.

Solicitors: Messrs. *Guscotte, Wadham, & Daw;* Mr. *H. P. Bird;* Messrs. *Freshfield;* Messrs. *Parke & Pollock.*

Ex parte PAPER STAINING COMPANY.
In re BISHOP.

L. C. and L. J. M.

1873

March 21.

Bankruptcy—Injunction—Liquidation by Arrangement—Non-payment of Composition by Debtor—Bankruptcy Act, 1869, *s.* 125.

Where a creditor objects to be bound by an arrangement with creditors on grounds personal to himself and not applicable to the rest of the creditors he will not be restrained by the Court of Bankruptcy from trying the question in an action at law.

A creditor refused to be bound by a resolution for a composition registered under the 125th section of the *Bankruptcy Act*, 1869, on the ground that his name was not duly inserted in the debtor's statement of debts, and that the composition had not been tendered to him within the prescribed time:—

Held, that he ought not to be restrained from suing the debtor at law.

THIS was an appeal from an order of Mr. Registrar *Hazlitt*, sitting as Chief Judge, whereby he restrained the *Paper Staining Company, Limited*, from proceeding with an action against *Bishop*, a liquidating debtor.

On the 20th of December, 1870, *Bishop* presented a petition for liquidation by arrangement, and on the 12th of January, 1871, a resolution was passed by the requisite majority of creditors, which was subsequently confirmed, and was registered on the 30th of January, to the effect that a composition of 2*s.* 6*d.* in the £1, paid in cash within one month after the registration of the resolution, should be accepted in full satisfaction of their debts.

The *Paper Staining Company* were creditors of *Bishop*, but their name was not inserted in the list of creditors. *Bishop* stated in his affidavit that he had always considered he was dealing with Mr. *Irwood*, the manager of the company, whose name and address, with the amount due to him or to the company whom he represented, were duly inserted in the statement. It also appeared that the proper notices had reached the company, and had been acted on by them, they having been advised not to offer any objection to the composition arrangement. The composition had not been tendered to the company or the manager, but the debtor, in explanation of this, referred to correspondence and negotiations with the company, which he relied on as dispensing with any

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tender. He also relied upon a distinct transaction as a ground for a set-off against or a relinquishment of the debt.

Mr. *De Gex*, Q.C., and Mr. *Finlay Knight*, in support of the appeal, referred to *In re Hatton* (1), *Edwards* v. *Coombe* (2), *Fessard* v. *Mugnier* (3), and *Hazard* v. *Mare* (4), as establishing that where the creditor's objection to the validity of the resolution for composition proceeded on grounds personal to himself, and not common to the other creditors, he ought not to be deprived of the right of trying the question in the ordinary way.

Mr. *Bagley*, for the debtor, contended that there was no ground for the application. The debtor did not know that the company were his creditors. He had always dealt with the manager. It was not necessary to tender the composition, provided the debtor was ready and willing to pay it: *Ex parte Hemingway* (5).

LORD SELBORNE, L.C.:—

The cases referred to shew that this action ought to proceed. As it is to proceed, it is better to give no opinion upon the question at issue between the parties.

SIR G. MELLISH, L.J.:—

The other creditors have nothing to do with the question to be tried in the action, which is simply between the debtor and a particular creditor. The order appealed from must therefore be discharged.

Solicitors: Messrs. *Hurford & Taylor*; Messrs. *Boulton & Sons*.

(1) Law Rep. 7 Ch. 723.
(2) Ibid. 7 C. P. 519.
(3) 18 C. B. (N.S.) 286.
(4) 6 H. & N. 434.
(5) Law Rep. 7 Ch. 724, n.

SHARPE *v.* SAN PAULO RAILWAY COMPANY.

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April 19, 21, 22, 23.

[1872 S. 248.]

Contract under Seal—Verbal Promises—Erroneous Statement—Certificate conclusive—Arbitration—Jurisdiction—Right of one Cestui que Trust to sue—Allegations of Fraud.

The engineer of a railway company prepared a specification of the works on a proposed railway, and certain contractors fixed prices to the several items in the specification, and offered to construct the railway for the sum total of the prices affixed to the items. A contract under seal was thereupon made between the contractors and the company, by which the contractors agreed to construct and deliver the railway completed by a certain day at a sum equal to the sum total above mentioned. If the contractors failed to proceed with the works the company might take possession and proceed with them; in which case a valuation should be made by the engineer or, if either party required it, by arbitration. The contract contained provisions making the certificate of the engineer conclusive between the parties; and it was provided that all accounts relating to the contract should be submitted to and settled by the engineer, and that his certificate for the ultimate balance should be final and conclusive; it was further provided that all questions, except such as were to be determined by the engineer, were to be referred to arbitration.

The railway was completed and the engineer gave his final certificate as to the balance due to the contractor.

The contractors had assigned their interest in the contract to trustees on trust for their creditors and for themselves, in certain proportions.

The contractors filed a bill against the company, making claims on several grounds, and praying an account and payment:—

Held, that the contractors could not, on mere verbal promises by the engineer, maintain against the company a claim to be paid sums beyond the sums specified in the contract under seal:

Held, that, although the amount of the works to be executed might have been under-stated in the engineer's specification, the contractors could not under the circumstances maintain any claim against the company on that ground:

Held, that, in the absence of fraud on the part of the engineer, and where his certificate has been made a condition precedent to payment, his certificate must be conclusive between the parties:

Held, that one of several *cestuis que trust* could not, on an allegation that the trustees refused to take proceedings, maintain a suit against a debtor to the trust estate.

Where a contract has provided that the certificate of the engineer or of an

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arbitrator, shall be a condition precedent to payment, the Court does not obtain jurisdiction because of the power to refer to arbitration.

Per Lord *Romilly*, M.R.:—Mere allegations of fraud without facts from which fraud will be inferred are not sufficient to avoid a demurrer.

Order of the Master of the Rolls affirmed.

THE bill in this suit was filed by *P. W. Sharpe* and *W. J. Sharpe*, contractors, against the *San Paulo Railway Company*, *J. Brunlees*, the engineer of the company, *G. A. Hillier*, the secretary, and the Baron *de Maua* and *Lewis Howard*, trustees of a deed of assignment, and stated as follows:—

That by a decree of the Emperor of *Brazil*, certain persons, including *James Brunlees* and the Baron *de Maua*, were authorized to form a company, which was to make a railway in *Brazil*, and interest was guaranteed by the government of *Brazil* and the province of *San Paulo* at the rate of 7 per cent. on such a sum, not exceeding £2,000,000, as should be expended in the construction of the railway; it was also provided that if the company should require a larger capital than £2,000,000, they might obtain it at their own risk and on their own guarantee. That it was a material object with the promoters of the railway, and with *James Brunlees*, the engineer, that the company should not be required to raise a larger capital than the £2,000,000. That under these circumstances *Brunlees*, on behalf of the promoters, prepared a detailed statement of the nature and quantities of the various works to be executed, and the materials to be provided, and submitted the same to Messrs. *Sharpe & Sons*, contractors, assuring them that it had been prepared with great care, and might be relied upon as entirely accurate. That *Sharpe & Sons* accordingly made a tender to the promoters, offering to form and complete the line of railway, and fixing prices to the different items of the statement, which made the sum total amount to £1,850,000. That after some difficulties the company was formed, and was an English company, and that the concession was transferred to the company. That *Sharpe & Sons*, acting in the belief of the accuracy of the statement of *Brunlees*, on the 8th of February, 1860, entered into a contract with the company, which was signed by *Sharpe & Sons*, and was under the seal of the company. The contract contained a

recital (amongst others) that *Brunlees* had made a *pro formâ* comparative tabular statement of the cost of the several proposed sections of the railway, of which an abstract copy was given in the second schedule to the contract. The contract contained many articles, amongst which were—

"8. Every certificate in writing of the company's engineer-in-chief given under his hand for any of the purposes of the contract, shall be binding and conclusive on the company and on the contractors, their heirs, executors, and administrators respectively, and shall be final, except where otherwise provided by these presents, and save only that the company's engineer-in-chief, by any subsequent certificate given for the purposes of this contract, may make any rectification which he thinks necessary and proper of all or any of his prior certificates.

Sect. 22 provided that the contractors would execute the whole of the railway and works, with all requisite stations, sheds, buildings, approaches, bridges, aqueducts, &c., and the railway should be constructed on the model of good European lines.

"25. The contractors will execute and provide not only all the works and materials mentioned in the specification comprised in the first schedule to these presents, but also such other works and materials as in the judgment of the company's engineer-in-chief are necessarily or reasonably implied in and by or inferred from that specification, and the plans and sections of the railway and works, it being the true intent and meaning of this contract that the works and materials to be executed and provided respectively by the contractors under this contract shall comprise all works, buildings, materials, operations, and things whatsoever proper and sufficient in the judgment of the company's engineer-in-chief for the perfect execution and completion of the railway, and all the works and conveniences thereof and connected therewith, and the maintenances of every section of the railway for twelve calendar months after the completion and delivery to the company of each such section."

"26. The contractors will provide at an expenditure not exceeding £60,000, exclusive of the cost of land, all such stations, warehouses, and station plant and furniture of every kind, fixed and moveable, as the company's engineer-in-chief requires."

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By sect. 28 the contractors were to provide rolling stock.

Sect. 59 provided that the company were to pay the contractors for the complete fulfilment of their part of this contract, whether with or without any modification, the sum of £1,745,000, by such monthly instalments as the engineer should from time to time certify to be payable, and by such other payments as the engineer should certify to be payable.

"60. The company should not, under any circumstances or on any account, be liable to pay to the contractors a greater sum than £1,745,000."

Provisions were then made for monthly payments to the contractors of sums certified by the engineer to be due.

"66. The amounts to be certified in the monthly surveys and valuations shall, as regards every section of the railway, be regulated by the prices of the second schedule; or where no value or price is mentioned in the second schedule, shall be such value or price as the engineer shall think reasonable; but it is the intention of this contract that the estimate and prices of the second schedule are to be taken only as a temporary basis for, and guide to, the resident engineer in making monthly surveys and valuations, and giving the monthly certificates, and not for any other purpose whatsoever; and although such estimate may be exceeded, the contractors shall not be entitled to make any claim for any extra work."

"71. When any section of the railway has been completed by the contractors to the satisfaction of the company's engineer-in-chief, and duly delivered over to the company, and has been maintained by the contractors to the satisfaction of the company's engineer-in-chief for twelve calendar months after the delivery over of the same to the company, the company's engineer-in-chief shall give to the contractors a certificate of final completion of that section, and shall then revise and settle the monthly certificates so far as they relate to that section, taking into account all payments theretofore made to the contractors in respect of that section, and shall certify the total amount payable on account of that section of the railway, which amount shall be as nearly as in the judgment of the company's engineer-in-chief is equitable the amount of the cost thereof according to the schedule of prices for that section."

Provisions were made for taking possession of the works if the contractors failed to proceed with them, and to maintain them for the twelve months; and it was provided that if the company so proceeded with the works, a valuation of the contractors' plant taken possession of by the company should be made either by the company's engineer-in-chief, or, if the company or the contractors so required, by arbitration, and the company should give to the contractors credit for the value thereof, as certified by the company's engineer-in-chief, or awarded, and should debit the contractors with the amount of all sums actually paid to them under this contract, and with all the payments, costs, damages, and expenses incurred by the company in and about the completion and maintenance by the company of the railway and works, and the fulfilment in all respects of the contractors' part of this contract; and the company's engineer-in-chief should, after the completion of the railway and works, and the maintenance thereof for twelve calendar months after the completion thereof, certify whether, on the balance of the accounts under the contract between the contractors and the company, there was any and what sum due from either party to the other, or the question as to such balance should, if the company or the contractors should so require, be determined by arbitration, and the company, or as the case might be, the contractors, should pay on demand to the other party the amount of the balance so certified or awarded to be payable.

There were many clauses providing for the payment of money on the certificate of the company's engineer. And it was provided as follows:—

89. "All the accounts relating to this contract between the company and the contractors shall be submitted to and adjusted and settled by the company's engineer-in-chief, and his certificate for the ultimate balance of the accounts shall be final and conclusive on both parties, without any appeal."

By sect. 95 all questions between the company and the contractors, except only such questions as were to be determined by the company's engineer, were to be referred to arbitration as therein provided.

The contract contained many provisions as to the valuations and the payments to be made thereon. The second schedule to the

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contract contained a detailed statement of the quantities of materials and works, and of the prices thereof, making the total £1,745,000.

In 1862 a supplemental contract was made, by which the time was extended, and the contractors acknowledged that they had then no claim for extra additional works. On the 8th of April, 1864, a second supplemental contract was made, by which, after reciting that the contractors had claimed £98,000 for extra works, and altered and additional works, and that the company denied their liability, and alleged that all was to be covered by the contract sum of £1,745,000, and that this supplemental contract was by way of final settlement of all differences between them; the company, amongst other things, agreed to pay £30,000 in full discharge of all past, present, and future claims by the contractors against the company for all works, matters, and things in connection with the railway, for which but for the now stating contract the contractors might claim to be paid, on the ground of their being extra, or altered, or additional works; and on these terms the contractors agreed to complete the whole railway on or before the 1st of January, 1868. It was further agreed that if the railway was completed before the 1st of July, 1866, the contractors should receive a graduated bonus.

The bill further alleged that when the railway was partially completed it became obvious that the proposed mode of conveying the traffic up and down a mountain called the *Serra* was wholly inadequate. That *Brunlees* prepared new plans and requested the contractors to construct the railway according to these plans; and when the contractors objected that the execution of these new plans would occasion the execution of earthworks greatly in excess of the quantities specified, *Brunlees*, as engineer and agent for the company, assured the contractors that he would, as engineer, be able to effect considerable savings in other parts of the railway, and promised and agreed to do so; on the faith of which the contractors constructed the inclines on the *Serra* in accordance with the new plans. That during the progress of the works it became apparent that the actual quantities of earthwork being done by the contractors were greatly in excess of the quantities specified in the schedule. That the contractors objected and protested, and that *Brunlees*, as

engineer and agent of the company, agreed that if it should prove that the total quantity of earthwork was in excess the contractors should be compensated by savings in sidings, stations, and other things which *Brunlees* promised to make. That the company became bound by the promises and agreements of *Brunlees*, and the contractors continued to work on the railway in reliance on these promises and agreements. That *Brunlees* did make some alterations, but the savings effected thereby were not sufficient. That the contractors had executed various extra works, in value far exceeding the £30,000, on the faith of the promises and agreements of *Brunlees*. That the railway was, on the 1st of October, 1866, completed and handed over to and accepted by the company. That during the construction of the railway considerable sums of money were due from the company to the contractors, and they were in want of money. That the Baron *de Maua* advanced them large sums of money, and on the 1st of October, 1866, entered upon the maintenance of the railway, and spent large sums thereon. That the company refused to pay to the Baron *de Maua* money due by them to the contractors, and thereupon, on the 1st of August, 1867, the Baron *de Maua* gave notice that he would not expend any money in the maintenance of the railway, and handed over to the company part of the contractors' plant, which was then valued by one Mr. *Fox*. That on the receipt of such notice the company seized the remaining plant of the contractors and applied it to their own use. That the value of the plant so seized was £30,079.

The bill then stated various steps in litigation between the Baron *de Maua* and the company, and other proceedings between the Baron *de Maua* and the Plaintiffs. That by an indenture dated the 30th of September, 1871, the Plaintiffs, who then represented the original contractors, assigned to the Baron *de Maua* and *Lewis Howard* all money then due from the company in respect of the contracts for making the railway, in trust, after payment of the costs, to distribute the same in accordance with a scheme set out in the indenture. The scheme provided for the division of the money to be received between the Baron *de Maua* and Messrs. *Sharpe* and their creditors, in certain specified proportions, the Baron *de Maua* receiving by far the largest share. That the Baron

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de Maua and *Howard* refused to proceed against the company. That the company had paid to the contractors £1,757,274, but that there was now due to them in respect of the balance of the contract sum and interest and bonus, and in respect of excess of works and new works, and plant and materials taken possession of by the company, the sum of £617,143. That the company admitted that sums amounting to about £50,000 were due to the contractors, but refused to pay unless the other claims were abandoned. That the company had adopted the promises and agreements of *Brunlees*. That *Brunlees*, at the instigation and by the order of the company, refused to give certificates as to several of the works for which the contractors claimed to be paid, and that such conduct was a fraud upon the contractors and the Baron *de Maua* and *Lewis Howard*. That the company had sent to the Plaintiffs a letter containing what purported to be a final statement of account between the Plaintiffs and the company as made by *Brunlees*, but such statement did not comprise the sums claimed by the Plaintiffs for excess of works and for contractors' plant seized by the company, and for damages for delay, and bonus.

The bill then set out what purported to be the final statement made by Mr. *Brunlees*, under which the company were made liable for £1,745,000 as per contract, £14,732 on account of stations, and £45,000 bonus. On the other side were payments to and charges against the contractors for work done by the company in completing the railway, under which, after allowing £1237 for plant taken by the company, £40,371 was found on that account due by the contractors to the company. On the whole a balance of £9774 was certified as due by the company, subject however to a question as to interest chargeable to the contractors.

The bill charged that the statement did not comprise all the sums due to the contractors, and included deductions which ought not to be made. And the bill prayed a declaration that the excess of works ought to be deemed new and independent of the contract, and that the Baron *de Maua* and *Howard* ought to be paid for the same, and for the bonus and damages for delay. And the bill prayed for accounts and inquiries, and, if necessary, that *Brunlees* might be decreed to certify the sums due to the con-

tractors, or to the Baron *de Maua* and *Howard* as representing them.

To this bill, the railway company demurred generally.

The Master of the Rolls allowed the demurrer (1), and the Plaintiffs appealed.

(1) 1872. Dec. 3. WM 1872 216

LORD ROMILLY, M.R., after stating the facts of the case, said that it was quite clear that the engineer had no power to vary the contract; he had power to give directions to do certain things upon the line within the limits of the contract, and if the contractors thought that these things were not within the contract they were not bound to do them. The bill alleged that the contractors had executed certain other works on the faith of the promises and agreements of Mr. *Brunlees* that the contractors should be paid for those works by the company. But these were merely the inferences and opinions of the contractors, on which the Court could not act, and the company certainly never led the contractors to take any such view.

There was another feature in this case, which was, that the contractors were in want of money and obtained assistance from the Baron *de Maua*, and were ultimately obliged to make an assignment of all the money coming from the company, which was to be divided in certain proportions between the Baron *de Maua*, themselves, and their creditors.

It was therefore remarkable that this bill was in a great measure, and principally, for the benefit of the Baron *de Maua* himself. It was not only so stated in the bill, but it was obvious from all the transactions that this was the case. [His Lordship then stated the transactions.] As to the alleged agreement with the engineer, if the contractors disapproved of the new arrangements as to the *Serra* incline, they ought to have entered into a fresh contract with the company; but it was clear that Mr. *Brunlees* had no power to alter the contract, or to enter into any contract on behalf of the company, assuming of course that he was acting *bonâ fide* and fairly. It was not otherwise alleged in the bill, for there was nothing like fraud alleged, except that in one place the bill did allege that his refusal to make or give a certain certificate had the effect of fraud. But His Honour was doubtful whether the mere allegation of fraud would be sufficient, in the absence of any particular facts upon which the fraud could be founded. There were no facts alleged to shew that Mr. *Brunlees* had not acted with perfect *bona fides* and fairness in the transaction. He had not, as in the case of *Kimberley* v. *Dick* (Law Rep. 13 Eq.1), a personal interest to benefit himself, by either withholding or giving any certificates.

Then, as to the extra works, the mere allegation that the contractors did these things upon certain vague statements of the engineer *Brunlees*, and the allegation of their own feelings and opinions, and the reasons why they did these things, would not ground an equity by which they would be entitled to come for relief to this Court. His Lordship was of opinion that they were bound by the contract, and that the contract was precise and distinct upon this subject; and that unless the Plaintiffs could shew that the company had, by some means or other, in writing—not necessarily under seal—clearly and decisively bound them-

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Sir *R. Baggallay*, Q.C., Mr. *Bovill*, Q.C. (Mr. *Strickland* with them), in support of the appeal:—

We say that the company are bound by the engagements of their engineer to pay for the extra work done on the *Serra* and elsewhere, and also that he has been induced by the company to withhold certificates which he ought to give us: *Taff Vale Railway Company* v. *Nixon* (1); *Hill* v. *South Staffordshire Railway Company* (2); *Ranger* v. *Great Western Railway Company* (3).

We say that the engineer's certificate is not conclusive. He had, at all events, no power to value the plant seized by the company, and his certificate cannot therefore be final. We cannot proceed at law, as the accounts between us and the company are too complicated. As to the objection that we cannot sue because we have

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selves, the Plaintiffs could not vary the contract and make a new and substituted contract by reason of any conversations said to have been held with the engineer, which it was obvious upon the bill itself he had repudiated and would not assent to. [His Lordship then stated the circumstances under which the Baron *de Maua* and then the company took possession of the railway.]

The Plaintiffs had no grounds for relief, because Mr. *Brunlees* had not given the certificates required. In *Kimberley* v. *Dick* he considered the case very fully, and had held that if persons chose to enter into a contract by which they agreed that they should be paid what a certain engineer or a certain builder should certify is the proper amount, and nothing more, they were bound by that if they could not shew any dishonesty, or any fraud or sinister motive. They must be bound by their contract, and they ought to have considered that before they entered into it. Under such circumstances, this Court had no power to compel Mr. *Brunlees* to give a certificate. There was nothing to shew that he was not acting with perfect honesty and *bonâ fide*. How could this Court say he ought to do anything more than he thought he ought to do? In saying this His Lordship had considered the bill as if the facts were proved, and had not taken the inferences drawn from them by Plaintiffs. No doubt it did appear from the final statement of Mr. *Brunlees* that a balance of £9774 was due by the company, subject however to some question as to interest. That, however, was a matter which could be properly disposed of by an action at law, if the company should say that they refused to pay. But, on the contrary, it appeared that they had offered and were willing to pay the sum so due, but that was not the desire of the contractors.

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(1) 1 H. L. C. 111. (2) 11 Jur. (N.S.) 192.

(3) 5 H. L. C. 72. 10 Jur 795.

assigned to trustees, if they will not intervene, we have a right to proceed.

The other arguments used are fully referred to in the judgments of the Master of the Rolls and the Lords Justices.

The *Solicitor-General* (Sir *G. Jessel*), Mr. *C. Hall*, and Mr. *Davey*, for the company, were not called upon.

SIR W. M. JAMES, L.J.:—

I think that the decision of the Master of the Rolls is perfectly unquestionable upon any principles of equity.

In this case the contractors undertook to make the railway, not to do certain works; but they undertook to complete the whole line, with everything that was requisite for the purpose of completion, from the beginning to the end; and they undertook to do it for a lump sum, something short of two millions sterling, which was the amount upon which the Brazilian Government had undertaken to guarantee the interest. It is important to bear in mind that the company was formed upon the basis of this guarantee, and it would be a singular hardship upon the shareholders—almost a fraud upon them—if they found, when they had taken shares in a company based on this guarantee, that they were to be compelled to pay something entirely different, and to do so in consequence of some conversations between the contractors and the engineer.

The first contract was that the line should be completed for a fixed sum. But the Plaintiffs say they are, upon several heads, entitled to a great deal more than that sum. The first head is that the earthworks were insufficiently calculated, that the engineer had made out that the earthworks were two million and odd cubic yards, whereas they turned out to be four million and odd cubic yards. But that is precisely the thing which they took the chance of. They were to judge for themselves. There was no fraud; it is not alleged that Mr. *Brunlees* had wilfully made miscalculations for the purpose of deceiving them; and if so, that would be the personal fraud of Mr. *Brunlees* himself. But he made the calculations apparently to the best of his ability, and calculated that the earthworks would be of a certain amount. The Plaintiffs say it is quite clear that this was a miscalculation.

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But that was a thing the contractors ought to have looked at for themselves. If they did not rely on Mr. *Brunlees'* experience and skill as an engineer, they ought to have looked at the consequences and made out their own calculations. I think probably they did look at it, and satisfy themselves to some extent. I do not know whether they calculated it over again, or whether they did not take 5*s.* a cubic yard, which seems a large sum for earthworks, for the purpose of covering them in all possible contingencies in that respect. But that is one of the things which, in my mind, was clearly intended to be governed by the contract, the company virtually saying, "Whether the earthwork is more or whether it is less, that is the sum we are to pay."

Then there was a considerable item as to the inclines up the *Serra*, but every statement in the bill, it seems to me, puts the Plaintiffs completely out of Court as to that. The bill says that the original specification was not sufficient to make a complete railway, and that it became obvious that something more would be required to be done in order to make the line. But their business, and what they had contracted to do for a lump sum, was to make the line from terminus to terminus complete, and both these items seem to me to be on the face of them entirely included in the contract. They are not in any sense of the word extra works.

Then it is alleged that the engineer, finding out that this involved more expense than he had calculated upon, promised that he would make other alterations in the line, making a corresponding diminution so as to save the contractors from loss on account of that mistake. And then in the vaguest possible way it is said that all these promises of the engineer were known to and ratified by the company. I am of opinion you cannot in that way alter a contract under seal to do works for a particular sum of money. The Plaintiffs cannot say that the company is to give more because the engineer found he had made a mistake and promised he would give more, and the company verbally, or in some vague way, ratified that promise. To my mind it was a perfectly *nudum pactum*. It is a totally distinct thing from a claim to payment for actual extra works not included in the contract.

The Plaintiffs then, thirdly, say that they were not to lay out

more than £60,000 on the stations; and I think it has been made out that they were not to do so, but if they did, there was to be compensation for it, and that was to be one of the things to be included in the final certificate to be made by the engineer settling everything on the full completion of the work. And the engineer has made his certificate, finding an ultimate balance upon all the accounts, which certificate is not, according to my view of the pleadings, in any way impeached on any grounds which this Court can take cognizance of. It is not pretended that Mr. *Brunlees* did not come to a conclusion to the best of his belief, and according to the best of his judgment. He was to determine the sums to be paid, and was not like an arbitrator dealing with evidence, or like a Judge dealing with a law suit. The very object of leaving these things to be settled by an engineer is that you are to have the practical knowledge of the engineer applied to it, and that he, as an independent man, a surveyor, a valuer, an engineer, is to say what is the proper sum to be paid under all the circumstances. That was the agreement between the parties. The contractors relied upon Mr. *Brunlees*, and the railway company relied upon Mr. *Brunlees*. That is the ordinary course between such companies and such contractors, and practically it is found to be the only course that is convenient for all parties, and just to all parties. I myself should be very loath to interfere with any such stipulation upon any ground except default or breach of duty on the part of the engineer.

But other considerations seem to me quite conclusive upon the demurrer to this bill. I am of opinion that the Plaintiffs are not the persons entitled to sue. The case is that there was an equitable demand by the Plaintiffs. That equitable demand they have assigned to the Baron *de Maua* and Mr. *Howard* upon trust for the Baron principally, and then as to the rest upon trust for the Plaintiffs and for a great number of creditors who are scheduled to the deed. Is it to be permitted that every one of the persons who has an interest in a thing assigned to a trustee for the benefit of a great number of persons should file a distinct bill in a distinct branch of this Court against the debtors to the estate? I had lately occasion to consider that question, and I came to the conclusion, very clearly, that a person interested in an estate or a

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trust fund could not sue a debtor to that trust fund, or sue for that trust fund, merely on the allegation that the trustee would not sue; but that if there was any difficulty of that kind, if the trustee would not take the proper steps to enforce the claim, the remedy of the *cestui que trust* was to file his bill against the trustee for the execution of the trust, or for the realization of the trust fund, and then to obtain the proper order for using the trustee's name, or for obtaining a receiver to use the trustee's name, who would, on behalf of the whole estate, institute the proper action, or the proper suit in this Court. That view I still adhere to, and I say it would be monstrous to hold that wherever there is a fund payable to trustees for the purpose of distribution amongst a great number of persons, every one of those persons could file a separate bill in equity, merely on the allegation that the trustees would not sue.

That would seem to me to dispose of the bill on the main grounds, but there is another case here. It appears to me on the allegations of this bill, that not only was there the original contract, but there was a supplemental contract, which was made long after some of these questions about extra works had arisen, in which the claim for extra works is alleged to have been made by the Plaintiffs. [His Lordship then expressed his opinion that under the supplemental contract any claim for extra works at the stations was to be governed and concluded by the certificate of the engineer.]

Then it is said that there is another matter which we ought to take into consideration, that is to say, that the engineer has valued the plant, and he was not made the absolute arbitrator or tribunal to determine what the value of the plant was. It appears to me that this was included. If, from any cause, the company took possession of the railway and plant, the value might be ascertained by him, or by arbitration, if required, and he should take that into consideration. It seems to me that unless the company or the person acting on behalf of the contractor desired an arbitration, the engineer was the proper person to ascertain the value. It would be wholly inconsistent with the whole spirit and scope of the contract to suppose that contractors might file a bill in this Court to have the whole accounts of the contract taken, because through their own default the company were obliged to take pos-

session of the plant, the value of which was not to be ascertained by the engineer. It appears to me that this would be a great injustice towards companies who enter into contracts of this kind. I am of opinion, therefore, on the whole of this case, that the Master of the Rolls was quite correct in allowing the demurrer; and, having regard to the nature of the case, there is no ground for saying that there has been any slip on the part of the Plaintiffs, and that, therefore, they ought to have leave to amend, so as to allege something different from what they have alleged in their bill. If there was a substantial equitable case, depending on something which had taken place between the contractors and the engineer after the date of the contract, and I was merely deciding on the technical ground that there was no sufficient allegation of anything after the date of the contract, I should feel it my duty, and feel obliged, to give the leave to amend which has been asked for. But I am satisfied on the whole case that the substantial question is whether the Plaintiffs are to be paid for the extra works; whether they are to be paid for the incline, and to have their claim for the extra works on the stations decided in equity. I am of opinion that this is not a proper tribunal for disposing of it, even if there were any ground for trying it, either in this Court, or in a Court of Law.

That being so, I do not think this a case in which we should be doing justice to the company if we allowed the Plaintiffs to amend and introduce an allegation with the sole purpose of avoiding the demurrer, so as to involve the parties in that enormous expense and trouble which it was the intention of this contract to prevent their being liable to. Their intention was to escape this expense and trouble by making the decision of the engineer final in all these matters, and contracting to pay a lump sum which was intended to cover everything really necessary to be done for the purpose of completing the line. I am of opinion the Master of the Rolls' decision is right, and that this appeal must be refused with costs.

SIR G. MELLISH, L.J.:—

I am entirely of the same opinion, and I agree with the reasons given by the Lord Justice.

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The only part of the case on which I wish to make a remark is with reference to the argument which was pressed by Mr. *Bovill*, that according to the true construction of this contract, and having regard to the fact that powers of reference to arbitration are given, and that the certificate of the engineer does not finally decide everything, leaving an appeal, as to several matters at least if not as to all matters, to an arbitrator,—that that gives the Court jurisdiction, and prevents the certificate of the engineer being final.

Now there is no doubt that the mere agreement that matters shall be referred to arbitration does not by itself take away jurisdiction from Courts of Justice. Under the *Common Law Procedure Act*, such an agreement enables the Court to stay proceedings if one of the parties is willing and desirous that the matter should be determined by arbitration, and the Court thinks there is no reason why it should not be determined by arbitration; but the agreement would not be a ground of demurrer. Nevertheless a contract may be so framed as under ordinary circumstances to take away the jurisdiction of Courts of Law and Courts of Equity to determine what is the amount payable under the contract. Wherever, according to the true construction of the contract, the party only agrees to pay what is certified by an engineer, or what is found to be due by an arbitrator, and there is no agreement to pay otherwise—that is to say, in every case where the certificate of the engineer or arbitrator is made a condition precedent to the right to recover, there the Court has no right to dispense with that which the parties have made a condition precedent, unless, of course, there has been some conduct on the part of the engineer or the company which may make it inequitable that the condition precedent should be relied upon. If nothing of that sort has happened, then the parties are bound by that which they have made a condition precedent.

Now to my mind it is quite impossible to read this contract, beginning with the 71st clause of the first contract and going on with all the clauses which immediately follow, without seeing that the parties have with the greatest possible care made the certificate of the engineer a condition precedent to the right of the contractors to recover any sum whatever under the contract. There

is no doubt that this was the intention of the parties; and in my mind the necessity of having a certificate applies to all the different claims which have been brought before us. I am of opinion that it applies to the sums beyond £60,000, which are to be paid on account of a larger sum than £60,000 having been expended in making the stations, and I am of opinion that it also applies to the deduction to be made from the lump sum on account of the company, when they took possession of the line, having found that many of the works were unfinished and having to complete them themselves. On both those matters—and they are really the two material matters—I am of opinion that the certificate of the engineer was to be a condition precedent to determining the sum which the company were to pay to the contractor. If the parties had come in time—it is now unnecessary to say whether it is too late—but if they had come in time, they might have had a power of appeal from the decision of the principal engineer in those respects. But I am of opinion that if the certificate of the engineer is made a condition precedent to the right to recover the sums which are to be paid, no jurisdiction is given to the Courts of Common Law or to the Courts of Equity by the mere circumstance that the parties may, if they please, have an arbitration by way of appeal from the determination of the engineer. The intention, no doubt, of that sort of arbitration is that if the parties are dissatisfied with that engineer, then they may agree and appoint some other engineer who would really determine the question just in the same way as the principal engineer would determine it. He would not set about it in the way in which a clerk chief would set about it, going through all the items; but he would take the accounts in the way engineers do take these accounts, and come within a comparatively short time to a conclusion. That is really what is intended, and in my opinion the bill fails to shew that there has been anything done beyond the scope of the contract itself. In my opinion neither the *Serra* incline, nor the pier, nor any one of the various things that are described, was beyond or outside the scope of the contract itself.

I am of opinion that the whole claim is within the contract; that the certificate of the principal engineer was to be a condition precedent to recovering the sums under the contract; and

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that there is no sufficient allegation in the bill that there has been any conduct on the part of Mr. *Brunlees*, or on the part of the company, which entitles or makes it the duty of the Court to say that his certificate is not conclusive.

Solicitors for the Plaintiffs: Messrs. *Roy & Cartwright*.
Solicitor for the Defendants: Mr. *G. M. Clements*.

L. JJ. 1873 April 25.

Ex parte TOPHAM. *In re* WALKER.

Bankruptcy—Fraudulent Preference—Motive of Debtor—Desire to obtain Fresh Credit—Conditional Delivery of Goods—Preliminary Meeting of Creditors—Bankruptcy Act, 1869, *s.* 92.

A trader, being in insolvent circumstances, applied to a creditor, to whom he owed £2500 for goods supplied in the way of his business, to supply him with more goods on credit. The creditor refused to supply any more goods unless the debtor paid £200 on account of the goods previously supplied. The debtor said he could not pay the money, and on being pressed by the creditor, he offered to return goods to the amount of the £200, which he did not want. This the creditor agreed to, and the goods were accordingly returned to him. On the same day the debtor filed a petition for liquidation:—

Held (reversing the decision of *Bacon*, C.J.), that the delivery of the goods to the creditor was not a fraudulent preference.

Ex parte Blackburn (1) approved.

Held, also, that the trustee in the liquidation was not entitled to have the goods given up by the creditor on the ground that the delivery to him was on condition of his supplying fresh goods, which he had never done.

Two of the principal creditors of a debtor had a meeting with him, at which he admitted that unless he could get assistance from his friends he must become bankrupt:—

Held, that one of the creditors might, notwithstanding the meeting, obtain payment from the debtor of a debt previously due.

THIS was an appeal from a decision of the Chief Judge in Bankruptcy, whereby he reversed a decision of the Registrar of the County Court at *Leeds*.

Nicholas Walker and *Benjamin Walker* carried on business at *Leeds* as cloth merchants under the firm of *N. Walker & Co.* On

(1) Law Rep. 12 Eq. 358.

the 21st of August, 1872, they filed a petition for liquidation by arrangement, and a resolution for liquidation was subsequently passed by the creditors. Before the filing of the petition they owed debts amounting altogether to about £5000, their assets being about £1500. Their largest creditor was Mr. *Moses Topham*, a cloth manufacturer at *Bradford*, to whom they owed £2500. Towards satisfaction of the debt they had accepted a bill of exchange for £300 due on the 21st of August, which *Topham* had indorsed to Messrs. *Crofts & Co.* On the 15th of August *Benjamin Walker* told *Topham* that they could not meet the bill, but they said they could find £200 if he would advance the other £100 himself, and *Topham* agreed to this proposal. On the 17th *Topham* came to *Leeds* with reference to a fresh order for goods which Messrs. *Walker* had sent him; and he told them that he could not execute the order unless they paid the £200 to meet the bill. On the 18th of August (which was Sunday) *Topham* came again to *Leeds*, and told Messrs. *Walker* that unless they found the £200 he could neither retire the bill nor let them have any more goods. Messrs. *Walker* had at that time some goods which had been supplied by *Topham* worth about £200, which they offered to send back to him instead of paying the money, and they had the goods packed up ready to be sent.

On the 20th of August *Benjamin Walker* went to *Bradford*, and a meeting took place between him, *Wilson Topham*, who was the son and manager of *Moses Topham*, and Mr. *Whitehead*, another of the creditors. At this meeting *B. Walker* submitted to *Whitehead* the state of his affairs, shewing liabilities of £5000 and assets of £1500; and it was then arranged that *Benjamin Walker* should endeavour to get assistance to carry on his business, and that *B. Walker* should come to *Bradford* the next day and inform *Moses Topham* and *Whitehead* of the result.

The next morning, the 21st of August, *B. Walker* called on *Wilson Topham* and told him that he was unable to bring his father the £200 towards meeting the bill. *W. Topham* pressed him for payment, and he then informed him that he had set apart goods to the amount of £200 to be returned to his father, and gave him a consignment note as follows:—

"Consigned by me to Mr. *M. Topham*, for sale by him, or as a

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lien against our account, the following goods" (mentioning them), "value £210 4*s.* 6*d.* If not sold as stated the difference to be charged to our account. "*N. Walker & Co.*"

A telegram was accordingly sent to *Crofts & Co.* at *Leeds* to fetch away the goods from Messrs. *Walker's* warehouse, which they accordingly did.

B. Walker then went to *Whitehead*, who declined to give him any assistance, and advised him to file a petition for liquidation. *B. Walker* accordingly went at once to his solicitor, and instructed him to prepare the petition, which was filed on the same afternoon. After it was filed, *Whitehead* and *M. Topham* applied on behalf of Messrs. *Walker* to some of the friends of the latter to endeavour to get assistance for them so as to save the business from liquidation, but were unsuccessful.

Under these circumstances the trustee in the liquidation applied for an order upon *Crofts & Co.* to deliver up the goods, on the ground that the delivery amounted to a fraudulent preference of *M. Topham.* The Registrar refused to make the order, and the trustee appealed to the Chief Judge. The Chief Judge reversed this decision, and ordered the goods, or their value, to be delivered up to the trustee (1). From this order *M. Topham* appealed.

(1) 1873. Feb. 24.

SIR JAMES BACON, C.J.:—

The sole question in this case is, whether the transfer of goods valued at £210 to *Crofts* was a fraudulent transfer within the words of the statute or not. There is a confusion in the way in which *Crofts'* name has been introduced, but *Topham's* name is associated with it, and the substance of the application is that £210 should be recovered for the bankrupt's estate either from *Crofts* or from *Topham.*

In my opinion, it is as clear a case of fraudulent preference as ever I heard of, and is clearly within the words of the Act of Parliament, because that the debtor was at this time unable to pay his debts out of his own resources is proved over and over again from the exhibition of the balance sheet and from those communications which acquainted Mr. *Topham* with the fact that his debtor could not pay him out of his own moneys, nor out of any that he could borrow. The terms of the statute are a safer guide than any scraps which may be collected as they may seem to serve out of any decision or expression of any Judge, and they are, "A transfer of property made by any person unable to pay his debts as they become due from his own moneys in favour of any creditor or any person in trust for any creditor, with a view of giving such a creditor preference over the other creditors, shall be fraudulent and void;" and then comes this saving clause, "That this section shall not affect the rights of a transferee, payee, or incumbrancer in good faith for

Mr. *De Gex*, Q.C., and Mr. *Ingle Joyce*, for the Appellant:—

In order to constitute fraudulent preference there must be no other motive but a desire to benefit the creditor. In the present case the debtor's object was to obtain fresh goods from the Appellant in order to continue to carry on his business. The demand came from the Appellant; he pressed for the money, and the debtor said he could not give the Appellant money, but gave him goods instead. At the time when the goods were delivered the debtor had still hopes to get assistance from his friends to carry on his business. Under these circumstances there was no fraudulent preference: *Hartshorn* v. *Slodden* (1); *Ex parte Tempest* (2); *Ex parte Blackburn* (3); *Bills* v. *Smith* (4).

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valuable consideration." If the first requisites are supplied, as in this transaction they clearly are, by communication with *Whitehead* and with *Topham*, and by all that proceeding on the 21st of August, the day on which the transaction took place—if they establish the fact that no creditor could in good faith receive from his debtor the payment of any sum of money that was due to him without knowing that it could only be made by preferring him to the other creditors—if that is established, what does pressure signify? Pressure does not furnish good faith; pressure does not repeal the Act of Parliament—the pressure, such as it is, is described in the evidence—and it may be called pressure. *Wilson Topham* pressed him no doubt; that is to say, if the proper version of it is given, knowing that he was going to become a bankrupt that morning, he pressed him to prefer his father to all the other creditors, and to that pressure he yielded.

The facts of the case seem to me to be as plain as any that ever were suggested. That Mr. *Crofts* has nothing to do with it seems to me to be quite clear, but as soon as this consignment note, as it is called, which is a mere form, was procured, a telegram is sent to *Crofts*, "Get all the goods from *Walker* that you can," and *Crofts*, as a man of business, sent up one of the partners, and they do claw away from *Walker's* place all that they can get, and they retain it. Mr. *Crofts* says he retains it because he got it on *Topham's* order for *Topham's* benefit; having nothing to do with the bankrupt's estate, claiming nothing upon it in preference to any other creditor in the bankruptcy, he held it as against *Topham*. As between Mr. *Crofts* and Mr. *Topham* they will have plenty of opportunity of settling their affairs in any way they like, but as concerns *Topham*, on the evidence before me, I think the order ought to have been that *Topham* should either restore these goods or pay back the value; for the transaction was within the 92nd section of the Act of Parliament, and wholly null and void as against the creditors of *Walker*.

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(1) 2 B. & P. 582.
(2) Law Rep. 6 Ch. 70; S.C. *nom.* *Ex parte Craven*, Law Rep. 10 Eq. 648.
(3) Law Rep. 12 Eq. 358. (4) 6 B. & S. 314.

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Mr. *Roxburgh*, Q.C., and Mr. *Marten*, for the trustee:—

This was a clear case of fraudulent preference. There could be no pressure, properly so called, when the debtor knew that he was hopelessly insolvent and was on the very point of filing his petition, which he did, in fact, the same day. What effect could any threat of the creditor have under such circumstances? It is clear that the debtor wished to oblige the creditor, who had been forbearing and friendly towards him. No doubt he hoped for future benefits from him, but that motive is always present to a debtor's mind when he prefers a creditor, and yet it may be still a fraudulent preference.

If it was not technically a fraudulent preference the trustee is still entitled to have the goods back. There was a distinct bargain that if the debtor sent the goods he should have some fresh goods from the creditor. It was either entirely void as a fraudulent transfer of goods in contemplation of bankruptcy, or it was a delivery of goods upon a condition which the creditor never performed. In either case the goods ought to be given up. It was, moreover, a fraud upon the other creditors. The creditors had met to consider the affairs of the debtor, and it had been shewn to them that he was insolvent, and they had only adjourned to see if he could get assistance. After that one creditor had no right to obtain an advantage over the others.

SIR G. MELLISH, L.J., after stating the facts as before mentioned, continued:—

Under these circumstances the question to be decided is, Was that a fraudulent preference? The Registrar thought that there was strong evidence of pressure throughout the transaction, and that, consequently, it was not a case of fraudulent preference. The Chief Judge appears to have held that, under the circumstances, the existence of pressure was of no consequence; that *Topham* having notice that *Walker* was hopelessly insolvent, it could not have been a *bonâ fide* transaction. But, according to the Chief Judge's own decision in *Ex parte Craven* (1), in which we concurred, and in *Ex parte Blackburn* (2), it is still necessary, upon the

(1) Law Rep. 10 Eq. 648; Ibid. 6 Ch. 70. (2) Law Rep. 12 Eq. 358.

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true construction of the 92nd section of the *Bankruptcy Act*, 1869, to prove that the preference is entirely voluntary, so that the motive actuating the debtor must be the wish that the creditor should be preferred. In *Ex parte Blackburn* (1) the Chief Judge, after referring to the first portion of the 92nd section, says: "If the clause stopped there, it no doubt gets rid of any question which can be raised respecting the 'contemplation of bankruptcy,' the solution of which had sometimes created considerable difficulty. The only condition prescribed by the statute in this respect is, that the debtor be 'unable to pay his debts as they become due from his own moneys,' and this, be it observed, is applicable to debtors generally, whether in trade or not. But then it adds another qualification or condition, which is the very life and essence of the enactment, the payment so made must, in order to be void, be made 'in favour of any creditor with a view of giving such creditor a preference over the other creditors.' So that unless it can be made clearly apparent, and to the satisfaction of the Court which has to decide, that the debtor's sole motive was to prefer the creditor paid to the other creditors, the payment cannot be impeached, even although it be obviously in favour of a creditor. The act of the debtor is alone to be considered—the object and purpose for which the payment is made can alone be inquired into—and although it is perfectly legitimate, and in all cases requisite, that all the attending circumstances should be carefully investigated, yet if the act done can be properly referred to some other motive or reason than that of giving the creditor paid a preference over the other creditors, then I conceive neither the statute, nor any principle of law or policy, will justify a Court of Law in holding that the payment is fraudulent or void."

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In my opinion that is a perfectly accurate description of the state of the law. Then what was the motive for Messrs. *Walker* returning these goods to *Topham?* Was it to give a preference to *Topham*, or was it to induce him to supply Messrs. *Walker* with fresh goods, or was it done in consequence of pressure by *Topham?* It is clear to me that it was done from one of the two latter motives. It is not necessary to decide whether their motive was, that they hoped that, by paying in the form of goods part of *Topham's* demand,

(1) Law Rep. 12 Eq. 364.

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they would obtain from him further credit, and be able to go on with their business, or whether they knew that they were hopelessly insolvent, and only did it from pressure. In either case, I am of opinion it was not a fraudulent preference.

That it was not done from a desire to prefer *Topham*, appears to me clear, from two considerations. In the first place, there is no reason to suppose that they had any reason to wish to prefer him. There is no kinship between them, nor is there evidence of any particular acts of kindness on the creditor's part. On the other hand, there is evidence that in previous negotiations he had held out to them hopes that if they paid part of the debt he would continue to supply them with goods on fresh credit; and in my opinion there is nothing to shew that *Benjamin Walker*, on the morning of Wednesday, knew that their affairs were desperate, and had made up his mind that they must stop. He probably thought that if they made this payment they would be able to arrange with their other creditors, and go on by means of the fresh goods.

If not, I think the goods were sent in consequence of pressure from *Topham*. The principle of the decision in *Ex parte Blackburn* (1) was, that the law of fraudulent preference was not altered by the Act of 1869, and the law before the Act was, that however desperate the circumstances of a debtor were, and although the creditor knew them to be desperate, the creditor is not debarred from pressing his debtor for payment; and if he did so press, and payment was made, such payment was not a fraudulent preference.

Some other points were raised, but I doubt whether we ought to consider them, as the question of fraudulent preference was the only one which was argued before the Registrar and before the Chief Judge, and these points were suggested in this Court for the first time. But even if they were fairly before the Court, I think they have no weight.

It was argued that these goods were given up in payment for other goods which were to be delivered, and as the fresh goods were never delivered, they ought to be returned. But that was not the bargain. The debtors wished *Topham* to go on delivering

(1) Law Rep. 12 Eq. 358.

goods on credit; *Topham* refused to deliver any more goods on credit unless Messrs. *Walker* paid him for those he had previously delivered. If no petition for liquidation had been filed, there is nothing to shew that *Topham* would not have kept to his bargain and delivered other goods, but that was rendered impossible by the liquidation.

Another point was, that there had been a meeting of creditors at which the position of the debtor had been considered, and that it was fraudulent of any one creditor to have any dealings with the debtor behind the backs of the other creditors. But there is no proof of any such meeting of creditors. If, indeed, there had been a general meeting of creditors, and they had postponed coming to any resolution as to a liquidation until the accounts were made up, and had adjourned for that purpose, an equity might have arisen *inter se* that one should not attempt to obtain a preference behind the backs of the others. But in the present case there was no such meeting of creditors; only two or three of the principal creditors met to discuss the possibility of giving the debtor further assistance.

On the whole, I am of opinion that the decision of the Registrar was right, and the order of the Chief Judge must be discharged.

SIR W. M. JAMES, L.J., concurred.

Solicitors for the Appellant: Messrs. *R. & W. B. Smith*, agents for Messrs *Ford, Eddison, & Ford, Leeds.*

Solicitors for the Respondent: Messrs. *Milne, Riddle, & Mellor*, agents for Messrs. *Terry & Robinson, Bradford.*

L. JJ.
1873
April 17, 18;
May 6.

ANDREWS *v.* SALT.

[1873 A. 12.]

Ward of Court—Religious Education—Abandonment by the Father of his right to control his Children's Education—Ante-nuptial Agreement as to Religion of the Children.

10 CLD 617
65 [illegible]
21 CLD 819
822-3
10 QBD 455
24 CLD 211.
25 CLD 221

An ante-nuptial agreement that the children shall be brought up in a different religion from that of the father is not binding at law or in equity; but such an agreement will have weight with the Court in considering whether the father has abandoned his right to educate his children in his own religion.

Where a father has not forfeited or abandoned his right to educate his children in his own religion, the Court cannot refuse to order a child to be educated in that religion merely because it thinks that the child will be more happy and contented, or better provided for, if left with those who have had the care of it.

But if a father has forfeited or abandoned his right to educate his children in his own religion, the Court will consider only the happiness and benefit of the child, and will order it to remain in the care of those by whom it has been brought up, and to be educated in their religion; although the child may not have so far imbibed the particular doctrines of that religion as to render it dangerous to change its religious training.

The father of the infant Plaintiff was a Roman Catholic and the mother a Protestant. Before the marriage they made a verbal agreement that the boys should be brought up as Roman Catholics and the girls as Protestants. The Plaintiff, who was a girl, was baptized in the Church of *England*. At the time of her birth her father was absent, ill of consumption, but was informed by letter of the mother's intention as to the baptism. He replied, saying that a Roman Catholic Priest would call on the mother. This was not done, and the child was baptized as a Protestant. The father died in February, 1863, when the child was about nine months old, leaving no property for the support of his children. A few days before his death he made a will whereby he directed that his children should be brought up in the Roman Catholic faith, and appointed his brother, who was a Roman Catholic, their guardian. After his death the Plaintiff was allowed by the guardian to remain with her mother and her mother's family, and to be brought up by them as a Protestant till she was nearly nine years old. The guardian then claimed that the child should be given up to him, and after long discussions applied for a writ of *habeas corpus* in the Court of Queen's Bench. The child was then made a ward of the Court of Chancery, being then nearly eleven years old, and the Lords Justices, having seen and conversed with her, were of opinion that she had not imbibed the distinctive principles of the Church of *England* to such an extent that it would be cruel

or dangerous on that ground alone to have her educated in the Roman Catholic faith:—

Held, notwithstanding (affirming the decision of *Malins*, V.C.), that the Plaintiff ought to be allowed to remain with her mother, and to be brought up in the Protestant religion.

THIS was an appeal from an order of Vice-Chancellor *Malins*.

The Plaintiff *Mary Ellen Andrews* was the infant daughter of *Thomas Andrews*, and her father being dead, this suit was instituted for the purpose of making her a ward of Court, and for the appointment of a guardian, and for direction as to her education.

The evidence was conflicting on several points. The witnesses and the testamentary guardian, who was the Appellant on the present occasion, were examined *vivâ voce* before the Lords Justices, and the result of the evidence was as follows:—

Thomas Andrews, the father of the Plaintiff, was a chemist and druggist, and was a Roman Catholic. His wife *Ellen* was the daughter of *Joseph* and *Mary Fleetcroft*, who lived at *Chester*, and she and her family were members of the Church of *England*. After the death of *Thomas Andrews* she married Mr. *Kelsey*, a butcher, her present husband. Mrs. *Kelsey* swore that on the day when she was engaged to be married to *Thomas Andrews* she, in the presence of her mother, had a conversation with him respecting the difference of religion between them; that she said to him, "If there is any family, it may make unpleasantness between us unless there is some arrangement made," and that he replied that he was quite willing that the girls should be brought up as Protestants and the boys as Catholics, and that she and her mother consented to this. Her mother, Mrs. *Fleetcroft*, confirmed her evidence, and the Lords Justices considered it proved that *Thomas Andrews* did promise his intended wife before their marriage that he would allow any girls they might have to be educated as Protestants. On the other hand, the Appellant and the other members of the *Andrews* family positively swore that they never heard of any such arrangement, and, though Mrs. *Kelsey* stated that she had had conversations with members of her husband's family on the subject, she could not remember when or with whom those conversations occurred, and the Lords Justices therefore were not satisfied that the arrangement that boys should be brought up as

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Catholics and girls as Protestants was ever communicated by *Thomas Andrews* to his own family.

Thomas Andrews and his wife were married in the Cathedral of *Chester* by a clergyman of the Church of *England*, on the 7th of March, 1854. A boy, *Francis Xavier Joseph Andrews*, was afterwards born, and had always been brought up as a Catholic. In the early part of the year 1862 *Thomas Andrews* became seriously ill of consumption, and went to reside with his own mother at *Liverpool*. His boy was also taken care of by his own relations. His wife went to reside with her father and mother at *Chester*, where, on the 22nd of May, 1862, the Plaintiff was born. She was baptized at *Christ Church*, in the city of *Chester*, by a clergyman of the Church of *England*. There was a conflict of evidence how far *Thomas Andrews* approved or disapproved the child being baptized as a Protestant. Mrs. *Kelsey* swore that she wrote a letter to inform him that she was going to have the child baptized, and mentioning the names of the sponsors, who were known to him to be Protestants, and that she got an answer, not stating any objections to the child being baptized as a Protestant, but saying that a Catholic priest would call upon her, but no priest called. The witnesses on the other side stated that *Thomas Andrews* spoke to them about getting a priest to baptize the child, but that there was a difficulty, because a priest would not go to a house to baptize a child unless it was ill. Some time afterwards, namely, about two months after the baptism of the child, the mother went from *Chester* with the child to visit the father at *Liverpool*. There was some doubt as to what took place between the father and the mother about the baptism of the child when they met. The witnesses for the Appellant represented that a Catholic priest had been sent for to baptize the child; that he did not do so because it was discovered that the child had been baptized already; and that the father was very much surprised and annoyed that the child had been baptized. On the other hand, Mrs. *Kelsey* denied that there was any unpleasantness whatever between her and her husband on the subject of the child being baptized a Protestant.

Upon this conflict of evidence, the Lords Justices considered it probable that *Thomas Andrews*, who at this time was very ill of

consumption, may have been really desirous that the child should, if possible, be baptized as a Catholic, and may have told his relations so, but that, at the same time, remembering the promise he had made to his wife that she should be allowed to bring up her daughters as Protestants, he did not dare openly to express his feelings to her, or to take any active steps to prevent the child being baptized a Protestant.

In December, 1862, *Thomas Andrews* went with his mother from *Liverpool* to *Manchester*, and Mrs. *Kelsey* returned with the child to her parents at *Chester*.

On the 14th of February, 1863, *Thomas Andrews* executed the following will:—

"I, *Thomas Andrews*, of *Manchester*, in the county of *Lancaster*, chymist and druggist, hereby direct that my children shall be baptized and brought up as members of the Roman Catholic Church, and, in the event of my death, I hereby appoint my brother *Joseph Andrews*, of *Manchester*, reporter, the guardian of my children for the execution of this my request, giving him power, should he see fit, to appoint any other person being a Roman Catholic as guardian to my children to act in case of his death, or upon his ceasing voluntarily to discharge the duty, and to adopt any course which he may think proper for carrying out my intentions."

The due execution of the will was proved before the Lords Justices, who saw no reason to doubt that it constituted a valid appointment of the Appellant to be the testamentary guardian of the two children of *Thomas Andrews*.

On the 16th of February, 1863, *Thomas Andrews* died. Mrs. *Kelsey* was sent for from *Chester*, but did not arrive until the day after her husband's death. No witness expressly stated that the will was given to Mrs. *Kelsey* to read, or that it was read to her; but *Joseph Andrews* swore that he told his mother to explain it to her, and one or two of the other members of the *Andrews* family said that they had conversations with her on the subject. On the other hand, Mrs. *Kelsey* denied that she was ever told of the will, or that her husband had by his will directed that her daughter should be brought up as a Catholic, and said that all she was told was that *Joseph* was to assist her and her children.

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On this evidence the Lords Justices were not satisfied that Mrs. *Kelsey* had notice that her husband *Thomas Andrews* had by his will directed that the Plaintiff should be brought up as a Catholic contrary to his promise to her that she should be brought up as a Protestant.

Thomas Andrews left no assets behind him for the support of his wife and children. From the time of his death the boy was supported at the sole expense of his father's relatives, and principally at the expense of the Appellant, while the girl, the Plaintiff, continued to live with her mother in the house of Mr. and Mrs. *Fleetcroft*. About three years after the death of her first husband, Mrs. *Kelsey* married her present husband, and went to live with him in *Liverpool*. The Plaintiff, however, continued to live with her grandfather and grandmother, Mr. and Mrs. *Fleetcroft*, and was solely supported by them and her mother. She was educated as a Protestant, and attended a small school kept by one of her aunts. The Appellant saw her occasionally, but until about the end of March, 1871, he took no steps whatever to assert his authority as guardian, and never informed either Mr. or Mrs. *Fleetcroft*, or Mrs. *Kelsey*, of his intention to have the child educated as a Catholic.

At the end of March, or beginning of April, 1871, the Appellant required Mrs. *Fleetcroft* to deliver the Plaintiff to him to be educated as a Catholic. This was refused, and a correspondence thereupon ensued between the Appellant and *John F. Fleetcroft*, an uncle of the Plaintiff, and afterwards between the solicitors on each side. Ultimately, on the 3rd of September, 1871, Mrs. *Fleetcroft*, under the threat of legal proceedings, gave up the Plaintiff to the Appellant, who took her to his own mother at *Liverpool*, where she remained until December, 1871, and for these three months she was supported by the *Andrews* family, and educated as a Catholic. Before Christmas, 1871, she was sent back to her grandmother, Mrs. *Fleetcroft*, at *Chester*, in order that she might pay her a short visit. It appeared to have been the understanding of the parties at the time that she should be returned in a fortnight or three weeks; but the *Fleetcrofts* shewed by their letters that they were unwilling to part with the Plaintiff, and ultimately, on the 22nd of January, 1872, Mrs. *Kelsey* wrote

a letter to the Appellant positively refusing to give up the Plaintiff.

Accordingly, the Appellant applied to the Court of Queen's Bench for a writ of *habeas corpus* that the Plaintiff might be delivered up to him, and the Court of Queen's Bench held, though with reluctance, that they had no discretion to refuse the writ. But not being satisfied as to the validity of the testamentary document they directed an issue to try its validity, and suspended the writ in the meantime. The case is reported (1).

A sum of £20 was thereupon invested in the names of two trustees in trust for the Plaintiff, and the present bill filed. The Plaintiff then moved for an injunction to restrain the Appellant *Joseph Andrews* from interfering with the custody or education of the child, and for the settlement of a proper scheme for her education, and for the appointment of a guardian.

The Vice-Chancellor granted the injunction, and from this decision *Joseph Andrews* appealed (2).

(1) Law Rep. 8 Q. B. 153.

(2) 1873. Feb. 15.

SIR R. MALINS, V.C., after stating the result of the evidence and referring to the judgment of the Court of Queen's Bench, continued:—

Now with regard to the doctrine of the Court, that a child, a ward of Court, must be brought up in the religion of its father in the absence of any special circumstances to the contrary, nobody will attempt to deny that. I relieved Mr. *Hemming* from any difficulty on that subject. It is a rule of the Court which is often very painfully brought into action. But still it is so absolute that I myself on many occasions have been obliged to warn mothers that they cannot be permitted to bring up their children in any other religion than the religion of their father, unless there be some particular circumstances which justify a deviation.

What, then, are the circumstances which may justify a deviation in the present case? Mr. *Hemming* has gone at great length into the decision of Lord *Hatherley*, which was relied upon by Mr. *Glasse*. The case of *Hill* v. *Hill* (10 W. R. 400) was largely commented on by both sides. In that case it was alleged, but not proved to the satisfaction of Lord *Hatherley*, that there was an arrangement before the marriage that the boys should be brought up as Roman Catholics and the girls as Protestants, the father being a Roman Catholic and the mother a Protestant. But Lord *Hatherley* did not say that if it had been proved he should have thought it an unimportant fact. Mr. *Hemming* argued that it is an inflexible rule of this Court that a father cannot renounce the duty he owes to his child. No doubt there may be some duties so absolute on a parent that he is not at liberty to renounce them. But with regard to this particular question, if a Roman Catholic thinks fit to marry a Protestant surely there are some duties

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Mr. *Charles Russell*, Q.C., and Mr. *Hemming*, for the Appellant:—

The ante-nuptial agreement relied on by the Plaintiff is not proved, and if it really was made it was not binding at law. In

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towards the mother as well as to himself, and in the question whether they shall be brought up as Christians or not that duty is imperative. Because if a Christian father were to undertake that his children should not be brought up as Christians that would be a matter of the highest possible consideration; but the question whether they should be brought up as Roman Catholic Christians or as Protestant Christians is a comparatively subordinate question, and surely it is a question on which the feelings of the mother as well as the feelings of the father are to be consulted; and if they enter into an arrangement of that kind which is founded on honour and justice, I confess I am unable to see any principle on which this Court would not give effect to it. Mr. *Hemming* calls to my recollection the *Statute of Frauds*, which says undoubtedly that all contracts in consideration of marriage which are not signed by the parties to be bound thereby are void. If it were a contract with regard to property I quite agree with him. If a husband were to agree to settle a large sum of money upon his wife, and the contract were only verbal and by word of mouth, that is by the *Statute of Frauds* absolutely void, and no effect could be given to it in this Court; but it is otherwise in such a matter as this, which is not a matter of property but a matter of feeling.

In the case to which I have referred Lord *Hatherley* goes at great length into the evidence to shew that there was no conclusive proof that there was such an arrangement. This, to my mind, is evidence that if he had come to the conclusion that there was such an arrangement he would have attached importance to it; not, indeed, on the question whether there was an abjuration of all duties to the child, because in a Protestant country like this I think we are bound to assume that a child is at least as likely to be well brought up in the Protestant religion as it could possibly be in the Roman Catholic religion. Therefore I cannot see that there is any abjuration whatever of the duty of a parent in agreeing that, instead of being brought up in that particular form of Christianity to which he himself belongs, the child, should, in deference to the feelings of the mother, be brought up in her particular form of the Christian religion. Therefore I entirely agree with what I take to be Lord *Hatherley's* opinion, that if such an agreement as that is established it is one to which this Court would feel every inclination to give effect. But coming to the conclusion as he did in that case, that such an agreement was not proved, he proceeds to look at the conduct of the husband, and from the conduct of the husband (who died when the child was a little under seven years of age), having allowed the mother to have the control of the education of the children and to bring them up in her own form of religion, namely, the Protestant form, he thought that he had thereby to that extent renounced the authority of a father. Therefore when those who claimed through him endeavoured to interfere, Lord *Hatherley* came to the conclusion (and I most entirely agree with his judgment) that it was not a

the first place, it was not in writing, and is therefore void under the *Statute of Frauds*. But a more important consideration is, that a father has no power to fetter himself by an agreement to exercise

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case in which he could allow the paternal relatives to interfere with the mother in bringing up the child as a Protestant, the father having himself allowed the child to be brought up by the mother until she was nearly seven years of age.

Now in this case it is proved to my satisfaction that there was an arrangement before the marriage that the female children (if any) should be brought up as Protestants. In pursuance of that I find that there is not only an agreement by the father, but that that agreement is acted on by his allowing the child to be taken to a Protestant church, and baptized in that church, which is a formal admission into the Protestant Church.

It was suggested by Mr. *Hemming* that this took place while the father was absent, but I consider it sufficiently proved that it was done with the father's approbation, and that he selected the sponsors. If the father himself were applying on this occasion I should hold that after that it was too late for him to interfere with the education of the child.

Then, assuming that *Joseph Andrews*, the paternal uncle, was duly appointed guardian, what has been his conduct? He allowed the child to enter her tenth year before he took any proceedings. For I can pay no attention to the correspondence in 1871, as it was not followed by action. I cannot consider that he did anything to assert his right until he applied for the writ of *habeas corpus* to Mr. Baron *Pigott* on the 12th of June, 1872. It is true that the child, previously to that, went on a visit to her guardian, but she returned in pursuance of an arrangement, and nothing was done until the writ was taken out. The child was then more than ten years old. Much has been said as to the case of *Stourton* v. *Stourton* (8 D. M. & G. 760). Mr. *Hemming* said that the subsequent decision of the present Lords Justices in *Hawksworth* v. *Hawksworth* (Law Rep. 6 Ch. 539) did not expressly overrule that case, but *quasi* overruled it. Now I confess I do not understand what *quasi* overruling a decision means. However, when I find two such eminent Judges as the Lord Justice *Knight Bruce* and the Lord Justice *Turner* agreeing on such a matter, I confess I should look with the very greatest hesitation at a subsequent decision which is said to overrule them; and unless I was perfectly satisfied in my own judgment that it was the intention of the Court by that subsequent decision to overrule them, I should follow the decision of those two Lords Justices.

Now what was the case to which that applied? It was a weaker case than this, for it related to the education of a child who was the son of a Roman Catholic and a member of a noble family. In that case the father of the child, Mr. *Stourton* (the father and mother being both Roman Catholics) died a Roman Catholic, and at his death the mother was a Roman Catholic. She afterwards changed her religion and became a Protestant. The *Stourton* family, with full knowledge of that, allowed the boys, whose education was in question in the cause, to remain with the mother. The note states that the child was born in 1847,

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rights which are not given him for his own benefit, but for the benefit of his children, in a way which, in his own judgment, he considers injurious to them. He is bound to educate his children

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that Mrs. *Stourton*, after her husband's death, as it appeared from the evidence not later than 1852, became a member of the Church of *England*—that is, when the child was five years of age. She then retained the custody of the child until he was nine years of age. Here the child is ten years and upwards. Then, for the first time, the paternal relatives interfered and sought to have the custody of the child in order that it might be brought up as a Roman Catholic. But in the meantime the mother, having become a Protestant when the child was five years of age, which is, I think, the earliest period at which you would consider a child would receive any religious impression, continued to educate it, and I suppose zealously educated it, in the Protestant religion. Lord Justice *James* seems to imply that she was a proselytizing mother. I confess I am unable to see on what ground he does so. It is a strong term. I do not see any evidence that she was a proselytizing mother. She was a mother who, I suppose from conscientious conviction, had left the Roman Catholic Church and had become a Protestant, when the child was five years of age, and being, as most converts are, very earnest, I daresay she most earnestly and zealously educated her child as a Protestant, for he appears to have been very well informed of the principles of the Protestant Church when he came before the Lords Justices at the age of nine years.

Now what are the principles on which the Lords Justices proceeded there? I confess to my mind they are general, broad, intelligible principles, upon which I always myself endeavour to act, and upon which I shall endeavour to act in the present case. The Lord Justice *Knight Bruce* says, "In my judgment, I repeat, there has been a failure in duty to the late Mr. *Stourton*." That is, a failure in duty to the late father in not at an earlier period interfering about this child. As soon as the mother became a Protestant that was the time for them to interfere; at all events, when the child attained seven years of age. But they allowed the matter to rest until he was nine. Then the Lord Justice says: "Application might, of course, have been made to this Court as to the child before his mind had become religiously influenced and biassed, in which case I am persuaded that his education in the doctrines of the church of his father would have been ordered, and so far as possible secured. Ought the same thing to be, or can it be done now? At the close of the argument I was unable to consider it otherwise than very possible that notwithstanding the early age of this boy his mother, a convert, might so effectually have availed herself of the full opportunity afforded by the paternal relatives as to have made religious impressions on his mind to a depth and an extent rendering dangerous and improper any attempt at important changes in them. It was my opinion accordingly, and that also of my learned brother, that we should have an interview with the lad." The Lord Justice *James* in a subsequent case seems to have thought that improper. I confess I am unable to concur in that opinion.

I am happy to find the Vice-Chancellor *Wickens* also, with regard to the infant in the other case of *Hawks-*

in the way which he conscientiously thinks the best for them. It is against public policy that a father should bind himself to relin-

worth v. *Hawksworth* (Law Rep. 6 Ch. 539), took the same course, although from the very tender age of the child in that case he did not consider that an important thing; and no doubt there is a great difference in children, as there is in men and women. One child of nine years of age may be very superior to another of the same age, and there may have been no doubt a great difference between young *Stourton* at the age of nine and young *Hawksworth* (a female child in that case) at the age of eight and a half years. Therefore Vice-Chancellor *Wickens* said, what might be expected, that he did not attach much importance to the interview, but the interview he had.

Then the Lord Justice continues: "He was brought to us in consequence on the 28th of February, and conversed with us. Certainly, I had thought it not unlikely that we should find him, in collegiate phrase, 'crammed' for the occasion; but I cannot say that I had anticipated such answers as he gave to some questions that we asked him, or was prepared for some of the observations that he made, not exhibiting (to us at least) any marked idiosyncracy. He seemed to be, in point of intelligence, rather above than below mediocrity, and to have received (what indeed in the circumstances was to be expected) more minute and close instruction as a Protestant, upon some at least of the main points of difference between the Church of *England* and that of *Rome*, than is usual in *England* with boys of his age." Then he says: "Upon much consideration I am of opinion"—now these are the things that are not to be overlooked—"that the child's tranquillity and health, his temporal happiness, and, if that can exist apart from spiritual welfare, his spiritual welfare also, are too likely now to suffer importantly from an endeavour at effacing his Protestant impressions, not to render any such attempt unsafe and improper."

Then Lord Justice *Turner*, taking the same view, says this: "The principles by which this Court is governed in cases of this nature, where there are no testamentary guardians, are not, as I apprehend, open to any serious doubt. When infants become wards of the Court the first and paramount duty of the Court unquestionably is to consult the well-being of the infants, and in discharging that duty the Court recognises no religious distinctions. If, consistently with the due discharge of that duty, the wishes of the father can be attended to, the Court having regard, as I apprehend, to the power with which the law of the country has entrusted the father of appointing guardians for his children, and thereby directing and regulating their future course of life, pays attention to those wishes; but if the wishes of the father cannot be carried into effect without sacrificing what the Court, acting without bias, judges to be for the well-being of the children, those wishes cannot be attended to. Where, therefore, as in the present case, the father has died without having expressed his intention as to the education of his children, and application is immediately or promptly made to this Court for its interference, I take it to be very much of course that the children should be brought up in the faith which the father has professed, the Court presuming that such would be the wish of the father; but where, as in the present case also, the application to this Court has been delayed and the chil-

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quish the control over his children's education: *In re Meades* (1); *Vansittart* v. *Vansittart* (2); *Hope* v. *Hope* (3). Unless the father

dren have been suffered to receive religious impressions different from those which the father entertained, other and far more serious considerations present themselves: the wishes of the father may be in conflict with the well-being and even with the safety of the children—and in order to ascertain whether this is the case or not, it becomes necessary to see what is the extent of the impression which has been made upon the minds of the children, and to consider what may be the danger of disturbing that impression."

No other case has occurred since that case to which I think it necessary to refer except that of *Hawksworth* v. *Hawksworth* (Law Rep. 6 Ch. 539). That case is plainly distinguishable from the present. There the father died intestate. It was the case of a female child brought up with the mother, well educated, as Vice-Chancellor *Wickens*, who saw them both, stated; but the father had done nothing from which you could infer any acquiescence on his part that the child should be brought up a Protestant. It was therefore a case for the application of the general rule of the Court, that as the father was a Roman Catholic the child must be brought up in the same faith. The child was only eight and a half years old. I am happy to find that it did not involve the removal of the child from the care of the mother, because if that had been necessary, I think it would have been a very strong decision indeed, and I confess my own individual opinion would much more go with the decision of *Stourton* v. *Stourton* (8 D. M. & G. 760) (a) than with that of *Hawksworth* v. *Hawksworth* (Law Rep. 6 Ch. 539), which always appeared to me to be a case in which the Court might very well have arrived at a different conclusion. I am perfectly satisfied that if it had come before me, as Vice-Chancellor, originally, I should have come to a different conclusion.

However, this case, in my opinion, is taken entirely out of the authority of *Hawksworth* v. *Hawksworth* (Law Rep. 6 Ch. 539), first, by the circumstance of the father agreeing that the child should be brought up as a Protestant, and, secondly and conclusively, in my opinion, by the fact of his having authorized its admission into the Protestant Church by being baptized in that church, and, thirdly, by the greater age of the child here, who is more than ten years of age. All these circumstances seem to concur in shewing that, being bound, as I am in all other such cases, to look at the well-being of the ward, I could not do anything less calculated to promote the well-being of the child, now close upon eleven years of age, than to take her from her present guardians. Up to the present moment the Plaintiff has remained with her maternal relatives, and for me to allow this child to be handed over under the writ, and to be taken to a Roman Catholic convent, to be brought up away from those to whom she has become endeared, who are also the objects of her affection, would be, in my opinion, as the Queen's Bench has already said, so harsh, and, in my opinion, so unjustifiable a step,

(1) Ir. L. Rep. 5 Eq. 98. (2) 2 De G. & J. 249.

(3) 8 D. M. & G. 731.

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acts upon the agreement in his lifetime, and shews his desire that the children should be educated in a faith different to his own, the father's religion must prevail: *Davis* v. *Davis* (1); *In re Curtis* (2); *Talbot* v. *Earl of Shrewsbury* (3). In the present case the father never did any act in his lifetime to shew his desire that his daughter should be brought up a Protestant. On the contrary, the fair result of the evidence is that she was baptized in a Protestant church contrary to his wish; and by his will, the validity of which is now fully established, he declared his desire that all his children should be brought up Roman Catholics. The effect of the will, if not the actual contents of the will, was well known to the infant's mother. The non-interference of the guardian can make no difference; he considered the child too young to be instructed in the distinctive doctrines of the Roman Catholic faith; at all events, he could not by his laches affect the rights of the father. It is intelligible that a father, who has both the right of deciding on the religious education of his children and the duty of acting on the decision, may be said to abdicate his right by conduct; but

that I am very happy indeed to find the Court of Queen's Bench took the view they did, although they considered they had no discretion to exercise in the matter. This is a case of a ward of this Court where the Judge having the management of the ward has a discretion, and in the exercise of that discretion I think I should exercise it most unwisely if I were to allow the education and custody of this child to be in any way interfered with by the paternal uncle, assuming him to be the guardian, which of course I must regard as doubtful. Suppose the father, instead of having died on the 16th of February, 1863, had separated himself from his wife, could he, after having allowed her to have the custody of the child and to educate it as a Protestant, have been permitted to come back and take the child away? It might be difficult perhaps to prevent the father from having the custody of his child, but if this Court had the control of her, if she were a ward of this Court, I am perfectly satisfied, under those circumstances, the Court would not have allowed him to interfere. I may also remark that if the child had been a ward on the 12th of June, 1872, it would probably never have entered the mind of the paternal uncle to have applied to the Common Law Court for the writ of *habeas corpus*. The interference of this Court would have been a pure matter of course. She was not a ward then, but she is a ward now. She has been brought under the protection of this Court, and I agree to the motion that has been made in her behalf.

(1) 10 W. R. 245. (2) 7 W. R. 474.
(3) 4 My. & Cr. 672.

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the guardian is a mere trustee with the duty imposed on him of giving effect to the father's wishes as to the education of the child. A mere duty like this cannot be abdicated by negligence. The only effect of negligence would be, that the Court would substitute another guardian to perform the duty which the testamentary guardian had neglected.

With respect to the supposed danger to the child in changing the course of her instruction, she was only nine years old when the guardian interfered, and she ought at once to have been given up to him. The doctrine of *Stourton* v. *Stourton* (1) is a very dangerous one, and will not be extended by the Court. It offers too great temptation to mothers to take an unfair advantage, and to attempt to proselytize their children at an early age. It was not followed in *Hawksworth* v. *Hawksworth* (2), nor in *In re Newbery* (3).

Mr. *Glasse*, Q.C., and Mr. *Ince*, for the Plaintiff:—

A father may abandon his right of controlling the education of his children. If he permits them to be brought up by persons or in a manner beyond his own control until a change would be injurious to their comfort or interests, he will not be allowed then to remove them from the persons who have had the care of them, or change their course of education: *Lyons* v. *Blenkin* (4); *Colston* v. *Morris* (5). It is of no importance whether the antenuptial contract could be enforced as a legal contract or not; it is, at all events, a point to be considered in estimating the conduct of the father, and explains why he did not interfere before his death with the baptism and custody of the child. It also explains the conduct of the guardian in not at once claiming the custody of the child. The real question is the happiness and interest of the child: *Austin* v. *Austin* (6). In the case of *In re Meades* (7) the father was alive, and the infants were not wards of Court, and the Court consequently had not the same discretion as it has here. The Court treats the office of a guardian as a mere trust: *Duke of*

(1) 8 D. M. & G. 760. (4) Jac. 245.
(2) Law Rep. 6 Ch. 539. (5) Ibid. 257, n.
(3) Ibid. 1 Ch. 263. (6) 34 Beav. 257.
(7) Ir. L. Rep. 5 Eq. 98.

Beaufort v. *Berty* (1), and will direct and control his conduct, like that of any other trustee (2). These considerations are independent of the question of religious training. But the case is much stronger when the only plea for removing the child is to change the faith in which she has been brought up. That is no ground for removing a young child from her mother: *Hill* v. *Hill* (3). The Plaintiff is quite of an age to render it dangerous to uproot the religious impressions which she has already received: *Stourton* v. *Stourton* (4); *In re Browne* (5).

Mr. *Hemming*, in reply.

May 6. SIR G. MELLISH, L.J., delivered the judgment of the Court as follows:—

This is an appeal by the Defendant, *Joseph Francis Andrews*, from an order of Vice-Chancellor *Malins*, whereby he ordered that the Defendant, *Joseph Andrews*, should be restrained until further order from interfering with the custody or education of the Plaintiff, and that a proper person or persons be appointed to act as guardian or guardians of the said infant during her minority or until further order, and to settle a scheme for her maintenance, education, and bringing up, and that the costs of the motion be costs in the cause. The practical question to be decided is, whether the infant Plaintiff, *Mary Ellen Andrews*, a girl now nearly eleven years old, ought to be removed from the custody of her grandmother, *Mrs. Fleetcroft*, where she is being educated as a member of the Church of *England*, to the custody of the testamentary guardian appointed by her father, to be educated as a Roman Catholic. The only evidence before the Vice-Chancellor was a single affidavit filed in support of the motion, but before us the witnesses on both sides were examined *vivâ voce*, and we also had an interview with the Plaintiff

(1) 1 P. Wms. 703.

(2) The Plaintiff's counsel also referred to the clause in the 12 Car. 2, c. 24, s. 8, which incapacitates a Popish recusant from being appointed a testamentary guardian, and which is not repealed by the 10 Geo. 4, c. 7, or the 26 & 27 Vict. c. 125; but they did not rely upon that point in their argument.

(3) 10 W. R. 400.

(4) 8 D. M. & G. 760.

(5) 8 Ir. Ch. Rep. 172.

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herself; and it is necessary we should state the conclusions we have come to on several disputed questions of fact which were raised before us. We may state that although there were several contradictions between the evidence given by the witnesses on each side, we think they may be accounted for by forgetfulness and by the natural bias of the witnesses in favour of their own side, and that we do not suspect any of the witnesses of intending wilfully to deceive us. [His Lordship then stated the effect of the evidence as given above, and continued:—]

10 Ch D 61
46, 8

We have not thought it necessary to state the letters of the parties at length, but they very plainly prove that, while the Appellant and his family were from religious motives conscientiously desirous that the Plaintiff should be educated as a Catholic, the *Fleetcrofts*, on the other hand, were principally influenced by a strong affection for the Plaintiff herself, and by what they believed would be for her happiness, and were comparatively indifferent to the religious question. Subsequently to February, 1872, the case has been in the hands of the lawyers. The Court of Queen's Bench have held at law that they are bound to order the Plaintiff to be given up to the Appellant as the testamentary guardian appointed by the father, if the will is duly proved. In consequence of this decision this bill has been filed, and the Vice-Chancellor has held that there are sufficient reasons to induce this Court to restrain the Appellant from enforcing his legal right to the custody of the Plaintiff, and we have to say whether we agree with this decision.

18 Ch D 62
66
21 Ch D 824

The first question we shall consider is, what is the legal effect of an agreement made before marriage between a husband and wife of different religious persuasions that boys should be educated in the religion of the father, and girls in the religion of the mother? We are of opinion that such an agreement is not binding as a legal contract. No damages can be recovered for a breach of it in a Court of Law, and it cannot be enforced by a suit for specific performance in equity. We think that a father cannot bind himself conclusively by contract to exercise, in all events, in a particular way, rights which the law gives him for the benefit of his children, and not for his own. We entirely agree with the decision of the Lord Chancellor of *Ireland* (*In re Meades* (1)), in which he held

(1) Ir. L. Rep. 5 Eq. 98.

that the Court could not during the lifetime of a father compel him out of his own funds to educate a child in a different religion from his own. So, also, if after a father's death it appeared to the Court that it was most for the benefit of a child to be educated in the religion of his father, we think that the Court would not abstain from ordering him to be so educated because the father had agreed with the mother that the child should be educated in her religion. On the other hand, if, after the death of the father, circumstances happen which, in the opinion of the Court, make it for the benefit of a child to be educated in the religion of the mother, and the question arises whether the father had so acted that he ought to be held in this Court to have waived or abandoned his right to have his child educated in his own religion, the fact that the father before marriage promised the mother that girls, the issue of the marriage, should be educated in her religion, is a circumstance to which in our opinion weight, and perhaps great weight, ought to be attached. This appears to have been the opinion of Lord *Hatherley*, from what he said on the subject in *Hill* v. *Hill* (1), though in that case he did not think that the fact of the agreement having been made was satisfactorily proved.

We will next consider whether it is made out that it will be for the interest of the Plaintiff to be educated in the religion of the Church of *England*, and as we are of opinion from our interview with the Plaintiff that she has not acquired the distinctive principles of the Church of *England* to such an extent as to make it wrong and cruel on that account that she should be educated in the Roman Catholic religion, the advantage of her being educated in the religion of the Church of *England* seems to depend on its being made out that it is for the advantage of the Plaintiff to remain with the *Fleetcrofts*, and that she cannot remain with them if she is to be brought up as a Roman Catholic. Is it, then, for the advantage of the Plaintiff to remain with the *Fleetcrofts?* Let us consider how the case would be if there were no religious question raised, and the parties were all of the same religious persuasion. A man having a wife and an infant boy and girl is prevented by consumption from earning a livelihood for them. He and the boy are supported

(1) 10 W. R. 400.

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by his relations—his wife and the girl by the wife's relations. He dies in that condition; the boy continues to be with and to be supported by the father's relations, and the girl to live with and to be supported by the mother's relations, until she is nearly nine years old. The mother's relations have acquired a strong affection for the girl, and the girl for them. Would the Court allow a guardian appointed by the father, but who up to that time had made no use of his power, had not even given notice to the mother's relations of his appointment as guardian, to exercise his legal right to remove the girl from the custody of those by whom she was being brought up? We are of opinion that the Court of Chancery would at once, under the circumstances supposed, restrain the guardian from exercising his legal powers. The girl must be educated by charity, and it is manifestly better and for her advantage that she should be intrusted to the charity of those whose kindness she has already experienced. If, therefore, there were no religious question, it is plain to us that the Plaintiff ought to be left with the *Fleetcrofts*.

Then, what difference does it make that there is a religious question; that the object of the testamentary guardian in removing the Plaintiff from the custody of the *Fleetcrofts* is that he may obey the injunctions of the father that the Plaintiff should be educated as a Catholic? Many persons would be disposed to say that it ought to make no difference whatever, except to afford an additional reason for not changing the custody of the child. We cannot go that length. The law unquestionably does give great weight to the right of a father to have his children educated in his own religion both during his lifetime and after his death; and if a father has done nothing to forfeit or abandon his right to have his child educated in his own religion, we think that the Court cannot refuse to order a child to be educated in the religion of its father because it thinks that the child would be more happy and contented, and possibly be better provided for by its mother's relations. On this ground, in *Hawksworth* v. *Hawksworth* (1) we affirmed an order made by Vice-Chancellor *Wickens*, which ordered a girl of eight years old, notwithstanding that her mother was a

(1) Law Rep. 6 Ch. 539.

Protestant, to be educated in the religion of her father, a Catholic. It is clear, however, that a father may, by his conduct, lose his right even in his own lifetime, and much more after his death: and after giving the case the best consideration in our power, we have come to the conclusion that *Thomas Andrews* and the present Appellant have by their conduct lost the right of requiring the Plaintiff to be removed from the custody of the *Fleetcrofts* for the purpose of being educated as a Roman Catholic. Not only did *Thomas Andrews* promise his wife that any girls they might have should be educated as Protestants, but practically that promise was carried out without objection or serious opposition until the Plaintiff was nearly nine years old. No doubt it is alleged by the Appellant and his family that this was done against the will both of *Thomas Andrews* in his lifetime and of the Appellant since his death, but we cannot help thinking, nevertheless, that it was the natural result of the conduct of *Thomas Andrews*. If *Thomas Andrews* had really never promised his wife that their girls should be educated as Protestants, and was really an earnest Catholic as alleged, he would have told his wife in plain terms when a girl was born that he wished the child to be baptized as a Catholic, and if she caused her to be baptized as a Protestant contrary to his wishes, surely he would have reproached her with having disobeyed his orders, and would have told her that he intended the child to be educated as a Catholic, and would not have concealed the making of his will from her. He did not do any of these things, and we are convinced he did not do them because he felt himself bound as between himself and his wife by the promise he had made her, and did not dare to tell her that he intended to break it. With respect to the Appellant, we do not wish to make any remarks against him. We think he acted with great liberality, having a wife and children of his own, in supporting his brother's boy, and that he could not have been expected to support the girl also. But still the result of his conduct and that of *Thomas Andrews* has been that the Plaintiff has been brought up by the *Fleetcrofts* as a Protestant, and cannot now be removed from their custody without prejudice to her happiness, her prospects in life, and possibly her health.

We are of opinion that the decision of Lord *Eldon* in *Lyons* v.

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Blenkin (1) and of Lord *Hatherley* in *Hill* v. *Hill* (2) are authorities on which we ought to act in the present case. *Lyons* v. *Blenkin* proves that even a father himself may lose the right to the custody of his child by allowing it to be brought up by other persons if it becomes the manifest interest of the child not to be removed from the custody in which it has been placed, and Lord *Eldon* thus explains the principle (3):—

"The view I have taken of the case is of this sort. Here is a fund provided for the maintenance and education of these children, and I think I am properly warranted by authorities in asserting that if a testator thinks fit to provide a fund for the maintenance and education of children during their minorities, and at the end of that period makes a further provision for them, and the father permits their maintenance to be supplied from that source, allowing them to be brought up with expectations founded upon a particular species of maintenance and education, which he himself cannot afford to give them, he is not (unless I greatly mistake the matter), according to the principles of this Court, at liberty to say that he will take them from the course of education which they have hitherto pursued, and that, too, at a period approaching to maturity of age. He is not at liberty to say, I will alter the course of education of my children by applying more scanty means to the purpose, and I will not permit them to have the benefit of that sort of maintenance and education which they have hitherto had, and in consequence of which their views in life are very different from what they would have been without it. With the religious tenets of either party I have nothing to do, except so far as the law of the country calls on me to look on some religious opinions as dangerous to society."

And afterwards (4) he said:—

"It is always a delicate thing for the Court to interfere against the parental authority, yet we know that the Court will do it in cases where the parent is capriciously interfering in what is clearly for their benefit. In the case of *Powel* v. *Cleaver* (5) the principles on which this Court proceeds were fully discussed. In a case

(1) Jac. 245.
(2) 10 W. R. 400.
(3) Jac. 255.
(4) Ibid. 262.
(5) 2 Bro. C. C. 499.

of this kind the Court would not feel itself at liberty to deliver back the infants to the custody of their father, and for the reasons that I shall notice. It has been stated that he is a dissenting minister. I mention that again, guarding myself against its being supposed that his bearing that character furnishes the least ground why he should not have the care of his children; but it furnishes this observation—that his situation in life leaves him without the means of so educating them as they ought to be educated, regard being had to their fortune and estate. The father objected to the aunt because she married; she objected to delivering over the children to their father because their mother died and the father had taken another wife; but the circumstance that decides me about not removing the children is this—that although the testatrix could not impose the terms of appointing a guardian where the father was living, yet the father, by his consent, might enable the guardian to act; and by his consent it appears that he has enabled the guardian to act, and by such consent these children have, with very little interruption, continued under the care and guardianship of the aunt. All their habits have been acquired under the roof of their aunt; all their connections have been formed under their aunt; and it appears to me that the father has so far given his consent to this course of education as to preclude him from saying that he shall now be permitted to break in and introduce a new system of education which cannot be consistent with the system to which they have been habituated, and where so much depends upon the *quantum* of supply for the purpose which the discretion of this lady may lead her to apply, if the testatrix has left her the discretion of regulating the means for their education."

The facts of the case of *Hill* v. *Hill* (1) more nearly resemble those of the present, though there are no doubt differences between them. They agree in this—that in both cases the unfortunate situation in which the child became ultimately placed was the result of the vacillating opinions and vacillating conduct of the father, caused by the conflict in his mind between his desire to fulfil his promise to his wife and his religious principles. We are also influenced by the strong opinion expressed by the Judges of

(1) 10 W. R. 400.

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the Court of Queen's Bench, that, if they had the authority and could have exercised the same discretion which the Court of Chancery has, they would not have ordered the Plaintiff to be given up to the Appellant.

The only question which remains to be considered is whether, although it may be advisable that the Plaintiff should remain with the *Fleetcrofts*, she may not remain with them and still be educated under the directions of the Appellant as a Catholic. We are, however, clearly of opinion that, although it appears to have been at one time contemplated that the Plaintiff should be a day scholar at a convent school at *Chester* and still live with the *Fleetcrofts*, this would for obvious reasons be a most injudicious and improper mode of education. If she is to remain with the *Fleetcrofts*, it seems to us obvious that she must be brought up as a Protestant. On the whole, we are of opinion that the order of the Vice-Chancellor ought to be affirmed, but under all the circumstances of the case, believing, as we do, that the Appellant has acted from conscientious motives, and thinking that he was justified in taking the opinion of the Court of Appeal, we are of opinion that the order should be affirmed without costs.

Solicitors for the Appellant: Messrs. *Chester, Urquhart, Bushby, & Mayhew*, agents for Messrs. *Hostage, Tatlock, & Hostage, Chester.*

Solicitors for the Plaintiff: Messrs. *Nisbet, Rooke, & Daw.*

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May 9.

Bankruptcy—Proviso in Fraud of the Bankruptcy Laws—Proviso that a Security shall be increased if the Debtor become Bankrupt—Agreement for Bill of Sale—Registration—17 & 18 *Vict. c.* 36, *s.* 7.

A. sold a patent to *B.* in consideration of *B.* paying royalties to *A.* *B.* at the same time lent *A.* £12,500; and it was agreed that *B.* should retain one-half of the royalties, as they became payable, towards satisfaction of the debt; provided that, if *A.* became bankrupt or made an arrangement with his creditors, *B.* might retain the whole of the royalties in satisfaction of the debt. *A.* became a liquidating debtor:—

Held, that *B.* had a lien on one-half only of the royalties, and that the proviso that he might retain the whole of the royalties in case of *A.*'s bankruptcy, &c., was a fraud upon the bankruptcy laws, and void.

An agreement for a bill of sale, if relied on as an equitable assignment of the property, requires to be registered under the *Bills of Sale Act* (17 & 18 Vict. c. 36).

IN this case there were two appeals from an order of Mr. Registrar *Spring Rice*, acting as Chief Judge, made in the liquidation of the estate of *Joshua Jeavons*, who carried on the business of an iron manufacturer at the *Millwall Iron Works* at *Poplar*, under the firm of *Joshua Jeavons & Company*.

By an indenture dated the 30th of March, 1872, and made between *J. Jeavons* of the one part, and *John Brown & Co., Limited*, and *Charles Cammell & Co., Limited*, of the other part, *Jeavons* assigned to *Brown & Co.* and *Cammell & Co.* a patent for improvements in the manufacture of armour plates, which had been granted to him. By that deed it was provided that *Jeavons* should be entitled to a royalty of 15*s.* per ton on all armour plates, whether made in accordance with the patent or otherwise, ordered of or supplied by *Brown & Co.* and *Cammell & Co.*, or either of them, for the English Government or English ship-builders, during six years from the 1st of January, 1872, and 10*s.* per ton on all armour plates in like manner ordered of or supplied by them for any foreign government or foreign builder during the same period.

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By a second indenture of the same date, between the same parties, *Jeavons* assigned to *Brown & Co.* and *Cammell & Co.* all his interest in the *Millwall Iron Works*, which he held under an agreement for a lease for twenty-one years, together with the machinery and plant and trade fixtures, by way of mortgage for securing the sum of £12,500 advanced by them, with interest, together with further advances.

By a third indenture of the same date, and made between the same parties, which was called a deed of arrangement, after reciting the two deeds of even date, and also reciting that it was part of the consideration of the advance of £12,500 that it should be secured as well by a mortgage of the lease of the said premises at *Millwall* as by certain chattels and effects of *Jeavons* at the same premises, and that a bill of sale of the said chattels and effects, which were described in a schedule, to *Brown & Co.* and *Cammell & Co.*, had been prepared and engrossed, but had not been executed, it was witnessed that, notwithstanding the provisions contained in the mortgage deed, and to be contained in the intended bill of sale, *Brown & Co.* and *Cammell & Co.* should not press for payment nor execute the said powers of sale contained therein respectively, but should repay themselves by retention of one-half of the royalties to be paid to the debtor under the assignment of the before-mentioned patent, and also by the retention of the whole, or of such part as might be mutually agreed upon, of the moneys that might become due from *Brown & Co.* and *Cammell & Co.* for work done for them by *Jeavons*.

It was also provided that *Brown & Co.* and *Cammell & Co.* should not call for the execution of the bill of sale unless they should have reasonable grounds for believing that it was necessary for their security; but if such case should arise, *Jeavons* would execute the bill of sale immediately; and when the same should have been executed, *Brown & Co.* and *Cammell & Co.* should be entitled to register the same immediately.

The deed of arrangement then contained the following provision:—That notwithstanding the foregoing provisions, if any person or firm, other than *Brown & Co.* and *Cammell & Co.*, or the English Government, should engage in the manufacture of armour plates, all obligation on the part of *Brown & Co.* and *Cammell & Co.* to

pay the royalties was to cease; and if any such event should happen, or if the debtor should become bankrupt otherwise than on the petition of *Brown & Co.* and *Cammell & Co.*, or take any proceedings for arrangement under the bankruptcy law to which *Brown & Co.* and *Cammell & Co.* should not assent, the said £12,500, or such part thereof as should remain due, should be subject to the provisions of the indenture of mortgage and of the said intended bill of sale without reference to the deed of arrangement, and the whole of the moneys secured should be deemed immediately due, and the whole of the royalties might be retained by *Brown & Co.* and *Cammell & Co.* until such moneys should have been fully paid; but in all other cases the provisions of the deed of arrangement and of the indentures recited therein should take effect and be in full force.

On the 16th of May following *Brown & Co.* and *Cammell & Co.* tendered a bill of sale to *Jeavons* for execution; but he refused to execute it, and they accordingly gave notice that they would not pay any of the royalties.

On the 29th of July a petition for liquidation was presented by *Jeavons*, and in due course a trustee was appointed. The trustee disclaimed the leasehold interest in the works at *Millwall*. At the date of the liquidation the sum of £12,500, and a considerable sum for further advances, amounting altogether to about £15,000, were due to *Brown & Co.* and *Cammell & Co.*, and they claimed a lien for this sum, first on the machinery and trade fixtures, and on the royalties payable in respect of the patent; and secondly, on the chattels and effects included in the intended bill of sale.

They accordingly applied to the Court for an order declaring their lien, and the Registrar made an order by which he declared that *Brown & Co.* and *Cammell & Co.* were entitled to a charge upon the machinery, engines, and plant in the nature of trade fixtures, and on the royalties payable by the companies to the debtor, and that the machinery, engines, and trade fixtures, and the royalties, should be sold for payment of the debt due to the companies; but he refused to make any order on the chattels included in the intended bill of sale.

From this order both the trustee, Mr. *Mackay*, and *Brown & Co.* and *Cammell & Co.* appealed.

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Mr. *De Gex*, Q.C., and Mr. *Finlay Knight*, for the trustee:—

In the first place there was no mortgage of the royalty or security upon it. There is nothing which can be sold under the 78th rule of the *Bankruptcy Rules*, 1870. A man cannot have a charge on a debt which is due from himself. But, secondly, if there is a security at all, it only extends over a moiety of the royalty. The clause giving the creditors a security over the whole in case the debtor shall become bankrupt is a fraud upon the bankruptcy law, and is void: *Wilson* v. *Greenwood* (1); *Whitmore* v. *Mason* (2).

Mr. *Fry*, Q.C., and Mr. *Henderson*, for *Brown & Co.* and *Cammell & Co.*:—

The royalties were part of the property of the bankrupt, and there is no reason why he should not give a security on them. The security extends over the whole of the royalties. There is nothing in the clause giving us a security over the whole which is contrary to the policy of the bankruptcy laws. The distinction is correctly laid down in Mr. *Swanston's* note to *Wilson* v. *Greenwood* (3), as follows: "The general distinction seems to be that the owner of property may, on alienation, qualify the interest of his alienee by a condition to take effect on bankruptcy, but cannot, by contract or otherwise, qualify his own interest by a like condition determining or controlling it in the event of his own bankruptcy, to the disappointment or delay of his creditors." This was not a condition by a person that the property should be altered on his own bankruptcy; it was not a disposition by the debtor at all. *Brown & Co.* and *Cammell & Co.* said: "We will purchase your patent, and will lend you £12,500, and we will pay you a royalty as the price of the patent, provided the royalty be made a security for the lease; but we will not enforce the payment of the royalty, except as to one-half, unless you become bankrupt." Such an agreement is not obnoxious to the rule against conditions taking effect on bankruptcy: *Rochford* v. *Hackman* (4).

(1) 1 Sw. 471.
(2) 2 J. & H. 204.
(3) 1 Sw. 481.
(4) 9 Hare, 475.

SIR W. M. JAMES, L.J.:—

It appears to me that this case is reasonably clear upon both points. I entertain no doubt that there is a good charge upon one moiety of the royalties, because they are part of the property and effects of the bankrupt. But, on the other hand, it is equally clear to me that the charge cannot extend to the other moiety. If it were to be permitted that one creditor should obtain a preference in this way by some particular security, I confess I do not see why it might not be done in every case—why, in fact, every article sold to a bankrupt should not be sold under the stipulation that the price should be doubled in the event of his becoming bankrupt.

It is contended that a creditor has a right to sell on these terms; but in my opinion a man is not allowed, by stipulation with a creditor, to provide for a different distribution of his effects in the event of bankruptcy from that which the law provides. It appears to me that this is a clear attempt to evade the operation of the bankruptcy laws. The result is that the order will be varied so as to declare that there is a security on one moiety only.

SIR G. MELLISH, L.J.:—

I am of the same opinion. The case comes directly within what Lord *Eldon* says in *Higginbotham* v. *Holme* (1). There His Lordship says: "This settlement looks forward to a change of intention, to the purpose of becoming a trader, and looks forward expressly to the possible consequences of that purpose; and so looking forward to such a change of purpose, and to such consequences, it is a limitation by the effect of which the estate would go to the creditors; that change being adopted with the express object of taking the case out of reach of the bankrupt laws; and as to the consideration from the covenant of the father, which, though it may perhaps prove worth little or nothing, is to be regarded as a consideration with reference to all the provisions of the settlement, though undoubtedly an annuity, might have been provided by the settlement for the wife in all events, yet it is not competent to a party giving a consideration for a

(1) 19 Ves. 88, 92.

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contract that is a direct fraud upon the bankrupt laws to have the benefit of it." That is to say, as I understand it, a person cannot make it a part of his contract that, in the event of bankruptcy, he is then to get some additional advantage which prevents the property being distributed under the bankruptcy laws.

It is certainly remarkable that there is apparently no reported case in which this has been decided with reference to a creditor in an ordinary mercantile transaction; but that seems to me an *à fortiori* case. In the simple case of a man lending a sum of money on mere personal security, and making a bargain that, in the event of his debtor becoming bankrupt, he should then have a security upon a certain portion of his property, it would really be an absurd contention that he should be allowed to have the benefit of the security under the bankruptcy law.

Mr. *Fry*, Q.C., and Mr. *Henderson*, then argued in support of the second appeal:—

We have a valid agreement for a bill of sale of the chattels on the premises at *Millwall*. We applied to the debtor, before the liquidation, to give us a bill of sale in accordance with the agreement, but he refused. We now rely upon the agreement as an equitable assignment, which does not require to be registered under the *Bills of Sale Act* (17 & 18 Vict. c. 36), but gives us a right in equity to the chattels comprised in it: *Smale* v. *Burr* (1); *Ex parte Homan* (2).

Mr. *De Gex*, Q.C., and Mr. *Finlay Knight*, for the trustee, were not called on.

SIR W. M. JAMES, L.J.:—

It appears to me that this contention is most unreasonable. It either is or is not an assurance of the goods. It is admitted that it is not an assurance at law, but it is contended that it is an assurance in equity; that is to say, that the creditors have acquired an equitable right to the goods. If it is an equitable assurance of the goods, it requires registration. I am of opinion, therefore,

(1) Law Rep. 8 C. P. 64. (2) Law Rep. 12 Eq. 598.

this contention entirely fails, and that the appeal ought to be dismissed with costs.

SIR G. MELLISH, L.J.:—

I am of the same opinion. I do not think we are stretching the words of the Act at all beyond what they properly mean. As far as I can discover, this is the first case in which the question has arisen whether the agreement to execute a bill of sale upon certain specific chattels without being registered can be relied on as a valid transfer and assurance of the goods in equity. The only real question is, whether the expression "bill of sale" is confined to a bill of sale which passes property at law—whether it includes a document which is a purely equitable assurance without passing the property at law. The words of the 7th section of the *Bills of Sale Act* are these: "The expression 'bill of sale' shall include bills of sale, assignments, transfers, declarations of trust without transfer, and other assurances of personal chattels." I agree that this is not a declaration of trust without transfer; but still the words shew that equitable assurances were in the contemplation of the Legislature as well as legal assurances. And then come these general words, "other assurances of personal chattels," and the question is, ought they to include an assurance of personal chattels in equity as well as an assurance of personal chattels at law? It is very difficult to say, unless it was to include a security of that description, why these general words were added. In my opinion the case is plainly within the mischief of the Act, and I think it is fairly within the words of the Act. No doubt, *quâ* agreement, it does not require registration; but in my opinion we ought to hold that an agreement to execute a bill of sale cannot be relied upon as being equivalent to an actual bill of sale in equity without involving the consequence that that brings it within the *Bills of Sale Act*, and that, if it is not registered, the Court will look upon it as invalid.

Solicitors: Messrs. *Lewis, Munns, & Longden;* Messrs. *Ashurst, Morris, & Co.*

L. JJ.
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April 29;
May 1.

THORPE *v.* BRUMFITT.

[1871 T. 96.]

Injunction—Right of Way—Right of Way in Gross—Nuisance arising from Acts of Several Persons.

10 Ch. 475 n.
14 L.T. 576

P. was the owner of an inn, the yard of which was approached by a passage over adjoining property of *M.* *P.* and *M.* agreed to alter their boundary, and substitute a new passage for the old one. *M.* accordingly, in 1854, conveyed to *P.* a small strip of land reaching across the end of the new passage where it entered the yard, and granted to *P.*, his heirs and assigns, "rights of way at all times and for all purposes along a passage intended to run between the piece of land hereinbefore conveyed and a street called the *Tyrrels*." By another deed *P.* re-leased his rights of way over the old passage. The Plaintiff was a lessee of the inn and yard under *P.* The Defendants were tenants of *M.*, occupying warehouses on his property, and the bill was filed to prevent the Defendants from allowing carts and waggons to remain stationary in the passage in course of loading and unloading, so as to obstruct the access to the yard:—

Held (affirming the decision of the Master of the Rolls), that the necessity of the business of the Defendants did not give them any right to occupy the passage by stationary obstructions when any other person having a right of way required to pass:

Held, further, that the right of way was not a right in gross, but was appurtenant to the property occupied by the Plaintiff, so that his lease gave him a right to the enjoyment of it.

Ackroyd v. *Smith* (1) explained.

The acts of several persons may together constitute a nuisance, which the Court will restrain, though the damage occasioned by the acts of any one, if taken alone, would be inappreciable.

THIS was an appeal from a decree of the Master of the Rolls granting a perpetual injunction.

In 1853 *Joshua Pollard* and *George Pollard* were seised in fee of an inn called the *Commercial Inn*, at *Bradford*, and certain land and buildings adjoining it. At the back of the inn was a yard occupied with it. The only access for horses and carriages to this yard and to the stabling of the inn was from a street called the *Tyrrels*, along a passage which was upon part of the land belonging to the *Pollards*. This passage ran northwardly from the yard to the *Tyrrels*.

(1) 10 C. B. 164.

On the 12th of July, 1853, the *Pollards* sold and conveyed to *John Morrell* the buildings and land adjoining the *Tyrrels*, reserving to themselves a right of way along the above-mentioned passage to the yard of the inn, which still belonged to them.

After this sale an arrangement was come to between *Morrell* and the *Pollards* for slightly altering the boundary between their properties, and for substituting a new passage to the inn yard. This arrangement was carried into effect by two indentures dated the 2nd of March, 1854. By the first of these *Morrell* conveyed to the *Pollards* in fee a triangular plot of land containing five and a half square yards (being in the rear of and abutting upon the south-western corner of part of the lands conveyed to *Morrell* in July, 1853), reserving to himself, his heirs and assigns, a right of way at all times and for all purposes over this plot to and from his property adjoining the eastern side of it. This plot was part of the property conveyed to him in the previous year by the *Pollards*, and was in part occupied by the roadway of the passage. By the same indenture *Morrell* granted to the *Pollards*, their heirs and assigns, "rights of way and passage at all times hereafter and for all purposes through, over, and along a certain road, passage, or gateway running or lying, or intended to run or lie, between the north side of the said piece of land hereinbefore conveyed and a street called the *Tyrrels*, and which road, passage, or gateway is more particularly delineated on the plan drawn in the margin hereof; and also the right, power, license, and privilege of granting similar rights of roadway and passage over the same road, passage, or gateway to any other person or persons whomsoever: To have and to hold, &c." And *Morrell* covenanted to construct the new road, and at all times thereafter to keep it in good repair. It was stipulated that *Morrell*, his heirs or assigns, might erect any buildings over the passage, so that it was left of the height of at least eight feet.

Morrell made the new roadway in conformity with the covenants of the last-mentioned deed. The triangular strip which he conveyed to the *Pollards* lay across the southerly end of the new passage.

By the other indenture of the 2nd of March, 1854, the *Pollards* conveyed to *Morrell* in fee a triangular piece of land, containing

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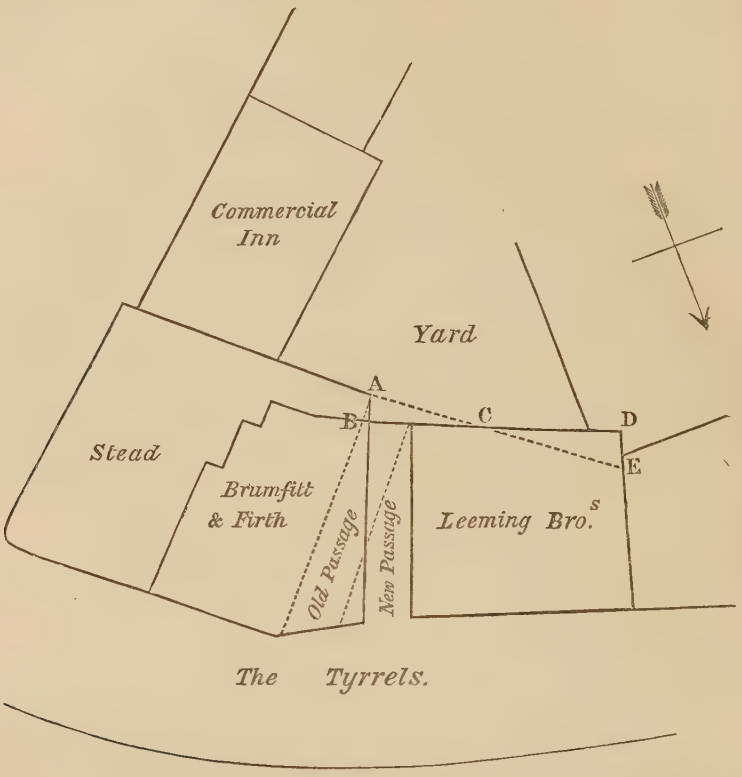
five and a half square yards, being in the rear of and abutting on the south-eastern corner of part of the property conveyed to



A B C. Plot conveyed by *Morrell* to the *Pollards*. C D E. Plot conveyed by the *Pollards* to *Morrell*, 2nd of March, 1854.

Morrell in July, 1853, and re-leased their rights of way which they had under the conveyance of 1853 over the old passage.

The Plaintiff was a lessee of the *Commercial Inn*, with the yard and appurtenants, under a demise from the successors in title of the *Pollards*.

In 1854 *Morrell* erected warehouses on the property purchased by him and made in the floor of the new roadway a large opening, forming an entrance to a cellar beneath, and covered it with a wooden trap-door. He also made a trap-door over it, forming an entrance through the roof covering the roadway, into the warehouse above. He also made side-entrances from the roadway into the warehouses, and placed in them folding doors for the purpose

of loading and unloading goods; and in 1860 he placed a crane in the wall close to one of these doors. These warehouses were let by him to different persons, and he never, after 1863, was in the occupation of any part of the property.

The case made by the bill was that *Morrell* and his tenants, who were Defendants to the bill, or some of them, but which of them the Plaintiff could not discover, caused the roadway to be blocked up with carts and waggons, and kept the trap-door and folding doors open and the crane at work for long and unreasonable periods, and particularly during the busiest hours of the day, when great numbers of persons required to pass with vehicles and on foot to and from the inn yard; and that many persons, in consequence of finding the roadway so obstructed, took their custom to other inns. The bill prayed for an injunction to restrain the Defendants from blocking up or obstructing the roadway, or causing or permitting it to be blocked up or obstructed, and for an inquiry as to damages. *Morrell* having put in an answer denying any power of controlling the acts of his tenants, his name was struck out by amendment, and the suit was continued against his tenants, *Brumfitt* and *Firth*, *Stead*, and *Bates* and *Leeming*. These Defendants all answered together, insisting that they had, under their leases, a right of way over the new roadway for the convenient occupation of their warehouses, to be exercised in a reasonable and proper way, so as not to interfere improperly with the exercise of the right of way granted to the *Pollards*; that ever since the new roadway was formed the occupiers of the warehouses had used it in the same way as at present; that the Plaintiff, who became tenant of the inn in 1864, had never made any complaint till 1869, and had lost by laches any right to sue in equity; that the use which the Defendants had made of the roadway had not been so continuous or so injurious to the Plaintiff as to entitle him to sue in equity, and that his remedy (if any) was at law; that the use of the roadway for loading and unloading waggons was necessary for the use of the warehouses for the purpose of erecting which *Morrell* had, to the knowledge of the *Pollards*, bought this land, and which were erected with their privity; that the right of way granted to the *Pollards* was not appurtenant to any particular land, but was personal only, and the Plaintiff therefore had not legal title to a

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right of way; and that there was no statement in the bill charging any of the Defendants specifically with obstructing the way, the Plaintiff only alleging that some of the Defendants, but which in particular he did not know, had caused the obstruction; and they claimed the same benefit of these two last objections as if they had demurred.

It was disputed on the evidence whether *Stead* had to any extent interfered with the Plaintiff's right of way, but the Court considered it to be sufficiently shewn that the way had been unjustifiably obstructed.

The Master of the Rolls made a decree to the following effect:—Declare that the Plaintiff and the Defendants have an equal and reciprocal right to the use of the roadway from the *Tyrrels* to the *Commercial Inn*, and that the persons interested therein have not, nor have any of them, any preferential right of way, and that the necessity or urgency of their particular trade or business does not give them any right to occupy the said roadway by stationary obstruction, when the passage is required by any other person having the right of using such roadway. Declare that it is the duty of all the parties interested in the said right of way so to arrange the use of the same as best to facilitate the use of it for the others interested therein; and that the said persons interested therein are not entitled to place or leave any stationary obstruction in such roadway, except at such times as the use thereof is not required for any other of the persons interested therein; and if when so occupied the use of the roadway is required by any other person entitled to use the same, the person placing such obstruction in the roadway is bound forthwith to remove the same. Injunction to restrain the Defendants and any persons interested in the said roadway, their respective servants and agents, from placing or leaving any stationary obstruction in the said roadway, except at such time as the use thereof is not required for any other of the persons interested therein, and from making use of the said roadway in any manner inconsistent with the meaning of the said declarations.

Brumfitt and *Firth* and *Stead* severally appealed from this decree.

Mr. *Hardy*, Q.C., and Mr. *Langworthy*, for the appeal of *Brumfitt*

and *Firth*, referred to *Vestry of St. Mary, Newington* v. *Jacobs* (1); *Swaine* v. *Great Northern Railway Company* (2); *Gaunt* v. *Fynney* (3), and *Watts* v. *Kelson* (4); and as to the right of way being in gross, to *Ackroyd* v. *Smith* (5).

Mr. *Fry*, Q.C., and Mr. *Smart*, for *Stead's* appeal, referred to *Hext* v. *Gill* (6) and *Cooke* v. *Forbes* (7).

Mr. *Whitehorne*, for other Defendants.

Mr. *Southgate*, Q.C., and Mr. *Locock Webb*, for the Plaintiffs, were not called on.

SIR W. M. JAMES, L.J.:—

I am of opinion that the decree of the Master of the Rolls is right so far as it has gone against the Defendants. Whether the Plaintiff is not entitled to a more clear and simple declaration of his right we need not consider, since he is satisfied with the decree as it stands. The Plaintiff alleges a right of way over a narrow passage to the yard of his inn, and he sets out a grant of that right which is in full and ample terms. The Defendants are tenants who claim under the grantor of the right of way. It is contended that this right is not assignable at law, for that it is a right in gross. I am of opinion, upon the construction of the deed, that it is not a right in gross. The case of *Ackroyd* v. *Smith* has been misapprehended. It was there in substance said to the Defendants, "In any view of the case, you are wrong. If this was a right of way appurtenant to a particular property it could only be used for purposes connected with that property, and you have been using it for other purposes. If it was not, then it was a right in gross, and could not be assigned to you." The case involved no decision that the right of way was in gross. In the present case the right of way is expressed to be over a passage running between the highway and the piece of ground which is granted by the deed; it is therefore a grant of a right of way to

(1) Law Rep. 7 Q. B. 47.
(2) 4 D. J. & S. 211. 10 Jur NS 191
(3) Law Rep. 8 Ch. 8.
(4) Law Rep. 6 Ch.166.
(5) 10 C. B. 164.
(6) Law Rep. 7 Ch. 699, 711.
(7) Law Rep. 5 Eq. 166.

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and from that triangular piece of ground. This must be construed reasonably as meaning a right of way between the highway and the yard of the inn of which the grantees were the owners, the triangular piece of ground not being intended to be held as a separate property, but being granted only for the purpose of being thrown into the yard, so as to make a more convenient boundary line between the properties of the grantor and the grantees. I therefore am of opinion that this was a right of way which would pass as appurtenant to the inn.

It was urged that the decree gives the Plaintiff an exclusive right of way. I cannot understand this objection. The Plaintiff only claims a right of way free from hindrance. He does not claim to be entitled to the soil or to prevent the owner of the soil from exercising over it any rights which do not derogate from his grant. The Plaintiff cannot complain, unless he can prove an obstruction which injures him. The case is not like one of trespass, which gives a right of action though no damage be proved. In the present case, I cannot come to any other conclusion than that arrived at by the Master of the Rolls, that the right of access to the inn-yard has been interfered with in a way most prejudicial to the Plaintiff. Nothing can be much more injurious to the owner of an inn than that the way to his yard should be constantly obstructed by the loading and unloading of heavy waggons. If a person who was going to put up his horses at the inn was stopped by the loading or unloading of waggons, he would probably at once go to another inn. Then it was said that the Plaintiff alleges an obstruction caused by several persons acting independently of each other, and does not shew what share each had in causing it. It is probably impossible for a person in the Plaintiff's position to shew this. Nor do I think it necessary that he should shew it. The amount of obstruction caused by any one of them might not, if it stood alone, be sufficient to give any ground of complaint, though the amount caused by them all may be a serious injury. Suppose one person leaves a wheelbarrow standing on a way, that may cause no appreciable inconvenience, but if a hundred do so, that may cause a serious inconvenience, which a person entitled to the use of the way has a right to prevent; and it is no defence to any one person among the hundred to say that what he

does causes of itself no damage to the complainant. It is urged that no case is shewn of *Stead* having done anything before the bill was filed; but this is no defence to a Defendant who by his answer justifies what the other Defendants have done, and insists on the right to do the same. The Defendants seem to have a notion that they have as much right to use the passage for loading and unloading waggons as the Plaintiff has to use it for the purpose of passing over it. But the practice of loading and unloading has arisen since the grant of the right of way, and has not been continued long enough to confer an easement. There is therefore nothing to prevent the Plaintiff from insisting on having a right of way not interfered with by obstructions such as are complained of.

SIR G. MELLISH, L.J.:—

I am of the same opinion, and shall only add a few words as to the right of way. I am of opinion that the right given was not a right in gross. In *Ackroyd* v. *Smith* (1), though it was not absolutely necessary to the decision to give any opinion whether the right of way was in gross or not, the Court gave an opinion that it was in gross. But in that case the close to which it was sought to make the way appendant was not at the end of the road, and *Cresswell*, J., said: "It is not in the power of a vendor to create any rights not connected with the use or enjoyment of the land and annex them to it, nor can the owner of land render it subject to a new species of burden, so as to bind it in the hands of an assignee. . . . It would be a novel incident annexed to land that the owner and occupier should, for purposes wholly unconnected with that land, and merely because he was owner and occupier, have a right of road over other land." The purposes for which the right of way was granted in that case were to a great extent unconnected with the use of the close to which that right was claimed as appurtenant. Here the words "between the north side of the said piece of land hereby conveyed and a street called the *Tyrrels*," may fairly be construed as making the right of way appendant to the piece of ground which is conveyed, and the

(1) 10 C. B. 164.

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words "for all purposes" as meaning "for all purposes which make it necessary to pass between that piece of ground and the street." There is no authority for holding that the generality of this expression, "for all purposes," makes a right of way not appurtenant where it is expressed to be to or from a particular piece of land.

Solicitors: Messrs. *Emmet & Son;* Messrs. *Parkers & Co.*

L. JJ. 1873 *May* 8.

TELEGRAPH DESPATCH AND INTELLIGENCE COMPANY *v.* McLEAN.

[1873 T. 5.]

Injunction—Sale of Business at Price to be ascertained from Profits—Implied Covenant.

The Defendant sold to the Plaintiffs his news-agency business for £2500, payable by instalments. The first two instalments of £500 each were payable at all events, but the payment of the other two of £750 each was contingent on the profits of the business, and in the event of the profits of the business exceeding a certain amount, the Defendant was to receive further benefits. The Plaintiffs at the same time engaged the Defendant to superintend their business, including along with the business sold certain other branches, for five years, at a salary; he undertaking to obey their directions. Within the first year the Plaintiffs agreed with a company to discontinue the news-agency business, giving the company the option of continuing such parts of it as the company might elect to continue. The Plaintiffs then directed the Defendant to discontinue the transmission of news, and the Defendant refusing to obey, they filed their bill for an injunction to restrain him from transmitting news, which injunction was granted:—

Held (reversing the decision of *Malins*, V.C.), that, as the purchase-money was to be ascertained by reference to the profits, there was an implied covenant by the Plaintiffs that the business should be carried on, and that as the Plaintiffs had broken this implied covenant, they were not entitled to restrain the Defendant from breaking any other part of the agreement.

THIS was a motion by way of appeal from an order of Vice-Chancellor *Malins* granting an injunction.

On the 5th of March, 1872, articles of agreement were entered into between the Plaintiffs and the Defendant, by which, after

reciting to the effect that the Defendant had, under the style of "*The Lombard Telegraphic News-Agency*," for some years acted as agent for the transmission of news, and been connected with the several associations and business matters specified in the schedule thereunder written, producing annual net profits amounting to £1600, which was thereinafter called "the guaranteed revenue" of the business, and that the company were desirous of acquiring, and the Defendant of transferring, that business upon the terms thereinafter mentioned, and that the company were also desirous of engaging the Defendant to manage and conduct that business, and superintend the general business of the company, it was agreed between the parties:

1. That the Defendant should sell and the company purchase, as from the 1st of March, 1872, the Defendant's agency business and his interest and connection with the associations, and in respect to the matters, mentioned in the schedule, for £2500, payable as follows: £500 on the execution of the agreement, £500 at the expiration of six months from the 1st of March, 1872, and two sums of £750 each at one year and six months and two years and six months from the same day, subject to the deductions thereinafter mentioned.

2. That if at the end of eighteen calendar months from the said 1st of March the net profits from the purchased business for that period should be less than the guaranteed revenue, the deficiency should be deducted from the first instalment of £750, and if at the end of two years and six months the net profits for the previous year should be less than the guaranteed revenue, the difference should be deducted from the last instalment of £750.

3. That if the net profit from the 1st of March, 1872, to the time when the last instalment of £750 should become due should exceed the guaranteed revenue, the company should pay the Defendant the difference if the amount did not exceed £500, and if in the half-year after the last instalment of £750 became due the net profits should exceed £800, the company should pay the Defendant the difference, if it did not exceed £250.

4. Related to the death of the Defendant before all the instalments became due.

5. The company engaged the Defendant to manage the business

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transferred by him, and to superintend their general business for five years from the 1st of March, 1872, determinable as hereinafter mentioned, at the yearly salary of £800.

6. Provided for the increase of the salary in case of a certain increase in the profits of the business.

7. The Defendant agreed to act as manager and superintendent, and not to engage in any other business, and to conform to the instructions received from the directors.

8. Related to giving notice to certain companies of the purchase provided for by the agreement.

9. The Defendant agreed to account for and pay over all moneys received by him as manager and superintendent; to make out an account on the 1st of each month; to keep proper books of account, and balance them on each 1st of March if required.

10. Provided for the dismissal of the Defendant by six months' notice if he neglected his duties or was absent from them for any cause more than two calendar months in any one year.

The two instalments of £500 were paid. The Plaintiffs alleged that the net profits of the Defendant's business up to the end of 1872 were only at the rate of £1200 a year.

On the 30th of December, 1872, the Plaintiffs entered into an agreement with *Reuter's Telegram Company*, by which it was agreed, first, that the Plaintiffs should forthwith relinquish all news business which they were carrying on or had undertaken to carry on, and should transfer to *Reuter's Company* all such news-contracts, agreements, and subscriptions as that company might elect to continue, but that the Plaintiffs should be at liberty to carry out their agreement for receiving shipping news from *Lloyd's* underwriters. Secondly, that the Plaintiffs should notify by circular to its subscribers or customers the transfer to *Reuter's Company* of all such contracts, agreements, and subscriptions as *Reuter's Company* might elect to take over, and that the Plaintiff should give notice to all other persons of their ceasing their news service, except as regarded *Lloyd's* underwriters. Thirdly, the Plaintiffs agreed to restrain all persons in their employ, or with whom they had any agreement, so far as lay in their power, from directly or indirectly continuing the news business thereby agreed to be relinquished.

Immediately after this contract had been made *Reuter's Company* and the Plaintiffs both gave notice to the Defendant to discontinue receiving any new subscriptions for news from *Belgium*. The Defendant replied that he should pay no attention to this notice, and when called upon for an explanation he stated that this was a part of the business which he had sold, and the income of which he guaranteed, and that he was therefore justified in disobeying the notice. After some further communications the Plaintiffs filed their bill, stating to the effect of the above statements, and asking for an account of what was due from the Defendant as manager, and for an injunction to restrain him from transmitting any news or intelligence to any company, agent, or other person. There was a conflict on the evidence as to whether this Belgian business was a part of the busiuess sold by the Defendant.

Vice-Chancellor *Malins* granted an interlocutory injunction without requiring any undertaking as to damages.

Mr. *Cotton*, Q.C., and Mr. *Everitt*, for the appeal motion :—

The Plaintiffs have made it impossible for them to fulfil their part of the contract, and the Court will not interfere in their favour : *Lumley* v. *Wagner* (1) ; *Stocker* v. *Wedderburn* (2) ; *Ogden* v. *Fossick* (3).

Mr. *Graham Hastings*, for the Plaintiffs :—

This is not, like *Lumley* v. *Wagner*, a case of negative stipulation, but there is a positive agreement by the Defendant to conform to the orders of the directors. There is no implied contract that the Plaintiffs will carry on the business, and there is no lien on personal property for implied purchase-money. The business, however, is not discontinued ; it is going on under another form. The Belgian news-agency was not part of the Defendant's business, and there can be no pretence for saying that he is entitled to continue that against the orders of the Plaintiffs.

SIR W. M. JAMES, L.J. :—

I am of opinion that the Plaintiffs have on the face of their bill stated that they themselves have deliberately broken their agree-

(1) 5 De G. & Sm. 485, 506. (2) 3 K. & J. 393.
(3) 4 D. F. & J. 426, 435.

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ment with the Defendant, part of which they are seeking to enforce against him. The Defendant sold his business to them at a price to be ascertained with reference to the profits, and it was not consistent with such a contract that they should sell the business to somebody else, not selling it in such a way as to keep the Defendant's rights alive, but selling it on terms which involved its entire destruction. It is quite obvious from the letters stated in the bill that the suit is not instituted for the benefit of the Plaintiffs, but of the company to whom they have sold the business in violation of their bargain with the Defendant. That being so, they are disqualified from obtaining any remedy against him by way of performance of any part of the contract.

Then the Plaintiffs say, that at all events there is a Belgian agency not included in the contract between the Plaintiffs and the Defendant, and that as to it the Defendant, who is their manager, is violating their orders. No special case of that kind is made by the bill. It is evidently a mere afterthought, and if the Plaintiffs have any such rights they perhaps may have some other mode of enforcing them. If the Defendant has been disobeying their lawful orders they can dismiss him on paying him six months' salary, or giving him six months' notice, and probably they have a right to dismiss him at once, but that is a distinct matter which does not seem to me to have entered into the bill, nor to be one of which this Court can take notice. On the plain broad ground that the Plaintiffs have themselves violated the bargain entered into by them with the Defendant, I think they are not entitled to the injunction they are seeking against him.

SIR G. MELLISH, L.J.:—

I am of the same opinion. Having regard to the whole scope and nature of the agreement, I am clearly of opinion that there is an implied covenant on the part of the company that the business shall be continued in such a way that the purchase-money to be paid for it may be ascertained. In substance the business is sold by the Defendant to the company. The price, no doubt, is, in the first instance, fixed at £2500, but only £1000 of that, as I understand the agreement, is to be paid at all events, and the remaining £1500 depends entirely on the profits the business earns. If the

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business earned no profit, the remaining £1500 would not be paid at all. If, on the other hand, the business is more profitable than was expected, then there may be an additional £500 earned, and the salary may in that event be increased for the remaining period of the agreement by the sum of £400 a year, so that the entire amount of the purchase-money to be paid for the business depends on the profit the business will earn during the next two years and a half. That being so, it appears quite plain there must be an implied covenant on the part of the company that they will so conduct the business that the real amount of the purchase-money may be ascertained. They having broken the agreement in that respect, I am of opinion they are not entitled to come into this Court for an injunction to prevent the Defendant breaking any other portion of it. When the agreement was broken by the Plaintiffs it put the Defendant into very great difficulty in determining what he should do, and I am of opinion that this Court ought not by injunction to restrain him from breaking any part of the agreement, even if he was not justified in doing what he did, on which I do not think it necessary to give any opinion.

The order must be discharged with costs in the Court below.

Solicitors: Messrs. *Gadsden & Treherne;* Mr. *R. H. Davies.*

BOOTH *v.* ALCOCK.

L. JJ.
1873
June 3.

[1873 B. 72.]

Right to Light—Lease—After-acquired Estate.

A lessor granted a lease for twenty-one years of a house with its appurtenances, amongst which lights were specified. At the time of the grant he held an adjoining house for a term of years. He subsequently acquired the reversion expectant on the term in the adjoining house; and after the expiration of the term he proceeded to build on the site of the adjoining house in a manner which might interfere with the lights of the demised house, those lights not being ancient lights:—

Held (reversing the decision of *Malins*, V.C.), that the lessor was not by his grant prevented from so building.

BY an indenture of lease dated the 31st of August, 1864, the Defendant *W. Alcock* demised to the Plaintiff *R. J. Booth*, for

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twenty-one years from September, 1864, the messuage, tenement and dwelling-house, No. 26, *Old Change*, in the city of *London*, "together with all edifices, buildings, ways, lights, sewers, watercourses, rights, easements, advantages, and appurtenances thereto belonging, or therewith used or enjoyed," at the annual rent of £500. The lease contained the usual lessor's covenant for quiet enjoyment.

At the time of making this demise the Defendant held a lease for eighty years from Midsummer, 1861, of the house so demised; and he also held an underlease of a house, No. 3, *Distaff Lane*, as assignee thereof for a term which would expire ten days before Christmas, 1868. On the 4th of March, 1865, the Defendant contracted with the owners of the reversion expectant on the term for the purchase of the fee in No. 3, *Distaff Lane*, which was, on the 8th of February, 1869, conveyed to him.

The Defendant, at the end of 1872, pulled down the house in *Distaff Lane*, and proposed to build on the site in a manner which, as the Plaintiff alleged, would interfere with the access of light to the house No. 26, *Old Change*, and so diminish the rents which he received by sub-letting parts of the house, in particular a part which was let to a silk merchant.

The Plaintiff, after much correspondence, filed the bill in this suit to restrain the Defendant from so building. There was a considerable conflict of evidence as to whether the proposed building would materially interfere with the light hitherto enjoyed by the Plaintiff; but it will be seen that, in the opinion of their Lordships, this question was immaterial.

The Vice-Chancellor *Malins* granted an injunction (1), and the

(1) 1873. March 20. WN(1873)73.

SIR R. MALINS, V.C., after stating the facts of the case, continued:—

Now I am not prepared to say, nor do I think, apart from the particular use for which these rooms of the Plaintiff's house are required, that the diminution of light here will be very great; some diminution there certainly must be, and I totally dissent from the architects who have made affidavits that there will be no diminution of light whatever, because when you increase building by a height of 18 feet, there must be a diminution of light. If this were a case between neighbouring proprietors merely, I should feel very much inclined to come to the conclusion that it would be a case not for an injunction but for compensation in money. This, however, is a different question altogether; it is a question whether a landlord can do anything in derogation of the rights of his tenant; and it has not

Defendant moved by way of appeal to discharge the order. The motion was turned into a motion for a decree, which now came on for hearing.

Mr. *Cotton*, Q.C., and Mr. *C. Harvey*, for the Plaintiff:—

No man who has granted a lease can, by building on other land belonging to him, obstruct the lights of his tenant. In this case the word "lights" is actually found in the lease; but even without that word, the general rule of law would be sufficient: *Watts* v. *Kelson* (1). A grantor cannot derogate from his grant: *Rowbotham* v. *Wilson* (2). We admit that we should have no remedy at law after the expiration of the term for which the lessor originally held the adjoining land, but equity will extend the relief to any subsequently acquired interest in the land.

Mr. *Miller*, Q.C., and Mr. *W. R. Ellis*, for the Defendant, were not called upon.

SIR W. M. JAMES, L.J.:—

I am of opinion that the Plaintiff has not the right to light which he has claimed by his bill; and it is therefore not necessary for us to go into the question of the extent of the diminution of light.

At the time when the lease was made the Defendant was, no doubt, the owner of a term of a few years in the adjoining property, and no doubt the words of the lease amount to a grant of the light coming over the adjoining property during the term which the

been contended that he can do so. The Defendant having granted a lease of this property, with all rights and advantages attached to it, it is perfectly plain that in law he cannot do anything in derogation of his own grant. All the rights that he could confer on the Plaintiff were given, and the lease contains the usual covenant for quiet enjoyment. The Plaintiff is therefore entitled to set up against the Defendant a requirement to use the windows for a particular purpose, requiring more than the usual quantity of light. That is the principle which I have acted upon in other cases. The grant must be taken most strongly against the grantor; and whatever he has conferred must be taken in the largest possible way. Therefore in this case I am of opinion that the Plaintiff is entitled to have the uninterrupted use of the light for every purpose for which it can be used to the greatest possible advantage.

(1) Law Rep. 6 Ch. 166.

(2) 27 L. J. (Q.B.) 61, 65.

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Defendant, at the date of the lease, had in that property; but the words appear to me to deal with no other rights than those which the Defendant then had. This is not the case of a man representing himself to have power to grant for twenty-one years the right to every particle of light then falling upon the house demised, and granting that right accordingly; nor is it the case of any estoppel either at law or in equity; and I am unable to find in the words of the lease any reference, either express or implied, to the extent of the interest which the Defendant then had in the adjoining property. He had at that time an interest in the adjoining property, and of course the Plaintiff had the benefit of that interest, because the Defendant then had it. But the moment the term held by the lessor came to an end, he had full right to do what he liked with his own property.

If the original owner of the freehold of the adjoining house had raised its height, he could not have been interfered with by the Plaintiff, the lights not being ancient; nor could the Defendant have been interfered with if he had bought the adjoining property after the house had been raised. Nor was there anything in the lease which amounted to a representation that the Defendant had power to grant the lights for twenty-one years, nor had he made any bargain to do so. It was a mere grant of a legal right unaffected by any equity. The Plaintiff has, in my opinion, failed to make out his case, and his bill must be dismissed with costs.

SIR G. MELLISH, L.J.:—

I am of the same opinion. There is no difficulty in ascertaining the meaning of the grant at law. No doubt it would be a grant of the right to all the lights, so far as they were liable to be affected by alterations in the house in *Distaff Lane*, for so long as the Defendant's then interest in it continued. That would have been the construction of the grant even if the word "lights" had not been inserted, though the insertion of that word makes the matter clearer. That right would, however, cease when the Defendant's then interest came to an end. Now, has the Plaintiff any greater right in equity? That must depend upon whether there was any bargain or contract that the Plaintiff should enjoy the lights during the whole of the twenty-one years. I am of opinion that there was

no such bargain or contract. As to this, there is a great difference between a grant in general words and an express grant of such a right. There may, perhaps, in this case be no great difference in result between a general grant of lights and an express grant of lights to continue during the existence of the grantor's then interest; but there is a very material difference between such grants with regard to the question whether the grantee is in equity entitled to any right after the determination of the estate which the grantor had in the other property at the date of the grant. General words in a grant must be restricted to that which the grantor had then power to grant, and will not extend to anything which he might subsequently acquire. In my opinion the Plaintiff has failed to make out any case for relief.

Solicitors for the Plaintiff: Messrs. *Wood, Street, & Hayter.*
Solicitors for the Defendant: Messrs. *Depree, Austen, & Jutsum.*

Ex parte PEARSON. *In re* MORTIMER.

Bankruptcy—Execution Creditor—Seizure and Sale—Private Sale by the Debtor to the Execution Creditor—Fraudulent Transfer—Fraudulent Preference —Bankruptcy Act, 1869, *s.* 6, *sub-ss.* 2, 5, *and ss.* 87, 92.

P. recovered judgment for a sum exceeding £50 from a trader, and on the 8th of August lodged an execution in the hands of the sheriff, who seized six of his horses.

On the 11th of August, before any sale had been made by the sheriff, the debtor agreed with *P.* to sell him the six horses which the sheriff had seized for the amount of the debt and the sheriff's charges; and *P.* accordingly withdrew the execution, but he left the horses in the debtor's stables, and signed an agreement to let the debtor have the use of them for a certain payment per day.

On the 15th of August, *P.* removed the horses, and soon afterwards sold them for about the same price as he gave for them. The debtor was at the time of the sale insolvent, and on the 15th of August he filed a petition for liquidation, and trustees were appointed, who claimed the price of the horses from *P.*:—

Held (affirming the decision of the Chief Judge), that the sale of the horses to the execution creditor, having been made for the purpose of avoiding a sale by the sheriff, was a fraudulent transfer under the 2nd sub-section of the 6th section of the *Bankruptcy Act*, 1869, and was void against the creditors.

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But, *semble*, it would not have been fraudulent if the debtor had been solvent.

Held, also, by *James*, L.J. (*dissentiente Mellish*, L.J.), that the seizure by the sheriff, followed by the sale by the debtor to the creditor, constituted a seizure and sale within the 5th sub-section of the 6th section, and an act of bankruptcy.

Held, also, by *James*, L.J. (*dubitante Mellish*, L.J.), that the sale was a fraudulent preference of the creditor.

9 Ch 274
302
435
441,
9 Ch 149
4 Ch D 558
559
17 Ch D 61
18 Ch D 139

THIS was an appeal from an order of the Chief Judge in Bankruptcy.

H. G. Mortimer was a contractor at *Lee, Kent*. On the 29th of April, 1872, *William Pearson* commenced an action against him to recover £104 for principal and interest due upon three bills of exchange accepted by *Mortimer*. *Mortimer* paid off part of the debt, and on the 8th of August, 1872, judgment was signed for the remainder of the debt and costs, amounting together to £79 15*s*. The same day execution was issued and lodged with the Sheriff of *Kent*, who seized six horses belonging to *Mortimer*. On the 10th of August another execution was put in by *Alexander Jones* for £53 6*s*., under which some other horses were seized. For the first two days the sheriff's officer, with *Pearson's* consent, allowed *Mortimer* to use the horses that were seized; but on the 10th he told him that he should not allow them any longer to be taken out of the stable.

On the 11th of August, which was Sunday, *Mortimer* called on *Pearson*, who was friendly disposed towards him, with a view of inducing him to allow him to have the use of his horses, in order that his business might not be stopped. This *Pearson* refused to do, but the result of this interview was that *Pearson* came to *Mortimer's* house on Monday morning, and met there the sheriff's officer and the clerk of *Pearson's* attorney. No sale had yet been made by the sheriff. An arrangement was entered into at the suggestion of the attorney's clerk between *Mortimer* and *Pearson*, that the latter should purchase the six horses for £93 10*s*., and *Pearson* the same day paid this sum by two cheques, one for £79 15*s*., which was handed back to *Pearson's* attorney for his debt and costs, and the other for £13 15*s*., which was handed to the sheriff's officer for his costs of the levy. The officer was then ordered by *Pearson's* attorney to withdraw.

and he did so. *Mortimer* signed a receipt for the money as the purchase-money of the six horses. He also signed a declaration that the six horses were his own property, and that they were not included in any bill of sale, or in any other way charged or incumbered. At the same time a written agreement was entered into between *Pearson* and *Mortimer* for the hiring of the six horses by *Mortimer* at the rate of 5*s.* a piece per day, and the horses were left in his possession. On the 15th of August *Pearson* removed them, and advertised them for sale by auction on the 31st of August. On the 28th of August Mr. *Phillips* (a friend of *Mortimer*) bought them, and after that *Mortimer* had still the use of them. On the 12th and 15th of August, two other executions for £31 and £32 respectively were put in by other creditors. On the 15th of August *Mortimer* filed a petition for liquidation by arrangement. No notice was given to *Pearson* of the petition till after he had removed the horses. At the first meeting of the creditors, on the 1st of September, 1872, it was resolved to proceed by liquidation, and two trustees were appointed. The trustees on the 6th of November applied to the Court for an order declaring that the transfer of the horses to *Pearson* was void as against them, and that *Pearson* might be ordered to restore the horses or to pay the value thereof to the trustees. The County Court Judge held, on the evidence, that the sale was not made *bonâ fide*, and he held that it was void as against the trustees under the liquidation, and made an order that *Pearson* should pay the trustees £75, which was agreed upon as the value of the horses, and the costs of the application. There was no evidence what the real value of the horses was.

This order was affirmed by the Chief Judge on appeal (1), and *Pearson* appealed from his decision.

(1) 1873. March 3. WN(1873)56

SIR JAMES BACON, C.J.:—

It is upon the construction of the statute alone that this question must be decided; there is no other law relating to it. I do not proceed upon any notion that there has been an evasion of the provisions of the Act, though there are cases in which the Courts have said that an evasion of the law of bankruptcy is an improper thing. [His Lordship referred to sect. 6 (sub-sects. 2 and 5) and sects. 87 and 125 of the *Bankruptcy Act*, 1869, and continued:—] Now apply that to the facts of the present case. The sheriff, under the execution issued by *Pearson*, seized *Mortimer's* goods. From that

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Mr. *De Gex*, Q.C., and Mr. *Finlay Knight*, for the Appellant:—

The transaction was not an act of bankruptcy within the meaning of the 5th sub-section of sect. 6 of the *Bankruptcy Act*, 1869 (1);

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time those goods were in the custody of the law, and it was the duty of the sheriff to proceed to a sale if the execution was not satisfied. If he had done this, unquestionably the proceeds of the sale would have been distributable among the creditors of *Mortimer* generally. This inchoate act of bankruptcy having been committed, the question is, whether it was competent to the execution creditor to deal with the debtor for the purchase of the goods which had been seized? They were not the debtor's to sell; they were the property of the law. The question is, whether he has fraudulently disposed of a part of his property. It is clear that all his other creditors are defeated and delayed by what he has done. A mere cursory view of the Act shews that it is not competent to a trader debtor when his goods have been seized in this way to sell them himself. I should have come to this conclusion in the absence of any authority. But there is plain, distinct, pointed authority to that effect in the judgments of all the Judges who decided *Woodhouse* v. *Murray* (Law Rep. 2 Q. B. 634; Ibid. 4 Q. B. 27). That was a decision on sect. 73 of the *Bankruptcy Act*, 1861, the provisions of which are analogous to those of sect. 87 of the present Act. It is true that in that case there was a transfer of all the bankrupt's property. But the Lord Chief Justice said during the argument (Law Rep. 2 Q. B. 637): "The difficulty arises under sect. 73; by that section the seizure by the sheriff is an inchoate act of bankruptcy. If a sale had taken place under the execution, the debtor might have been adjudged a bankrupt, and then his property could have been distributed rateably among all his creditors. By withdrawing the sheriff and taking the assignment, the Plaintiff gets everything and the other creditors nothing." Literally, that is not so here, for the other creditors did get something, but they did not get that which was sold to *Pearson*. But the Judges in their judgment went fully into this part of the case:—[His Lordship read passages from the judgments of the Chief Justice, and of *Mellor* and *Shee*, JJ., and continued:—] That decision was afterwards affirmed by the Exchequer Chamber. And in my opinion, this being the law, the decision of the County Court Judge in the present case was perfectly right. By a contrivance between the debtor and the execution creditor the other creditors were deprived of a benefit which the statute intended them to have. The debtor attempted to sell that which was not his to sell. The transaction was a complete nullity. The order of the County Court Judge was a proper one, and it must be affirmed. The appeal must be dismissed with costs.

(1) Sect. 6 defines "acts of bankruptcy;" among them one by sub-sect. 2: "That the debtor has in *England* or elsewhere made a fraudulent conveyance, gift, delivery, or transfer of his property, or of any part thereof." And by sub-sect. 5: "That execution issued against the debtor on any legal process for the purpose of obtaining payment of not less than £50 has, in the case of a trader, been levied by seizure and sale of his goods."

And by sect. 87: "Where the goods of any trader have been taken in execution in respect of a judgment for a sum

the words "seizure and sale" mean seizure and sale by the sheriff. The property in the goods still remained in the debtor: *Giles* v. *Grover* (1); *Ex parte Williams* (2). The debtor might at any time before the sale pay the debt and redeem the goods, and why should he not pay in goods as well as in money? The sale was evidently not made at an undervalue. The decision in *Woodhouse* v. *Murray* (3), upon which the Chief Judge relied, turned upon the fact that the debtor had made an assignment of the whole of his property without an equivalent, and that was in itself an act of bankruptcy. That does not apply to the present case. An execution creditor who has seized is not a trustee for the other creditors, but is entitled to the fruits of his diligence. If the Court holds such a sale to be void, it will be inventing a new fraud which is not mentioned in any previous decision.

Mr. *Bagley*, and Mr. *Winslow*, for the trustees:—

We do not contend that in a *bonâ fide* case where the debtor has other means for carrying on his business he and the debtor may not arrange to withdraw the execution, and so avoid an act of bankruptcy. But the act of bankruptcy is inchoate, and if the debtor is in insolvent circumstances the creditors have an inchoate right to the proceeds; and it is a fraud on the bankrupt laws for the execution creditor to gain possession of the goods, and prevent the distribution of the proceeds among the others: *Ex parte Rayner* (4).

The test of insolvency is whether the debtor has other property out of which to satisfy the debt, and if the goods are sold either by the sheriff or to the creditor privately it is equally a proof that the debtor has no other property. Therefore if it is not strictly within the words of the section, it is a fraudulent preference of the particular creditor under the 92nd section, and a fraudulent

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exceeding £50 and sold, the sheriff . . . shall retain the proceeds of such sale in his hands for a period of fourteen days, and upon notice being served on him within that period of a bankruptcy petition having been presented against such trader, shall hold the proceeds of such sale, after deducting expenses, on trust to pay the same to the trustee."

(1) 9 Bing. 128.

(2) Law Rep. 7 Ch. 314.

(3) Law Rep. 2 Q. B. 634; Ibid. 4 Q. B. 27.

(4) Law Rep. 7 Ch. 325.

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transfer within the 2nd sub-section of the 6th section of the Act: *Rust* v. *Cooper* (1); *Alderson* v. *Temple* (2); *Devas* v. *Venables* (3); *Woodhouse* v. *Murray* (4). It is true that in the last-mentioned case there was an assignment of the whole of the debtor's property; but the *ratio decidendi* was that it was an evasion of the bankrupt laws, and it is equally so whether it be an assignment of the whole or of part.

Mr. *De Gex*, in reply.

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SIR W. M. JAMES, L.J., after shortly stating the facts as mentioned above, continued:—

The amount of litigation in this case is wholly incommensurate with the sum in dispute, and has been apparently carried on for the purpose of vindicating the skill of the attorney's clerk in suggesting this device. We are of opinion, however, that this device has not succeeded, and that the orders of the County Court Judge and of the Chief Judge were correct for more than one reason.

For myself, I am of opinion that there was in this case a "seizure and a sale" within the meaning of the 5th sub-section of the 6th section of the *Bankruptcy Act*, 1869. The sub-section is not very grammatically expressed. Levying an execution is a pleonasm meaning literally executing an execution; but I think the meaning of the Legislature is, that if the judgment be followed by an execution, and the debt levied by seizure and sale, in that case there is an act of bankruptcy.

In the present case goods were seized, and then the execution creditor, with the consent of the debtor, dispenses with the further assistance of the sheriff, and takes upon himself the sale of the goods. I am of opinion that if the creditor, with the consent of the debtor, relieves the sheriff of his duty, and deals with the goods himself, it is a levying of the debt by seizure and sale within the meaning of the bankrupt law. It has been argued that this is a penal statute, and ought to be strictly construed. I am of opinion that it is not a penal statute, and that it ought to be construed,

(1) Cowp. 629.
(2) 4 Burr. 2235.
(3) 3 Bing. N. C. 400.
(4) Law Rep. 2 Q. B. 634; Ibid. 4 Q. B. 27.

like the statutes of *Elizabeth* as to fraudulent conveyances, in such a way as to repress the mischief aimed at and to advance the remedy. Where a trader is in such a position that he cannot pay his debts, and his assets are being expended in costs and sheriff's expenses, it is quite time that he should be relieved of his property, and that it should be distributed equitably among his creditors. The 87th section which has been referred to, directing the disposal of the proceeds of the sale by the sheriff, does not appear to me to cause any difficulty. It was intended for the direction of the conduct of the sheriff under certain circumstances, and for his protection.

I am further of opinion that this sale was a voluntary transfer of the goods by the debtor to the execution creditor, and that it was void as a fraudulent preference under the 92nd section of the Act. The execution creditors have only a defeasible title to the proceeds of the goods, and then the debtor consents to that defeasible title being turned into an indefeasible title, the bankruptcy of the debtor being at the time certain and imminent. No doubt this was done by the debtor, not out of pure gratitude to the creditor, but with a view to his own benefit, not in that respect differing from the ordinary case of fraudulent preference, where a debtor prefers his father or brother, or the trustees of his marriage settlement, not merely from love to them, but partly from the expectation of benefits to arise from the grateful recollection of that which he has done. Here it is clear that he acted under the expectation that the creditor would behave liberally to him, and would allow him the use of the horses, and when he parted with them would let them go into the hands of a friend.

But this was not the ground on which the County Court Judge and the Chief Judge appear to have based their decisions. They decided the case on the broader ground that this transaction was a fraud upon the bankruptcy laws; and I agree with their view. I am of opinion that Lord *Mansfield* and the other eminent Judges who established the law as to fraudulent preferences and fraudulent assignments by the debtor would have had no difficulty in applying that law to a case like the present. I am of opinion that the power and the duty which have been exercised by our fathers have not been abdicated or repudiated by the Courts in later times, and that

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the Legislature, in adopting the old decisions and crystallizing them into positive enactments, have in no way abrogated the duty of this Court to apply the same principles in proper cases. I think this is a proper case for its application; and I am the more inclined to this conclusion because I can conceive a still more refined contrivance for evading the operation of the Act, which this Court ought to discountenance. The two execution creditors, *Pearson* and *Jones*, might have combined together, and *Pearson* might have bought *Jones'* goods, and *Jones* might have bought *Pearson's* goods, and the amounts might have been applied in satisfaction of their respective debts. Such a contrivance ought not to be allowed to prevail. On the whole, therefore, I am of opinion that there was a contrivance to evade the law, and a fraudulent dealing with the goods of the debtor, and an act of bankruptcy. The appeal must be dismissed with costs.

SIR G. MELLISH, L.J.:—

I have come to the same conclusion. I do not, however, agree that the transaction amounted to an act of bankruptcy under the 5th sub-section of the 6th section of the *Bankruptcy Act*, 1869. I think that the words "levied by seizure and sale" are used in their technical sense of seizure by the sheriff and sale by him, and that it would be carrying the words beyond their plain and ordinary meaning to hold them to apply to a case where there has been a seizure of goods by the sheriff, and a subsequent sale of the goods by the debtor. Similar words had occurred in the 73rd section of the *Bankruptcy Act*, 1861, which enacted, "that if any execution shall be levied by seizure and sale of any of the goods and chattels of any trader-debtor, upon any judgment recovered in any action personal for the recovery of any debt or money demand exceeding £50, every such debtor shall be deemed to have committed an act of bankruptcy from the date of the seizure of such goods and chattels," where the sale is expressly spoken of as being made "upon any judgment;" and by the 133rd section of the *Bankrupt Law Consolidation Act*, 1849, "all executions and attachments against the goods and chattels of any bankrupt, *bonâ fide* executed and levied by seizure and sale before the date of the fiat or the filing of the Petition," were declared

to be valid. I think in both these cases the Legislature must be taken to be contemplating a sale by the sheriff, not by the debtor.

I have also great doubt whether this case comes within the 92nd section as to fraudulent preference; because the County Court Judge, who carefully considered all the facts, has abstained from finding that it was a purely voluntary act for the sole purpose of benefiting the creditor. But, after giving it my best consideration, I am of opinion that we ought to affirm the orders of the County Court Judge and the Chief Judge, on the ground that there was a fraudulent transfer of part of the debtor's property within the 2nd sub-section of the 6th section of the Act of 1869. Acts of bankruptcy were meant to be a test of a debtor's insolvency. The Legislature has said that if a debtor's goods are seized, and he cannot prevent them being sold by the sheriff, it is a fair test of his insolvency; and that in that case the proceeds ought to be distributed among all his creditors equally, and that the execution creditor ought not to have the whole.

In this case it is clear that both the debtor and the creditor well knew that the debtor was insolvent; and knowing this, and knowing the law, for they had the advice of the attorney's clerk, they agree together to do the precise thing which the Legislature declared to be an act of bankruptcy, in such a way as to avoid, as they supposed, committing an act of bankruptcy. I think that we ought to hold that such a transaction was a fraudulent transfer. I agree with Mr. *De Gex*, that we ought to hesitate before we establish a new kind of fraud. But the Legislature has used general words, which must apply as much to newly-invented frauds as to those which we find described in the books. Where an Act of Parliament makes a new act of bankruptcy the parties may adopt fresh contrivances for evading it, and we must apply the old principles to the new state of things.

I do not say that such a sale as this might not be effected without committing an act of bankruptcy, if the debtor was solvent at the time. The Legislature has not made seizure without sale an act of bankruptcy; for it was intended that if a man's goods were seized he should have an opportunity of saving them by paying the debt, and the mere fact of his selling them to the

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execution creditor would not be necessarily an act of bankruptcy if he were solvent. But when a debtor is really insolvent, and this device is resorted to for the express purpose of avoiding the operation of the 5th sub-section of sect. 6, I think it is a fraudulent dealing with the goods and an act of bankruptcy.

Solicitors for the Appellant: Messrs. *Linklater, Hackwood, & Co.*, agents for Mr. *C. R. Gibson, Dartford.*

Solicitor for the Trustees: Mr. *James Mote.*

L. JJ. 1873 *May* 23.

Ex parte DEMPSEY. *In re* DEMPSEY.

Bankruptcy—Fraudulent Debtor—Liquidation by Arrangement—Jurisdiction—Right of Appeal from Judge of County Court—Debtors Act, 1869, *ss.* 3, 16—*Bankruptcy Act*, 1869, *ss.* 71, 125.

10 Ch. 656
10 Ch. D. 790, 3
—799

An order can be made under the 16th section of the *Debtors Act*, 1869, (32 & 33 Vict. c. 62), for the prosecution of a fraudulent debtor in a liquidation by arrangement, as well as in a bankruptcy.

An appeal lies to the Chief Judge in Bankruptcy from an order made by a County Court Judge, under the 16th section of the *Debtors Act*, 1869.

Whether, on an appeal brought by the trustee from an order made under that section, it is necessary to serve the debtor, *quære.*

THIS was an appeal from a decision of the Chief Judge in Bankruptcy.

Martin Dempsey was a marine store dealer at *Gateshead.* On the 4th of July, 1872, he filed a petition for liquidation by arrangement. The creditors resolved on a liquidation, and trustees of the estate were appointed. On the 23rd of September, and on the 19th of December, the trustees reported to the Court, in conformity with sect. 16 of the *Debtors Act*, 1869, that in their opinion, founded upon the examination taken before the Court and inquiries made by them in investigating the debtor's affairs, he had, with intent to defraud his creditors, been guilty of certain offences under sect. 11 of the Act, such as not fully discovering to the trustees all his property; not delivering up to the trustees all such part of his property as was in his custody or under his control; and concealing his property and books; and that he had also been

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guilty of a misdemeanour under sect. 13 of the Act. An application was then made to the Judge, under sect. 16 of the *Debtors Act*, for an order to prosecute *Dempsey* for these offences. The Judge was of opinion that there was reasonable probability of a conviction being obtained, and made an order directing a prosecution.

This order was drawn up and signed by the Judge, but before it was filed he, upon further consideration of the Act, came to the conclusion that he had no jurisdiction to make the order, and he accordingly cancelled it. He stated as the ground for his doing so that he thought sect. 16 of the Act applied only to a case of bankruptcy and not to a case of liquidation, liquidation not being mentioned in the section, and he said that he was confirmed in this view by the circumstance that in sects. 11, 12, and 14, liquidation, as well as bankruptcy, is referred to. From this refusal of the Judge to direct a prosecution the trustees appealed to the Chief Judge.

On behalf of the debtor the objection was raised that there was no appeal from an order made by the County Court Judge under the 16th section of the *Debtors Act*, but the Chief Judge overruled the objection. His Honour discharged the order of the County Court Judge, and ordered "that the trustees be empowered to prosecute *Dempsey* for the offences alleged in the report." From this decision the debtor appealed.

Mr. *Grantham*, and Mr. *Finlay Knight*, for the Appellant.

Mr. *Little*, Q.C., for the trustees, objected that the debtor had no *locus standi* in the Court. The only question was between the trustees and the creditors, whether the costs of the prosecution should fall upon the estate, with which the debtor had no concern.

SIR W. M. JAMES, L.J.:—You have given the debtor a *locus standi* by serving him with notice of the appeal before the Chief Judge. We cannot refuse to hear him now.

Mr. *Grantham*, and Mr. *Finlay Knight*:—

We contend, in the first place, that the 16th section of the *Debtors Act* does not include liquidation by arrangement. Liquidation is nowhere mentioned in the section; whereas in sects. 11, 12, and 14,

(1) See W.N. (1873) 68. 21 W.R. 529.

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where the offences for which the debtor is punishable are defined, liquidation is mentioned as well as bankruptcy. It was probably intended by the Legislature that in bankruptcy the trustee should have the discretion to order a prosecution, but in liquidation it should be left to the decision of the creditors.

But, in the second place, we contend that there is no appeal from a decision of the County Court Judge made under the 16th section of the *Debtors Act.* The right of appeal from a County Court to the Chief Judge is given by the 71st section of the *Bankruptcy Act,* 1869, but that does not extend to orders made in pursuance of the *Debtors Act.* The words are: "Every Court having jurisdiction in bankruptcy under this Act may review, rescind, or vary any order made in pursuance of this Act." There is nothing to shew that the two Acts are to be read as one. A right of appeal can only be given by a clear expression of the intention of the Legislature: *Reg.* v. *Justices of Surrey* (1); *Rex* v. *Hanson* (2). The Chief Judge has no original jurisdiction, except in the *London* Bankruptcy Court.

SIR W. M. JAMES, L.J.:—We think that the Chief Judge had jurisdiction to order the prosecution under the 16th section of the *Debtors Act.* But we wish to hear counsel as to the right of appeal.

Mr. *Little,* Q.C., Mr. *Winslow,* and Mr. *Ellis J. Davis,* for the trustees:—

The County Court Judge was acting under the powers given him by the *Bankruptcy Act,* 1869, and in the course of procedure directed by that Act. The order made was therefore "made in pursuance of the Act." According to the contention of the Appellants, if any additional duties are imposed on the trustee by any subsequent Act there would be no appeal from the order of the County Court Judge respecting them, because they would not be made under the *Bankruptcy Act,* 1869, which cannot have been intended. If a question arises on the effect of a bill of sale, that is, strictly speaking, a question under the *Bills of Sale Act;* but it is not doubted that if the County Court Judge makes an order on

(1) 39 L. J. (M. C.) 49. (2) 4 B. & A. 519.

it there is an appeal from his decision. So also as to orders made in insolvencies which were pending under the *Insolvent Debtors Act* at the time of the passing of the *Bankruptcy Act*, 1861. There was nothing about appeal in the sections of that Act which relate to pending insolvencies, yet there was a right of appeal notwithstanding: *Ex parte Perkins* (1). It was the intention of the Legislature that the *Debtors Act* and the *Bankruptcy Act* should be read as one Act.

Mr. *Finlay Knight*, in reply.

SIR W. M. JAMES, L.J.:—

I am satisfied that the order of the Chief Judge was altogether right, not merely that it ought not to be discharged, but that it ought not to be altered. The only point on which I must confess that I entertained considerable doubt during some part of the argument was, whether it was a subject-matter of appeal at all from the County Court, it being a matter of special legislation, and apparently separate from the *Bankruptcy Act*, from some design by the Legislature. But I think that, upon the true construction of the two Acts, there is a right of appeal. I assume for this purpose that we are right on the other point, as to which I shall say a few words presently, namely, as to this being a liquidation and not a bankruptcy. The words of the 16th section of the *Debtors Act*, 1869, are these: "Where the trustee in any bankruptcy reports to any Court exercising jurisdiction in bankruptcy that in his opinion the bankrupt has been guilty of an offence under this Act"—then certain consequences shall follow. The words "any Court exercising jurisdiction" do not, of course, mean that if there is a bankruptcy at *Newcastle*, the trustee could apply at *Bristol* for an order; but they must mean any Court having jurisdiction in the bankruptcy in which the matter arises; that is to say, the whole Court, the Lords Justices, the Chief Judge, and the County Court Judge in the particular case; all of whom together, and each one of them separately, constitute a Court exercising jurisdiction in bankruptcy, and exercising that jurisdiction in the particular bankruptcy in which the application is made. That appears to me

(1) 13 W. R. 1001.

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to be the natural meaning of those words; and I am also of opinion that this is an order made in pursuance of the *Bankruptcy Act*, 1869, s. 71, which provides that "every Court having jurisdiction in bankruptcy under this Act may review, rescind, or vary any order made by it in pursuance of this Act." Now I am of opinion that it would be a very narrow construction to hold that an order made by a Court constituted under that Act, and having all its powers derived from that Act, is not "making it in pursuance of that Act" merely because by an Act of Parliament passed on the same day or in the next session some extra power is given to the Court to deal with some particular matter. Whenever a Court of Bankruptcy constituted under this Act is dealing with anything which is given to it because it is the Court constituted by this Act, then I am of opinion that anything done by the Act is done by it "in pursuance of the Act," and is subject to the power of review and appeal which is given in respect of orders made "in pursuance of the Act."

That view is strengthened, as it seems to me, by the words of the 72nd section, which are, that the Court shall have power or jurisdiction to determine all questions of law and fact which arise in the matter of the bankruptcy. Beyond all question there was a question of law—and a mere question of law—which did arise in the matter of this bankruptcy, as to whether liquidation was equivalent to bankruptcy for the purpose of this section. That was a question which the County Court Judge, in my opinion, ought to have determined, in my view, contrary to the way in which he did determine it; because I am of opinion that a trustee in liquidation, according to the very definition of the *Bankruptcy Act*, is exactly the same thing as a trustee in bankruptcy, and has the same power and the same duties, and that the one was intended to be equivalent to the other in everything where there is no express provision made to the contrary; and we cannot suggest any reason whatever why the punishment of a fraudulent debtor should be at all different in the two cases, either as regards the duty of punishing him or the power of throwing the expense on the creditors or on the country; or why it should be in the slightest degree dependent on whether the creditors preferred proceeding by a domestic bankruptcy or by a bankruptcy in Court. I should be

very loath, indeed, to be constrained to put any interpretation on the words which would lead to such an unreasonable distinction between the two cases as that would be. On the whole, therefore, I am of opinion that the plain meaning of the words is, that a trustee in bankruptcy is the same thing as a trustee in liquidation, and that he has the same powers and the same duties; and the Court exercising jurisdiction in the bankruptcy is exercising it whether it is in a voluntary liquidation or not; and that being so, that the decision of the County Court Judge in that matter was based on a wrong view of the Act on a matter of law, and being a matter of law, it was properly the subject-matter of appeal to the Chief Judge, and from the Chief Judge to this Court. I am of opinion, therefore, that the decision of the Chief Judge ought to be affirmed.

SIR G. MELLISH, L.J.:—

I had certainly some doubt on the question whether there was jurisdiction to carry an appeal to the Chief Judge; but, on the whole, I am of opinion that there was. I think that the true construction of the 71st section is, that from every order of a Court of Bankruptcy, whether of the County Court Judge or not, which is made in a bankruptcy under the Act of 1869, or in any liquidation or composition under the Act of 1869, there is to be an appeal from the County Court Judge to the Chief Judge, and from the Chief Judge to us. Possibly the words "in pursuance of this Act" were really put in from caution, because the Court of Bankruptcy still continues to have a certain jurisdiction under the old Acts in respect of matters which were in course of winding up under those Acts; and as to them the appeal was to remain as it was under those Acts. I think that the real meaning of the clause is, that every order which is made by a Court of Bankruptcy under the Act of 1869 is an order made in pursuance of that Act, although the actual power to make the particular order may be given by some other Act, and not by the Act of 1869 itself.

SIR W. M. JAMES, L.J.:—

The order of the Chief Judge should be amended in one respect,

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namely, that the trustees should be "ordered," and not "empowered," to prosecute the debtor, so as to follow the words of the Act. The appeal will be dismissed with costs.

Solicitors for the Trustees: Messrs. *Lumley & Lumley.*
Solicitor for the Debtor: Mr. *G. C. Rice.*

L. JJ. 1873 June 6.

Ex parte PEACOCK. *In re* DUFFIELD.

Injunction in Bankruptcy—Compounding Debtor—Non-payment of Composition—Unliquidated Liability—Untaxed Costs—Proof of Debts under Composition—Bankruptcy Act, 1869, *ss.* 31, 126—*Bankruptcy Rules*, 1870, *rr.* 169, 170, 311.

A claim for costs is a debt proveable in bankruptcy under the 31st section of the *Bankruptcy Act*, 1869, although the costs have not been taxed at the date of the adjudication.

Such a debt may also be included in a composition under the 126th section of the *Bankruptcy Act*, 1869, and the debtor is bound to pay the composition on the estimated amount which he has inserted in his statement, even though the costs are not taxed at the time limited for payment of the composition.

It is not necessary for a creditor whose debt is inserted in the statement of the debts of a compounding debtor to prove his debt before he receives his composition; but, *quære*, whether he can vote at a meeting of creditors until he has done so.

A debtor who made a composition with his creditors under the 126th section of the *Bankruptcy Act*, 1869, was liable to a creditor for payment of untaxed costs in an action at law, and the debtor inserted them in his statement at an estimated amount. The costs were not taxed at the time appointed for payment of the compensation; and accordingly the debtor did not tender the composition to the creditor. The creditor then signed judgment, and had the costs taxed, and levied execution against the goods of the debtor for the whole amount. The debtor applied for an injunction to restrain the creditor:—

Held (reversing the decision of the Registrar), that the debtor ought to have paid the composition on the estimated amount of the debt, and that the creditor was entitled to proceed with his execution notwithstanding the composition.

THIS was an appeal from an order made by the Registrar sitting as Chief Judge, whereby he restrained the Appellants, *J. Peacock* and *J. T. Peacock*, from taking any further proceedings

upon a judgment at law obtained by them against *William Duffield*, a compounding debtor.

An action was brought by the debtor against the Appellants in the Court of Common Pleas for breach of contract. The trial took place on the 23rd of January, 1873, when a verdict was found for the Defendants, under which they were entitled to their costs of the action.

On the 27th of January, before any further proceedings were taken, *Duffield* filed a petition for liquidation by arrangement; and in the list of creditors he inserted the names of Messrs. *Peacock* as creditors for £70 17*s.* 6*d.*, which was intended to comprise a County Court judgment for £10 17*s.* 6*d.*, and £60 for the estimated amount of their claim for costs in the action in the Common Pleas. The first meeting of creditors was held on the 12th of February, 1869, at which an extraordinary resolution was passed by the statutory majority under the 126th section of the *Bankruptcy Act*, 1869, accepting a composition of 3*s.* in the pound, to be paid within seven days after the registration of the resolution.

This resolution was duly confirmed at a subsequent meeting of creditors, and it was soon afterwards duly registered. Notice was sent to all the creditors, including the Appellants, to prove their claims, and was advertised in the *London Gazette*. The Appellants did not attend the meetings of creditors, and the debtor did not tender to them the amount of the composition.

On the 3rd of April the Appellants signed judgment against the debtor, and upon the same day their costs were taxed at £42 19*s.* 3*d.* They immediately levied an execution upon the goods of the debtor for the full amount of the taxed costs.

The debtor then moved for an injunction to restrain the Appellants from proceeding with the execution, which the Registrar granted, and they appealed from the order.

Mr. *De Gex*, Q.C., and Mr. *C. Browne*, for the Appellants:—

The Appellants' debt not being ascertained at the time of the resolution for composition, the Appellants could not have voted at the meeting: *Bankruptcy Act*, 1869, ss. 16 (sub-s. 3) and 126; *Ex parte Wilmot* (1). Such a debt could not be the subject of a com-

(1) Law Rep. 2 Ch. 795.

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position at all. It could not be proved in bankruptcy under sect. 31, for the costs do not arise by reason of any contract. They are in the nature of damages for a tort, and are not proveable until they are taxed: *In re Goodier* (1). If a compounding debtor includes such a debt in his statement he must be taken to admit for the purposes of the composition that the amount inserted is the correct amount, and he ought to have tendered the composition on that sum. As no composition was tendered to the Appellants they are not bound by the resolution, and have a right to proceed at law against the debtor: *Edwards* v. *Coombe* (2); *In re Hatton* (3).

Mr. *Roxburgh*, Q.C., and Mr. *Brough*, for the debtor:—

The object of the *Bankruptcy Act*, 1869, was to clear off all liabilities of every kind, and make the debtor a free man: *Ex parte Llynvi Coal Company* (4). The words of the 31st section of the Act are as extensive as they could possibly be made, and all debts can be proved for to which the debtor is subject by reason of any obligation incurred previously to the order of adjudication. The "obligation" to pay the costs arose directly the verdict was pronounced. Therefore there was nothing to prevent the Appellants from voting at the meeting of creditors. An estimate might have been made of the costs as provided by the 31st section, or the meeting might have been adjourned till the costs had been taxed. But it was entirely through the delay of the Appellants that the debt was not ascertained before the first meeting of creditors, for quite sufficient time had elapsed since the verdict. The debtor was justified in not tendering the composition until the creditors had proved their debt. It is necessary for the creditors to prove their debts under a composition in the same way as in a bankruptcy: *Bankruptcy Rules*, 1870, rr. 269, 270.

The debtor acted throughout with perfect *bona fides*; he estimated the Appellants' debt at more than the correct amount, and if he was mistaken in not tendering the composition on that amount, he acted from a misapprehension, and the Court will in such a

(1) 22 L. T. (N.S.) 426.
(2) Law Rep. 7 C. P. 519.
(3) Law Rep. 7 Ch. 723.
(4) Ibid. 28.

case exercise its discretion and relieve him from the proceedings at law: *In re Hatton* (1); *In re Mills* (2).

Mr. *De Gex*, in reply.

SIR G. MELLISH, L.J.:—

This is an appeal from the order of the registrar, which involves the question whether a particular creditor of a debtor, who has entered into an agreement for a composition with the consent of his creditors, is entitled to be paid in full, or is only entitled to be paid a composition upon his debt; and various questions have been argued before us.

Now, the nature of the debt was of this kind: it was a debt for costs. The debtor had brought an action against the creditor, and a verdict had been found for the Defendant. At the time when the composition was first entered into the Defendant was in a position to tax his costs and sign his judgment. But he had not done so. The first question which was argued was, whether that was a debt which could be proved at all, or which came within the composition, and it was argued that until the costs were taxed and the judgment signed it was not a debt at all, and that the creditor could not have voted at the meeting. Perhaps it is not necessary to give a positive decision upon that point, but my opinion certainly is that it would be within the provisions of the sections. Although perhaps the provisions of the composition section, namely, the 126th, may not extend to all the creditors to which the other sections in the case of bankruptcy and liquidation extend, yet the general object of the Act unquestionably is, as far as possible, to discharge a debtor from all the claims of his creditors, and I am disposed to think that a creditor for costs, although they may not have been actually taxed, and although judgment may not have been signed, is a creditor within the 31st section. The words of that section are these: "All debts and liabilities, present or future, certain or contingent, to which the bankrupt is subject at the date of the order of adjudication, or to which he may become subject during the continuance of the bankruptcy by reason of any obligation incurred previously to the date of the order of adjudication, shall be deemed to be debts proveable in bankruptcy." It

(1) Law Rep. 7 Ch. 723. (2) Law Rep. 6 Ch. 594.

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was argued that it did not come within those words because it was not incurred by reason of any contract; and the case of *In re Goodier* (1), before Lord Justice *Giffard*, under the previous section, which contains clear words with reference to contracts, was cited; but in my opinion the word "obligation" ought not to be confined to obligations incurred by reason of a contract; and I am of opinion that when a verdict has been obtained, as here, before the liquidation proceedings are commenced, so that nothing remains except for the costs to be taxed and the judgment to be signed, there is either a debt or "a liability to which the debtor is subject, incurred previously to the date of the order of adjudication," and that it is a claim proveable in the bankruptcy; and I am also of opinion that such a liability is not prevented from coming within the 126th section by reason, as it was argued, that the creditor could not vote at the meeting. I am disposed to think that the creditor might have a vote, that is to say, that he might have come in and offered to prove his debt. There was nothing to prevent him from at once signing judgment and taxing his costs, and the meeting might have been adjourned to enable him to do so. I am therefore of opinion that the case was within the 126th section; and the debtor was also of that opinion, for he inserted the creditor's name in the list of creditors and statement of his debts for an amount of £70, which was the amount at which he estimated the costs, together with another small debt which he owed on a judgment obtained in the County Court.

Then the resolution was carried and confirmed, and the creditor did not appear and did not vote; he got the notices and he did nothing more. In my opinion he was not bound to do anything more. When he found his name inserted in the list as a creditor for £70, and he was satisfied with the amount at which he was inserted in the list as a creditor, I do not see why he should be bound to incur a perfectly useless and unnecessary expense in taxing costs and signing judgment. He would naturally say, "The debtor has put me down as a creditor for £70. I think that that is the full amount I should get if I taxed the costs, and therefore I will not tax the costs." I think he was entitled to wait, to see if the amount was tendered.

Then the important question arises, whether the amount not

(1) 22 L. T. (N.S.) 426.

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having been tendered makes any difference. Now in my opinion it is not only clear that it was not tendered, but it is perfectly plain that the debtor was not prepared or ready to pay the amount, because the construction he put upon the Act of Parliament was, that he was not bound to pay a composition upon the amount of the debt which, by his statement, he admitted to be the true amount, but that he was entitled to require proof to be given of that amount. I cannot find that there is any section in the Act of Parliament which at all allows that. No doubt the general rules which apply both to bankruptcy and to composition refer to proof, and it is necessary that they should do so, because in the case of a creditor who comes to the meeting to vote he has to prove his debt; but the 311th rule appears to me rather to shew that it was not intended that proof should be necessary before a composition was paid. That rule is as follows: "All debts must be proved prior to the payment of dividend thereon by the trustee." It does not say all debts must be proved prior to a composition being paid by the debtor. The language of the 126th section seems also to imply the same, for it says: "The provisions of a composition accepted by an extraordinary resolution in pursuance of this section shall be binding on all the creditors whose names and addresses, and the amount of the debts due to whom, are shewn in the statement of the debtor produced to the meetings at which the resolution was passed, but shall not affect or prejudice the rights of any other creditors." Therefore it appears to me that the amount of debts inserted in the statement is the amount upon which the composition is to be paid. No doubt if the creditor came to the meeting to prove his debt, and it was proved to be less than what appeared in the statement, I presume the statement would be altered at once, and the true amount would be inserted; but if that is not done then the creditors vote on the assumption that that statement is correct. Of course I do not allude to any case where there may have been a clear mistake; for instance, where a man's name may have been inserted erroneously when he was not a creditor at all, or where by mistake the wrong amount has been inserted. Probably a remedy for that might be found in the Court of Bankruptcy. But in the present case there was no mistake at all; the debtor estimated the amount somewhat above the

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amount which it was proved upon taxation to be, but still he did estimate the amount.

That being so, the question arises, what was the effect of the debtor not tendering the composition, and not being ready and willing to pay it on the day named, but apparently waiting until the creditor should come in to prove his debt? In my opinion there is no reason why this case should be distinguished from the case of *Edwards* v. *Coombe* (1) before the Court of Common Pleas, and the case of *In re Hatton* (2) which was before us. There was no mistake of any kind except that the debtor's advisers made a mistake in point of law in considering that the creditor was bound to come in and prove the amount of his debt before they were bound to tender him the composition. If any application had been made in this case to the Court of Common Pleas to stay the execution on the ground that the creditor was bound by the composition, and then it appeared that the day had passed for payment, and that the composition had never been tendered, it is quite clear to my mind that the Court of Common Pleas, acting upon their own decision in *Edwards* v. *Coombe*, would have said that the composition not having been tendered on the proper day, the creditor was relieved from the composition, and was entitled to go on with his proceedings by taxing his costs and issuing his execution.

Then is there any equitable ground, which a Court of Law would not notice, by reason of which we should give a different decision, and say that the creditor in this case is not entitled to proceed with his execution? It is no doubt true that in the case of *In re Hatton* we guarded ourselves by saying there might be cases where by possibility relief might be given to the debtor, but I am rather disposed to think upon consideration that such relief must be granted upon some act done on the part of the creditor which makes it inequitable that he should enforce his strict legal right. If, for instance, he has done anything tending to shew that he was not ready to receive the composition, if tendered, that might be a circumstance to be taken into consideration; but there is no evidence in this case that between the time of the resolution and the time that the composition ought to have been paid the creditor

(1) Law Rep. 7 C. P. 519. (2) Law Rep. 7 Ch. 723.

did anything whatever; he simply waited to see whether the composition was tendered, and if the composition on the £70 had been offered to him no one can tell at the present moment whether he would have taken it or not.

I am of opinion, therefore, that this case is governed by the case of *Edwards* v. *Coombe* (1), and the case of *In re Hatton* (2), and that the decision of the Registrar must be reversed.

SIR W. M. JAMES, L.J.:—

I am of the same opinion. I desire to add one word respecting the interpretation of the 31st section. I read the words in the second paragraph, "by reason of any obligation," as only extending to the second part and not to the first part of the paragraph. I read it thus: "All debts and liabilities, present and future, certain or contingent, to which the bankrupt is subject at the date of the order of adjudication." That is the completion of that clause. Then commences another: "or to which he may become subject during the continuance of the bankruptcy by reason of any obligation incurred previously to the date of the order of adjudication, shall be deemed to be debts proveable in bankruptcy." Any liabilities actually existing are proveable under the first part, and liabilities coming into existence subsequently, by reason of a previous obligation, they are also proveable.

Solicitors for the Appellants: Messrs. *Dalston & Son.*
Solicitors for the Debtor: Messrs. *Loxley & Morley.*

(1) Law Rep. 7 C. P. 519. (2) Law Rep. 7 Ch. 723.

L. J. M.
1873
March 4.

In re WILLIAMS.

Bankruptcy—County Court District—Avoiding Service—Notice by Delivery—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 59—*Bankruptcy Rules*, 1870, *r.* 61.

A debtor left the County Court district in which he had carried on business; he afterwards returned, and was then served with a notice requiring him to pay a debt. He again left the district, and could not be found, remaining away in order to avoid service.

An order was made for service on him of a debtor's summons by delivery at a house in the district, and he was afterwards adjudicated bankrupt by the County Court of that district:—

Held (affirming the decisions of the County Court Judge and of the Chief Judge), that the debtor, by leaving the district for the purpose of avoiding service, did not deprive the County Court of jurisdiction; and that, though the evidence on which the order for service by delivery was obtained was not satisfactory, yet, as the debtor was staying away in order to avoid service, the bankruptcy would not on that ground be annulled.

THIS was an application to annul an adjudication in bankruptcy made against *Henry Williams*.

By an indenture of lease dated the 20th of June, 1862, Dr. *Percy* demised to *Williams* a colliery at *West Bromwich*, in the county of *Stafford*, for twenty-one years from the 29th of September, 1862, the lessee paying certain dead rents and royalties, and covenanting to work the mines and pay the rents and royalties. The lease contained a declaration that the bankruptcy of the lessee should terminate the lease. In 1867 Dr. *Percy* distrained on the colliery for rents of £440 then due, and took possession of the colliery. In June, 1869, he sued *Williams* for £500, and on the 16th of November, 1869, caused judgment by default to be signed.

In April, 1870, *Williams*, whilst at the house of one *Vernon*, in *Staffordshire*, was served with a notice requiring him to pay the £500. On the 2nd of May a debtor's summons was issued against him in the County Court of *Staffordshire*. The solicitors of Dr. *Percy* were unable to find where *Williams* resided, or was to be found. On the 28th of May an order was made under Rule 61 of the *Bankruptcy Rules*, 1870, for service of the summons by

delivery at the house of his mother at *Roodend*, in the county of *Stafford*, on evidence that he had resided there. On the 9th of July a petition for adjudication was filed, of which notice was, under an order of the County Court, gazetted, and advertised in a *Staffordshire* newspaper. On the 8th of August, 1870, *Williams* was, by the County Court of *Staffordshire*, adjudicated a bankrupt. Meetings in the bankruptcy had been held, but Dr. *Percy* was the only creditor who appeared.

On the 5th of April, 1871, *Williams* applied to the County Court of *Staffordshire* to annul the bankruptcy, and after several adjournments, the Judge of the County Court, on the 9th of August, 1872, dismissed the application, and his decision was affirmed by the Chief Judge.

Williams appealed, and the appeal now came on to be heard.

There was much evidence before the County Court, both on affidavit and *vivâ voce*.

It appeared that *Williams* had before 1868 resided and carried on his business at *West Bromwich*, in the county of *Stafford*, and in his affidavits he described himself as of *West Bromwich*. He had afterwards resided with his mother at *Harborne*, in the county of *Stafford*, but he generally, in 1868 and the beginning of 1870, resided with his friend *Vernon* in *Staffordshire*. His mother subsequently removed to *Roodend*, where the summons was served, but *Williams* denied that he had ever resided there, and the evidence on which the order to serve the summons at *Roodend* had been made was by the Lord Justice *Mellish* considered unsatisfactory. In March, 1870, *Williams* went to *Leeds*, and, as he stated, he obtained employment there as a colliery engineer, and had no longer any business in *Staffordshire*. He stated that when he was served with the notice he was only on a visit to *Vernon*. On the evidence the Lord Justice *Mellish* came to the conclusion that *Williams* had stayed away in order to avoid service of the notices in bankruptcy.

Mr. *Roxburgh*, Q.C., and Mr. *Bagley*, for the Appellant:—

The order for service of the summons was obtained on affidavits which were not true, and the Court was deceived. The whole proceedings, therefore, ought to be annulled. Moreover, the order

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under Rule 61 of the *Bankruptcy Rules*, 1870, ought to have been served at the last-known place of abode of the debtor, which this clearly was not. *In re O'Loghlen* (1). Another defect was, that *Williams* neither resided nor carried on business within the jurisdiction of the County Court of *Staffordshire*: 32 & 33 Vict. c. 71, s. 59. The sole object of these proceedings is to put an end to the lease, and to recover possession of the colliery, and the Court ought not to lend itself to such a course: *Ex parte Gallimore* (2).

Mr. *De Gex*, Q.C., and Mr. *Finlay Knight*, for Dr. *Percy*:—

Dr. *Percy* has given the bankrupt abundance of time and opportunity, but could not allow the colliery to remain useless and unworked. The bankrupt has occasioned all the difficulties by keeping out of the way.

Mr. *Roxburgh*, in reply.

Sir G. Mellish, L.J., after stating the facts of the case, said that he thought the application was too late; but as the County Court Judge and the Chief Judge had decided the case on the merits, it would be more satisfactory so to dispose of the case. His Lordship continued:—

The first objection is, that the County Court Judge had no power, because the bankrupt was not residing or carrying on business within the jurisdiction of the County Court.

Now, the object of the provisions of the *Bankruptcy Act* on that point is simply to ascertain which is the right Court in which to proceed against a debtor. No man can avoid the bankruptcy laws by residing nowhere, and there must always be some place where the debtor must be held to reside or carry on business for the purpose of being made a bankrupt. If he has no other residence, the place where he was actually sleeping would for this purpose be his residence.

The question is, whether at the time of the service of the summons the debtor was, within the contemplation of the Act, residing or carrying on business in the *Staffordshire* County Court district.

(1) Law Rep. 6 Ch. 406. (2) 2 Rose, 424.

Now, in the first place, he was the lessee of a colliery in *Staffordshire*, and that was the business of his life. He fell into difficulties; after which, according to his own statement, he went to reside with his friend *Vernon*, still being within the jurisdiction of the County Court of *Staffordshire*. Up to the time when he left *Vernon*, which was in March, 1870, if any debtor summons had been served, it must have been issued from the *Staffordshire* Court.

Then did he sufficiently change his residence by going into *Yorkshire?* In my opinion that was clearly not a sufficient change, because the object of the bankruptcy law in fixing the place for proceeding in is merely that the bankrupt shall be proceeded against in the place where his creditors and his assets are, and a mere change of residence is not sufficient to change the place for proceeding. The debtor merely went into *Yorkshire*, and when he returned to *Vernon's* house, beyond question his residence changed back. While there he was served with the notice, and the next day he left the place. He knew the object of the service, and could he deprive the Court of jurisdiction by going into another district, leaving the creditor to find out where he was and then take a fresh proceeding? If this were so, the creditor might never be able to serve his debtor, for after he was found he might start off to another district.

I am clearly of opinion that, as he was residing within the district at the time of being served with the notice, he could not, by merely changing his residence, deprive the County Court of *Staffordshire* of jurisdiction to issue adjudication against him. That objection, therefore, falls to the ground.

The only question as to which I have some doubt was as to the service of the summons. [His Lordship then expressed his opinion that the evidence as to *Williams'* residence with his mother was doubtful, and that all the circumstances were not fairly before the County Court.] But then the question arises, What is the effect of that omission?

If it had turned out that the bankrupt was really absent, and was not staying away for the purpose of avoiding service, then without doubt the adjudication ought to be set aside, and the petitioning creditor and his solicitor would run great risk of being

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made liable for damages in having procured the debtor to be made bankrupt. But *Williams* knew that the debtors summons would be issued, and that his creditor would proceed, and he kept out of the way on purpose. Then ought the Court, on his application, to set the service aside? I think not. The County Court Judge and the Chief Judge were of opinion that the debtor was staying away to avoid service, and that being so, he has no ground for complaint that he has been made bankrupt in his absence. He took every care that no one in *Staffordshire* should know where he was in *Yorkshire*, and he did all he could to avoid obtaining information of what was going on. No injury was done to a man of that kind by ordering the summons to be delivered as it was. If he had remained in *Staffordshire* he would have received the summons; and the only reason why he did not receive it was that he took pains to avoid receiving it.

The order of the Chief Judge must be affirmed, and the appeal dismissed with costs.

Solicitors for the Bankrupt: Messrs. *Doyle & Edwards.*
Solicitors for Dr. *Percy:* Messrs. *Church, Son, & Clarke.*

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Feb. 26.

[1872 O. 35.]

Foreign Judgment—Fraud—Action at Law—Injunction—Concurrent Jurisdiction.

A plea of fraud is a good defence at law to an action on a foreign judgment; and therefore the Court of Chancery will not, on the ground that such a judgment was obtained by fraud, interfere with the action at law.

In cases of concurrent jurisdiction proceedings at law will not be interfered with by the Court of Chancery, unless that Court can give a more perfect remedy, or the case can be better tried by the procedure of that Court.

Decision of *Malins*, V.C., affirmed.

C. E. OCHSENBEIN, the Plaintiff in this case, was a seed merchant in *London*, and *S. Papelier*, the Defendant, was a seed merchant at *Nancy*, in *France*. In January, 1872, *Papelier* agreed to sell to *Ochsenbein* a large quantity of trefoil seed, and accordingly shipped for *Ochsenbein* some trefoil seed to *London* and some to *Havre*. *Ochsenbein* complained that the seed was inferior, and not equal to sample, and much correspondence on the subject ensued. Finally, *Ochsenbein*, by arrangement, went to *Paris*, and there saw *Papelier's* son, who was authorized to act as *Papelier's* agent. After much discussion, every point was, on the 13th of April, as *Ochsenbein* alleged, settled between them, except as to the loss of weight which had taken place in the transit of the seed. However, on the same day *Papelier's* son brought to the hotel where *Ochsenbein* was staying an "assignation" or writ from the Tribunal of Commerce at *Nancy* to recover the price of the seed and damages. *Ochsenbein* was much annoyed at this, and remonstrated with *Papelier's* son on this proceeding, as being in want of good faith, when *Ochsenbein* had come to *Paris* to arrange the matter. *Papelier's* son, as *Ochsenbein* alleged, thereupon apologized, and agreed that all the questions between them should be referred to arbitration in *London*, to which place *Papelier* should come, and thereupon the writ was, with the assent of *Papelier's* son, burnt by *Ochsenbein*. *Ochsenbein* then returned to *London*, and exerted himself to obtain offers for the seed.

Papelier, however, proceeded with the action at *Nancy*, and in

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June, 1872, obtained at *Nancy* judgment by default against *Ochsenbein* for £220 (5502 francs).

In July, 1872, *Papelier* brought, upon this judgment, an action in the Court of Queen's Bench for £220 and interest.

Ochsenbein then filed the bill in this suit against *Papelier*, alleging as above stated, and that the agreement to refer had only been made by *Papelier's* son in order to enable *Papelier* to obtain a judgment behind *Ochsenbein's* back, and alleging that he had no defence at law to the action, as the Court of Queen's Bench would only require proof of the judgment in the Court of *Nancy*; and praying for an injunction.

The Plaintiff moved for an injunction accordingly; and Vice-Chancellor *Malins* refused the motion with costs.

The Plaintiff appealed.

Mr. *Glasse*, Q.C., and Mr. *Whitehorne*, for the Appellant:—

We allege that the foreign judgment was obtained by fraud, and that the case, therefore, comes within the jurisdiction of this Court. The Plaintiff has not pleaded any equitable plea, and has a right to come here: *Gompertz* v. *Pooley* (1). Where a foreign judgment is, on the face of it, regular, there is no case where a plea of fraud has been held good at law: *Kingsford* v. *Swinford* (2). At all events we have a right to discovery, and that gives the Court jurisdiction to interfere: *Pearce* v. *Creswick* (3). It is by no means certain that the Court of Law will admit evidence of the fraud, and we ought not to be exposed to that risk. Nearly all the authorities cited on the point in *Story's* Conflict of Laws (4) are from Chancery. *Hoare* v. *Bremridge* (5) shews that the Court has jurisdiction. *Bank of Australasia* v. *Nias* (6), *Imrie* v. *Castrique* (7), and *Godard* v. *Gray* (8), shew that a Court of Law is inclined to enforce a foreign judgment. So also do *Schibsby* v. *Westenholz* (9) and *Bowles* v. *Orr* (10). Though there may be a legal defence, this Court will often interfere: *Thornton* v. *M'Kewan* (11).

(1) 4 Drew. 448.
(2) 7 W. R. 215.
(3) 2 Hare, 286.
(4) §§ 603, 606.
(5) Law Rep. 14 Eq. 522; Ibid. 8 Ch. 22.
(6) 16 Q. B. 717.
(7) 8 C. B. (N.S.) 405.
(8) Law Rep. 6 Q. B. 139.
(9) Ibid. 155.
(10) 1 Y. & C. Ex. 464.
(11) 1 H. & M. 525.

Mr. *Higgins*, Q.C., and Mr. *Marten*, for the Defendant, were not called upon.

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LORD SELBORNE, L.C.:—

It is the rule of this Court that in cases of concurrent jurisdiction this Court ought not to interfere with any proceedings at law unless it has better means of doing justice between the parties than are possessed by a Court of Law. That may be the case either because a Court of Equity is able to give a more perfect remedy, or because the nature of the case admits of its being better tried by the procedure of this Court than by that of a Court of Law.

If this is a case of strictly concurrent jurisdiction, it appears to me that neither of these grounds exist, so as to justify the interference of this Court with the action at law. The remedy in this case would not be different in effect from a successful defence to the action at law; and there are no better means of trial according to the procedure of this Court than there are at law. On the contrary, it appears to me that, in all the material points of the question in this case, the procedure of a Court of Law is far better adapted to elicit the truth, as to the controverted question of fact, than the procedure of a Court of Equity.

If, therefore, this is a case of strictly concurrent jurisdiction of Law and Equity, I should say, as was said in *Hoare* v. *Bremridge* (1), that this case is more fit for the decision of a Court of Law. I should also say that the jurisdiction ought to remain in the Court in which the proceedings have been commenced.

Is it, then, a case of strictly concurrent jurisdiction? Notwithstanding the effect of the statute, which permitted equitable defences to be pleaded at law, it has been determined that in many cases a Defendant at law is entitled, as he was before, to come into this Court. These cases have, in my judgment, no application whatever to that before us, because the conclusion at which I have arrived, assuming this to be a case in which equity might have jurisdiction, is that the Court of Law has concurrent jurisdiction, and that complete justice can be done at law.

It has been suggested in the able and zealous arguments for the Plaintiff that there may be a doubt about the power of a Court of

(1) Law Rep. 14 Eq. 522; Ibid. 8 Ch. 22.

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Law to give full effect to the allegations of fraud contained in those portions of the bill which relate to the foreign judgment. I should be sorry to think that anything should fall from this Court which might give the least colour to any doubt as to the power of a Court of Law to take cognizance of fraud in obtaining foreign judgments.

On that point there are many cases, and the doctrine has never been controverted. The *dicta* of Chief Justice *De Grey* in the *Duchess of Kingston's Case* (1) have always been considered perfectly sound law, and they apply with at least as much force to foreign as to English judgments. His Lordship there said of a judgment that (2), "like all other acts of the highest judicial authority, it is impeachable from without; although it is not permitted to shew that the Court was mistaken, it may be shewn that they were misled. Fraud is an extrinsic collateral act which vitiates the most solemn proceedings of Courts of justice. Lord *Coke* says it avoids all judicial acts, ecclesiastical or temporal." There is no difference in this respect between the doctrine of law and equity. In *Buller's Nisi Prius* (3) and *Story's* Conflict of Laws (4) legal and equitable authorities are cited indiscriminately on the point, and I think that writers of such eminence would not have referred in that manner to a doctrine as to which they conceived that there was any such distinction. And when I examine the case of *Price* v. *Dewhurst* (5), it is plain that the principles there enunciated by the Vice-Chancellor, when rightly understood, mean that a foreign judgment is not a thing to be got rid of by the intervention of equity only, but is a thing which, when fraud has been shewn, will be void at law also. If it is a nullity in equity, it is a nullity everywhere. The Vice-Chancellor says (6): "This, I apprehend, I am at liberty to do, namely, to see whether a judgment obtained abroad has been fraudulently obtained or not; and I apprehend that, if the Court finds that certain proceedings abroad have been fraudulent, then it is at liberty to deal with the parties it finds before it, and the subject it has to administer, just in the same manner as if the foreign judgment had never taken place."

(1) 2 Sm. L. C. 679, 6th Ed.
(2) Ibid. 687.
(3) Page 244 a.
(4) §§ 607, 608.
(5) 8 Sim. 279.
(6) Ibid. 302.

And again (1): "Thus the Court, by means of the injunction, set aside the judgment of a foreign Court, and the ground on which the Court proceeded was that the foreign judgment had been obtained by fraud. Now I take that to be quite consistent with the principles on which this Court acts; and it is of no consequence where the judgment is given if it appears to have been obtained by fraud; in every such case the Court will consider it as a nullity."

So much for the cases in equity, which are properly referred to as being equally authorities at law. In *Smith's* Leading Cases (a book by a writer of as much authority as any in very modern times) it is treated (2) as free from doubt that fraud in judgments is examinable at law as well as in equity; and the same thing is said by Lord *Campbell* in his judgment in *Bank of Australasia* v. *Nias* (3). Mr. Justice *Story* says the same thing—that, as a matter of course, foreign judgments are avoided if founded on fraud. He says, § 603: "It is admitted on all sides that in such cases the foreign judgments are *primâ facie* evidence to sustain the action, and are to be deemed right until the contrary is established, and of course they may be avoided if they are founded in fraud, or are pronounced by a Court not having any competent jurisdiction over the cause." And again, at § 607: "It is easy to understand that the Defendant may be at liberty to impeach the original justice of the judgment, by shewing that the Court had no jurisdiction, or that he never had any notice of the suit; or that it was procured by fraud; or that upon its face it is founded in mistake; or that it is irregular, and bad by the local law, *fori rei judicatæ*. To such an extent the doctrine is intelligible and practicable. Beyond this, the right to impugn the judgment is in legal effect the right to re-try the merits of the original cause at large, and to put the Defendant upon proving those merits." And in § 608: "The general doctrine maintained [until recently] in the American Courts in relation to foreign judgments certainly is, that they are *primâ facie* evidence, but that they are impeachable. But how far and to what extent this doctrine is to be carried, does not seem to be definitely settled. It has been declared that the jurisdiction

(1) 8 Sim. 304. (2) Vol. ii. p. 732.
(3) 16 Q. B. 717, 735.

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of the Court, and its power over the parties and the things in controversy, may be inquired into, and that the judgment may be impeached for fraud. Beyond this no definite lines have as yet been drawn."

Lord *Campbell*, in *Bank of Australasia* v. *Nias* (1), says: "Doubtless it is open to the Defendant to shew that the foreign Court had not jurisdiction of the subject-matter of the suit, or that he never was summoned to answer, and had no opportunity of making his defence, or that the judgment was fraudulently obtained." The words used by Mr. Justice *Blackburn* in *Godard* v. *Gray* (2) were not intended to throw any doubt upon so clear a matter. On the contrary, what was said in that case and in *Schibsby* v. *Westenholz* (3) is quite in accordance with that principle.

I say, therefore, without hesitation, that, supposing the fraud to be one proveable here, it could be pleaded at law, and would be a legal defence.

I must add that I for one should be most unwilling to exercise the jurisdiction of granting an injunction, which this Court undoubtedly possesses, in any case of an action commenced before the suit in this Court in which I was satisfied that perfect justice would be done at law; and in any such case, unless I felt myself bound by authority, I certainly would not interfere.

SIR G. MELLISH, L.J.:—

It is perfectly true, as stated by Mr. Justice *Story*, that for a considerable time doubts existed at law as to the validity of a foreign judgment; but it was never doubted that a foreign judgment could be impeached for fraud. It was always held that a foreign judgment could be impeached at law as contrary to the principles of natural justice, as, for instance, on the ground of the Defendant having had no notice of the foreign action, or not having been summoned, or of want of jurisdiction, or that the judgment was fraudulently obtained. But the doubt was whether the Court could not enter into the merits, and whether, when the action was brought in this country, the foreign judgment was more than a *primâ facie* case, to which the Defendant might plead

(1) 16 Q. B. 735. (2) Law Rep. 6 Q. B. 139, 149.
(3) Law Rep. 6 Q. B. 155.

that the matter was improperly decided. That doubt was settled in the case of *Bank of Australasia* v. *Nias* (1), which shewed that the merits could not be opened again, and that if the question between the parties had been decided by a foreign Court with jurisdiction, that decision was conclusive; but if the foreign judgment was obtained by fraud, that would be an answer to any proceedings founded on that judgment.

That being so, the question here is whether this is a case which ought to be tried at law or in this Court. I agree that though this Court has concurrent jurisdiction in cases of fraud, yet, having regard to the case before us, which is that the Defendant had by his agent fraudulently persuaded the Plaintiff to let judgment go by default, and the only question being whether that really took place, it is plain that the question depends upon the evidence which will be given as to what actually took place.

That being the question in dispute, I am clearly of opinion that it is a very proper question to be tried by a jury, and that there is no reason why a jury should not come to a proper conclusion. If the jury should hold that the judgment was obtained by fraud, it will be got rid of, and the question whether the Plaintiff at law is entitled to recover may then be tried by a Court of Law in this country.

My opinion is that this appeal must be dismissed with costs.

Solicitor for the Plaintiff: Mr. *G. B. Bower.*

Solicitors for the Defendant: Messrs. *Thomas & Hollams.*

(1) 16 Q. B. 717.

L. JJ.
1873
May 3.

In re MARINE INVESTMENT COMPANY.
Ex parte POOLE'S EXECUTORS.

Winding-up—Arrangement—Purchase of Assets—Companies Act, 1862, *ss.* 161, 162.

The *M. Company* made over its property to the *M. Corporation*, which undertook to satisfy all the obligations of the company. The corporation was unsuccessful, and the company was obliged to pay a debt of £7000, from which the corporation ought to have indemnified it. The company was being wound up under supervision, and all its debts were paid. The corporation was being wound up, its shares were fully paid up, it owed a considerable amount of debts, and it had substantially no assets, except some shipbuilding property, which was of speculative value and not readily saleable. Nearly all the creditors of the corporation, other than the company, were willing to accept an immediate payment of 4*s.* in the pound in satisfaction of their debts. Under these circumstances the liquidators entered into an arrangement which was confirmed by extraordinary general meetings of the shareholders of the company and the corporation respectively, that the corporation should make over its assets to the company; that the company should pay 4*s.* in the pound to all the creditors of the corporation whose debts exceeded £10, and pay in full all the debts under £10, and keep the corporation indemnified against all its debts, whether proved in the winding-up or not. *Malins*, V.C., made an order approving of this agreement, and directing that all shareholders in the company who disapproved of it should have their interests valued, be paid the amount of such valuation at once, and release their interests to the liquidator. All the shareholders of the company acquiesced in this order except two, one of whom appealed on the ground that the arrangement was one which the Court would not sanction:—

Held, on appeal, that the order of the Vice-Chancellor was right.

THIS was an appeal by *Poole's* executors from an order of Vice-Chancellor *Malins*.

The *Marine Investment Company* was registered in July, 1863, as a limited company, with a capital of £500,000 divided into 20,000 shares of £25. Its object was the lending money on the security of ships and freights, and on other securities connected with navigation.

At an extraordinary general meeting of the company held on the 20th of August, 1866, special resolutions were passed that the company should be reconstructed by means of the formation of a new company, to be called the *Marine Investment Corporation*,

Limited, with a capital of £250,000, in 50,000 shares of £5 each, and the transfer thereto of the business and properties of the company; and that for this purpose the company should be wound up voluntarily, and that Captain *Pelly* and *H. A. Coffey* should be appointed liquidators. These resolutions were duly confirmed at an extraordinary general meeting, on the 5th of September, 1866.

The corporation was registered as a limited company on the 6th of September, 1866.

By a memorandum of agreement, dated the 22nd of October, 1866, and made between the above-named liquidators of the one part, and the corporation of the other part, it was agreed that the liquidators on behalf of the company would sell, and the corporation would purchase, all the business property and assets of the said company, including its land and shipbuilding premises situate on the banks of the *Clyde*, and their mortgages of ships and other securities, whether standing in the names of trustees or otherwise; and that the corporation would undertake all the liabilities, whether present or prospective, ascertained or contingent, of the company, and indemnify the company and its directors, trustees, and members from the same.

The corporation was unsuccessful in business, and at a meeting held on the 29th of July, 1867, a resolution was passed for winding it up voluntarily. This resolution was duly confirmed on the 14th of August, 1867, and liquidators were appointed.

On the 15th of August, 1867, Vice-Chancellor *Malins* made an order that the voluntary winding-up of the company should be continued under the supervision of the Court.

The assets of the company agreed to be sold to the corporation had been duly transferred to the corporation accordingly; but the corporation had failed to perform its agreement to provide for all the liabilities of the company, a debt of £8813 13*s.* 8*d.*, and interest due to the *National Bank of Liverpool*, and the expenses of the winding-up of the company being left unpaid.

By an agreement, dated the 26th of June, 1871, the *National Bank of Liverpool* agreed to sell their claims to *Child*, *Emerson*, and *Wilson*, as three of the shareholders of the company, for the sum of £7500, payable as therein mentioned. *Child*, *Emerson*,

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and *Wilson* were three of the liquidators of the company, and entered into this agreement for the benefit of the company.

By another agreement, dated the 26th of June, 1871, and made between the company of the first part, *Child*, *Emerson*, and *Wilson* of the second part, and the several persons whose signatures were affixed in the schedule thereto of the third part, it was agreed that the parties thereto of the third part would respectively pay the sums set opposite to their respective names in the schedule to the parties thereto of the second part, when required, such sums when received to be applied in satisfaction *pro tanto* of the debt of the bank, in accordance with the provisions of the last-mentioned agreement, and to be treated, in case of a call being thereafter made, as having been paid on account of the uncalled capital of the company.

The £7500 payable to the bank, and a large proportion of the winding-up expenses of the company, were paid by means of a call of £3 a share upon the shareholders in the company.

The unpaid debts of the corporation, when the agreement about to be mentioned was entered into, amounted to about £50,000, and the debts under £10 amounted only to a very trifling sum. The shareholders had paid up the full amount of their shares, and the assets were of small value, except the shipbuilding property on the *Clyde*. This property had been originally made over to the company as security for a loan, the company had subsequently become absolute owners, and it was included, as appears above, in the property made over to the corporation. It was estimated at the value of £39,600, but was subject to incumbrances to the amount of about £13,000, was of somewhat speculative value, and could not be sold by a forced sale, except at a ruinous loss. Under these circumstances a majority of the creditors of the corporation, whose debts exceeded £10, were willing to accept a composition of 4*s*. in the pound with speedy payment.

On the 13th of June, 1872, an agreement was entered into between the corporation and its liquidators of the one part, and the company and its liquidators of the other part, by which, subject to the approbation of the Court, to be obtained as thereafter mentioned, it was agreed—

1. That the corporation and its liquidators should sell, and the

company and its liquidators purchase, all the real and personal property of the corporation (the sale to include the particulars enumerated in the 2nd schedule, but not to be confined to them in case such enumeration should prove incomplete) subject, however, to the securities of the *Alliance Bank, Limited*, and to the right of a Mr. *Dalzell* to be indemnified against certain costs out of a sum of £400 set aside for that purpose, and without prejudice to the rights, remedies, and securities (if any) of such of the creditors as should not accept the 4*s.* in the pound upon their debts, and who had any mortgages, charges, or liens upon the said assets or any part thereof, and to all other, if any, the incumbrances on the said property and effects, saving and reserving to the liquidators of the corporation the power in the meantime before the agreement should have become binding upon them, at their discretion to realize for the ultimate benefit of the corporation or the company, as the case might be, all or any part of the property sold.

2. That the corporation and its liquidators immediately on the agreement becoming binding on them, should deliver to the liquidators of the company all such parts of the property as were capable of delivery, and should at the cost of the company execute and do all such conveyances and things as the liquidators of the company should from time to time reasonably require for carrying the sale into effect, the same to be settled by the Judge in Chambers in case of difference, and that in the meantime it should be lawful for the liquidators of the company in the name or names of the corporation or its liquidators, but keeping them indemnified against all costs and damages which might arise thereby, to bring and defend actions and suits, and do all other things either in *England* or elsewhere, which might be necessary or expedient for obtaining the full benefit of the sale.

3. That as part of the consideration for the sale, the company, as well out of the assets of the corporation as out of the uncalled capital of the company, should on demand by the respective creditors pay in full all the outstanding debts of the corporation which did not exceed £10 each, and should on or before the 1st of July then next pay the sum of 4*s.* in the pound on their respective debts to all those of the creditors of the corporation whose debts

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exceeded £10 each, and that the company would keep the corporation and its liquidators indemnified against all the debts and liabilities of the said corporation, whether proved or admitted in the winding-up or since, and whether secured or unsecured, and against all costs, charges, and expenses in respect thereof.

4. That the company should pay and keep the corporation and its liquidators indemnified against all costs and expenses, past or future, of the winding-up of the corporation, and of a certain suit therein mentioned, and of any other legal proceedings, if any, to which the corporation then were or had been or should be parties.

5. That if default should be made by the company in observing clause 3 or 4, the liquidators of the corporation should have a lien for the amount on all such parts of the property sold as should not have been previously realized by the company; but that the corporation should not have any vendor's lien or other lien than as above.

6. That the liquidators of both the company and the corporation should apply to the Judge in the winding-up for his sanction to the agreement, and that the agreement should not be binding upon the parties until such sanction had been obtained.

This agreement was adopted on the day of its date by extraordinary general meetings of the shareholders in the company and the corporation respectively. Nearly all the shareholders in the company assented to it.

Vice-Chancellor *Malins* made an order in Chambers sanctioning this agreement, and directing that those shareholders in the company who dissented from it should have the values of their interests ascertained, and that upon being paid the amounts of such values by the liquidator of the company, they should surrender to him all their interests in the company.

Captain *Poole* had been a holder of twenty £25 shares in the company, and his executors, the present Appellants, were contributories of the company in respect of them. They had not assented to the agreement, and moved before the Vice-Chancellor to discharge the order. All the other dissentient shareholders, with one exception, had acquiesced in having their interests valued. The Vice-Chancellor refused the motion with costs, and *Poole's* executors appealed from this decision.

Mr. *Higgins*, Q.C., and Mr. *Phear*, for the Appellants:—

This agreement saddles the company again with a property which caused the ruin both of the company and the corporation. We contend that sects. 161 and 162 of the *Companies Act*, 1862, do not apply to a case like this, and that we ought not to be forced to take the price of our shares at a valuation. We shall remain liable to the debts to be contracted by the company: *Vining's Case* (1). We shall also be liable to the costs of realizing this property, which will be costs in the winding-up of the company. The case of *Imperial Bank of China* v. *Bank of Hindustan* (2) is against the validity of such an arrangement as this.

Mr. *Cotton*, Q.C., and Mr. *Jackson*, Q.C., *contrà*:—

The agreement is one approved as beneficial by the shareholders in both companies, and the Court will not throw obstacles in the way: *Ex parte Fox* (3). In the case of *In re South Barrule Slate Quarry Company* (4) the Court sanctioned a resumption of business by the company, which was under winding-up, giving a dissentient shareholder the value of his shares. *Vining's Case* only shews that the liability to creditors cannot be taken away; here there are none. A transfer of their shares under sect. 161 will relieve the Appellants from future liability. The cases of *In re Imperial Mercantile Credit Association* (5) and *In re Agra and Masterman's Bank* (6) shew how far the Court will go in sanctioning the reconstruction of a company, and that it will not allow a single shareholder to stop an arrangement which every one else thinks beneficial.

Mr. *Higgins*, in reply.

SIR W. M. JAMES, L.J.:—

I am of opinion that the order of the Vice-Chancellor in this case was clearly right.

It appears that the company had originally acquired the property in question as security for a loan, and had been compelled to take the property in satisfaction of the loan. It is a shipbuild-

(1) Law Rep. 6 Ch. 96.
(2) Ibid. 6 Eq. 91.
(3) Ibid. 6 Ch. 176.
(4) Law Rep. 8 Eq. 688.
(5) Ibid. 12 Eq. 504.
(6) Ibid. 509, n.

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ing property on the banks of the river *Clyde*, near *Glasgow*, and is of speculative value. This property, with other property, was transferred by the company to a new body—the corporation—which was formed for the same objects as, and, in fact, for carrying on the business of the company. The corporation bound itself, in consideration of receiving the assets and business of the company, to pay all its debts and liabilities. This obligation the corporation has failed to discharge; it has been unfortunate, and is being wound up, and its fall has involved the fall of the company, which has also had to be wound up. The result is, that the company has been obliged to pay a debt of more than £7000 which the corporation had bound itself to pay. All the creditors of the company have been satisfied, and all its assets have been realized except its demand against the corporation in respect of this £7000 debt. The corporation has been wound up so far that its assets have been ascertained, and amongst them is the property in question, which substantially forms the whole of its assets. That property is, in the opinion of the liquidators of the company, and in the opinion of the great body of the shareholders of the company, a very valuable property, but a property the value of which would probably not be obtained by an immediate and forced sale. This property is the only thing out of which the debt of the company can be paid; but there are other large claims against this very property. The liquidators and the great body of the shareholders are of opinion that the best thing, and indeed the only thing that they can do, with a view to obtain payment in respect of this demand of £7000, is to take the property, to make an arrangement with the other competing creditors to pay them 4*s.* in the pound, and then out of the surplus to get what they can in repayment of the £7000. To a certain extent, no doubt, that is a speculation, because they may get more. Their calculation is that they will not only get more than the £7000, but that they will get some further profit to divide amongst their shareholders. But then, of course, they are perfectly safe if they can, after paying the 4*s.* in the pound, get anything towards the £7000 which they have otherwise no means of getting. Anything they get towards payment of their debt is so much for the benefit of the company, and I cannot have any reasonable doubt that some-

thing or other will be got out of it. Whether their hopes will be realized as to getting a surplus, or even getting the whole of their debt, is a mere matter of speculation, upon which, of course, I cannot form any opinion. But the mass of the shareholders say, and it appears to me reasonably say, "We have a fair chance, in this way, of getting something towards our debt, and this is the only way in which we can possibly get anything." I am of opinion that they can do this, just as they could have taken any mortgaged property, compromising with the mortgagee as to the amount due from him, and taking the equity of redemption in satisfaction or towards satisfaction of their debt. It appears to me that it is a thing in the course of business which it is *intrà vires* the company to do. It is not necessary to say whether this could be done without making any terms with dissentient shareholders, for, by way of obviating any objection that could be made by any shareholder that the transaction was a rash one—one in which the trustees for all the shareholders were running unnecessary risk—one into which it was not right for the majority to enter as against a dissentient shareholder—they say to the dissentient one, "We will pay you off upon the exact state of things at the present moment, and give you at once every farthing to which you can be entitled according to the value of the property as it stands." It seems to me that it would be monstrous to allow any one shareholder to say, "I will not be content with taking the whole of my money, but I will take it in such a way as will deprive you of the mode of realizing the assets according to your view of what is most beneficial for yourselves." That offer having been made to him, it appears to me he ought to have accepted it.

The Appellants, however, say, "We are exposed to liabilities by this arrangement, and you have no right to enter into any arrangement which will expose us to liability," and I am bound to say I was very much struck with this argument during the opening. But now that the whole facts are before us, it appears to me that there really is no substance in that suggestion. The debts of the corporation have been ascertained as completely, and in the same way, as debts are ascertained for the purpose of dividing a testator's estate in this Court. And it must be assumed for all practical purposes that there is no outstanding creditor whose claim can

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be brought forward at any future time. No such liability as is suggested is therefore to be apprehended.

Then it is said, "You are incurring fresh liabilities in the winding-up of the company." That seems at first sight a serious obstacle. It is urged that if the winding-up is continued it is impossible to say what liabilities the contributories may be incurring. The answer to that is this—though it is not competent by any arrangements in the winding-up to affect the rights of any creditor, so as to relieve any shareholder from his liability towards that creditor, it is competent in the winding-up for the liquidators to take a transfer to them of the shares of the shareholder, which transfer would, as far as regards any costs of winding-up, entirely, in my judgment, relieve the transferring shareholder from any future liability, not only with respect to the costs of the winding-up, but any costs of any liabilities incurred by reason of the transaction which is the subject matter of the dissent.

Then there was one thing which struck me when the agreement was read, namely, that the covenant to indemnify the corporation against all claims, whether proved or not, was *ultrà vires*. This covenant, however, does not create a debt of the company for which the dissentient shareholders can be liable, it only creates a liability which, in my judgment, stands on the same footing with any other liabilities incurred by the liquidators, in the further prosecution of the winding-up, from all which liabilities the dissentient shareholders will be released by the transfer of their shares. In my judgment, therefore, the Appellants will never be liable for anything in this respect, and I consider that they have no ground for interfering with the completion of this transaction, which the large body of their brother shareholders desire to have completed. That transaction is, in my opinion, quite within the jurisdiction and powers of a company formed for purposes of the kind, and the objection fails technically and fails substantially. The appeal motion must be refused with costs.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

Solicitors: Messrs. *Ashurst, Morris & Co.*; Messrs. *Cowdell, Grundy, & Browne.*

Ex parte OGLE. *Ex parte* SMITH. *In re* PILLING.

L. JJ. 1873 May 30.

Bankruptcy—Creditors' Deed—Personal Liability of Trustee for Negligence and Overpayment of Dividends—Interest on Money lost by Breach of Trust—Appeal for Costs.

Among the assets of a debtor who executed a creditors' deed under the 192nd section of the *Bankruptcy Act*, 1861, was a bill of exchange which the debtor had deposited with his solicitor as a security for his professional charges. The bill was dishonoured at maturity, at which time the solicitor had received from other sources sufficient to pay all his charges then due. The trustee, however, allowed the bill to remain in the solicitor's hands, who brought an action on it against the acceptor, but nothing was recovered in consequence of the acceptor's insolvency. The creditors sought to charge the trustee with the loss of the money, on account of his allowing the solicitor to keep the bill and treat it as his own, instead of himself dealing with the acceptor and effecting a compromise :—

Held (affirming the decision of the Chief Judge), that there was no ground for charging the trustee on this account.

A creditor signed the deed for a debt due on bills for which the debtor was liable. Before making formal proof of the debt, the creditor received dividends from the estates of other persons who were liable on some of the bills, but the trustee nevertheless paid him dividends on the full amount of the bills. The other creditors sought to surcharge the trustee with the dividend thus overpaid :—

Held (affirming the decision of the Chief Judge), that considering the uncertainty of the law at the time, which was before the decision of the case of *In re Kelson* (1), the trustee ought not to be surcharged for the overpayment of the dividends.

The trustee allowed wine and spirits to the amount of £130 to remain in the debtor's possession, which was eventually lost to the estate :—

Held, that the trustee must personally make good the loss, with interest at £5 per cent.

The Court will not allow an appeal for costs under the *Bankruptcy Act*, 1861.

IN this case there were two appeals from a decision of the Judge of the County Court at *Manchester*.

The question in dispute arose under a deed of assignment dated the 21st of October, 1864, by which *David Pilling*, a leather factor at *Manchester*, assigned all his property to *Edward Smith*, as a trus-

(1) Law Rep. 4 Ch. 125.

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tee for his creditors. The deed was assented to by the requisite majority of creditors, and was registered under the 192nd section of the *Bankruptcy Act*, 1861 (24 & 25 Vict. c. 134).

Mr. *Ogle* and other creditors charged the trustee with negligence and mismanagement of the estate, and claimed to surcharge him in the accounts which he had rendered in several particulars, and the charges were referred to the Registrar to report on the facts. The effect of his report, dated the 7th of May, 1872, so far as material to the present appeal, was as follows:—

Item 1. As to wine sold to the debtor or allowed to remain in his hands.

The trustee discovered on the 19th of November, 1864, that there were 519 bottles of wine and 84 of brandy in the debtor's possession unaccounted for. The trustee instructed his solicitor, Mr. *Simpson*, to take legal steps for the recovery of the property.

On the 3rd of May, 1865, the value of the wine and spirits amounted to about £130. The trustee made several written and personal applications to his solicitor to recover the property; but no legal steps were taken. Most of the stock was consumed by the debtor. In August, 1866, he executed another deed of composition with his creditors for 3*d.* in the pound.

Mr. *Simpson's* managing clerk stated that the reason why more active measures were not adopted was that Mr. *Simpson* believed that the debtor intended eventually to pay for the wine, and that he wished to treat him in a friendly spirit and not hostilely.

Item 2. Bills of exchange deposited with Mr. *Simpson*, the trustee's solicitor.

Shortly before the execution of the deed of assignment the debtor deposited four bills of exchange, amounting together to £429 19*s.* 1*d.* to cover charges for costs already due or to be incurred in future. Three of the bills were paid at maturity, and applied by Mr. *Simpson* in payment of his charges, but the fourth, for £152, accepted by one *Haller*, was dishonoured. This bill became due on the 1st of February, 1865. At that time Mr. *Simpson* had been paid all that was then due to him. *Haller* wrote to the trustee, stating that he was in difficulties, but that if time was allowed him he would pay all his creditors in full, and on the 8th of February he sent the trustee £50, promising to send more as

soon as possible. This sum was handed by the trustee to Mr. *Simpson*.

Soon afterwards Mr. *Simpson*, without any instructions from the trustee, considering, as was alleged, that the bill was his own property, commenced an action on it against *Haller*, but nothing was recovered in the action, *Haller* having become bankrupt. Neither the trustee nor Mr. *Simpson* proved in the bankruptcy, and consequently nothing was recovered on the bill except the £50 previously paid.

Item 3 related to transactions in leather, on which the appeal was withdrawn.

Item 4 related to interest on trust funds which was not the subject of appeal.

Item 5. As to dividends overpaid by the trustee to some of the creditors.

Among the creditors who executed the deed were the *Manchester and Liverpool District Banking Company*, who signed the deed for £33,904 5*s.* 1*d.*, but as some of the bills which they held ran out and were received in full, this debt was reduced to £13,604 18*s.* 9*d.* A part of this balance was in respect of bills accepted by other persons and indorsed by the debtor, on which the bank, in the interval between their signing the deed and the month of October, 1867, when they actually proved the debt and produced the bills, had received certain payments for which they did not give credit. The trustee paid a dividend of 9*d.* in the pound on the whole of the sum of £13,604 18*s.* 9*d.* without deducting the amount received on the bills.

A similar charge was made in respect of a debt due to Messrs. *Parr, Lyon, & Co.*, who signed for a debt in respect of bills accepted by the debtor, but on which they had received a dividend of 14*s.* 7*d.* in the pound from the drawer's estate, before formally proving the debt, which was done in September, 1867. The trustee notwithstanding paid the dividend on the full amount of £4781.

The charges arising out of the report were brought before the Judge of the County Court, and his Honour made an order to the following effect on the items which formed the subject of appeal:—

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Item 1: That the trustee should be surcharged with £130 as the value of the wine and spirits, with interest at £5 per cent. from the 3rd of May, 1865.

Item 2: That no surcharge should be made as to the bills of exchange deposited with Mr. *Simpson*.

Item 5: That no surcharge should be made against the trustee in respect of dividends alleged to be overpaid by him.

Item 6: That the trustee should pay his own costs of investigating all the items, and also the costs of the creditors of investigating the items found against him, and that the creditors should have the costs of the items found in favour of the trustee out of the estate.

From this order as to items 2 and 5 the creditors appealed: and the trustee presented a cross appeal as to items 1 and 6.

Mr. *Little*, Q.C., and Mr. *Winslow*, for the creditors:—

First, with respect to the bill of exchange referred to in item 2. The trustee committed a breach of trust in permitting *Simpson* to appropriate the bill. It was only deposited as security, and as soon as *Simpson* had received sufficient to cover his bills of costs the trustee ought to have claimed the bill, and made the best terms he could with the acceptor. He might have effected a compromise and recovered some of the money. He ought, therefore, to be made responsible for the loss: *Bullock* v. *Wheatley* (1); *Styles* v. *Guy* (2).

Mr. *De Gex*, Q.C., and Mr. *Bagley*, for the trustee, were not called on.

SIR W. M. JAMES, L.J.:—

This appeal seems to me perfectly unfounded. Either *Simpson*, by dealing with the bill, made it his own bill, and made himself liable to the estate or to the trustee, or he did not. If he did, the estate has obtained a great benefit, for it will make him account for it when his own bill of charges comes to be settled. If he did not, there was no negligence on the part of the trustee, because an action was brought and resulted in nothing. It is impossible to

(1) 1 Coll. 130. (2) 1 Mac. & G. 422.

say that the trustee was liable on the ground that he did not accept terms of compromise. I never heard of a person being made liable on that ground. As to the £50, of course *Simpson* will have to give credit for that when his account is settled.

SIR G. MELLISH, L.J., concurred.

Mr. *Little*, Q.C., and Mr. *Winslow*:—

Next, as to the overpayment of dividends in item 5. Although there was at one time some doubt upon the question, it is now quite clear that the time for ascertaining the amount of the debt on which proof can be made under a creditors' deed is not the time of signing the deed, but of making the formal claim, when the bills are produced: *In re Kelson* (1); *In re Daunt* (2). It is true that neither of these cases was decided when the dividends were paid, but it was well known that the question was doubtful, and the trustee ought to have consulted the Court before he paid the dividends. His ignorance of the law will not excuse him from liability: *Boulton* v. *Beard* (3); *Lewin* on Trusts (4); *Sheridan* v. *Joyce* (5).

Mr. *De Gex*, Q.C., and Mr. *Bagley*, for the trustee, were not called on.

SIR W. M. JAMES, L.J.:—

I am prepared, without hesitation, to concur in the judgment pronounced by the Judge of the County Court. Having regard to the position and duties of the trustee, and to the position, rights, and remedies of the creditors, I agree with him that it would be impossible, without hardship and injustice such as no Court is bound to inflict, to make a trustee personally answerable for money which has been *bonâ fide* paid by him under a misapprehension of the state of the law, which misapprehension was really occasioned by the language of the Legislature. We have been referred to cases in which the Court of Chancery has felt itself bound to make trustees and executors liable for money which they have honestly paid.

(1) Law Rep. 4 Ch. 125.
(2) Ibid. 6 Ch. 455.
(3) 3 D. M. & G. 608.
(4) 5th Ed. p. 281.
(5) 7 Ir. Eq. Rep. 115.

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It may have been necessary to make them liable on grounds of public policy, but I am not disposed to extend those decisions.

Here the trustee was not a mere trustee; under the Act of Parliament he performed *quasi* judicial duties. If he made a mistake, he must be treated as an arbiter or a judge, supposing that he acted to the best of his power. It is said that he has made a mistake by listening to false evidence, or neglecting to take advice. But he appears to have acted on the belief that the proofs should be considered as made at the date of the deed. No doubt subsequent decisions have shewn that this was not so. But it would be hard to make the trustee personally responsible for having acted on what was then the common opinion as to the effect of the law. There was no reason of public policy to induce the Court to act thus harshly; for if any creditor found that another creditor had been overpaid, he could summon him to the Court of Bankruptcy and obtain an order that he should refund what he had wrongfully received, without making the trustee liable for not having burdened the estate with the costs of legal proceedings in every case in which there was the least doubt as to the amount of a creditor's claim. I think that the order of the County Court Judge was quite right, and the appeal must be dismissed with costs.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

Mr. *De Gex*, Q.C., and Mr. *Bagley*, then opened the cross appeal:—

As to item 1: The trustee was not to blame in permitting the wine to remain in the debtor's possession. He did all that he could by placing the matter in the solicitor's hands. It is very doubtful whether the Court, under the Act of 1861, had power to order a debtor to give up property which he kept possession of. At all events there is no authority for charging the trustee with interest on the value of the wine. A trustee is never charged with interest unless he has himself possessed and used the property: *Tebbs* v. *Carpenter* (1). In *Grove* v. *Price* (2) no interest appears to have been

(1) 1 Madd. 290. (2) 26 Beav. 103.

charged, although the money was clearly lost by the trustee's negligence.

SIR W. M. JAMES, L.J:—

It appears to me that this was not merely a debt, but a deliberate breach of trust. No proceedings were taken against the debtor because he was a friend of the solicitor. The County Court Judge was, in my opinion, right in charging the trustee, not only with the value of the wine but with interest, on the ground that it was a breach of trust.

SIR G. MELLISH, L.J., concurred.

As to item 6, relating to the costs of the investigation,

Mr. *De Gex* contended that although this was, in form, a cross appeal, the proceedings being under the *Bankruptcy Act*, 1861, it was doubtful whether a cross appeal was really necessary. At all events the strict rule had never been laid down in bankruptcy, that a party could not appeal on account of costs. The whole matter was open to the Court to do justice between the parties.

SIR W. M. JAMES, L.J.:—

It would be too dangerous a precedent to allow a party who has no other ground of appeal to maintain an appeal for costs.

Solicitor for the Creditors: Mr. *Storer, Manchester.*

Solicitors for the Trustee: Messrs. *Horne & Hunter,* agents for Messrs. *Blain & Chorlton, Manchester.*

L. JJ.
1873
June 6.

Ex parte BISHOP. *In re* TÖNNIES.

Bankruptcy—Covenant to settle Money—Avoidance of Marriage Settlement—Right of Trustees to prove—Bankruptcy Act, 1869, *s.* 91.

A trader by his marriage settlement covenanted that he would pay £6000 to the trustees on or before a given day, to be held by them on the trusts of the settlement. Before the money was payable he filed a petition for liquidation by arrangement:—

Held (affirming the decision of *Bacon*, C.J.), that a covenant for payment of a sum of money not specifically earmarked was not within the 91st section of the *Bankruptcy Act*, 1869, as a covenant for the future settlement of money or property in which the trader had no interest at the date of his marriage, and that the trustees were entitled to prove against his estate for the £6000, less the value of the settlor's life interest, which they were entitled to retain.

THIS was an appeal from a decision of the Chief Judge in Bankruptcy.

The questions at issue arose on a special case stated for the opinion of the Court.

By an indenture of settlement, dated the 2nd of March, 1872, and made in contemplation of the marriage between Mr. *Tönnies*, a seed merchant, and Miss *Olguin*, *Tönnies* covenanted with *J. Olguin* and *Pfeiffer* that if the marriage should take place he would pay to them, or the survivor of them, or his executors or administrators, the sum of £5000 on or before the 30th of March, 1872, and the further sum of £7000 on or before the 31st of December, 1872. And it was thereby declared that the trustees should stand possessed of these sums when they should be respectively received upon trust for investment as therein mentioned, and upon further trust to pay the annual income to *Tönnies* during his life, and after his death to his wife for her life for her separate use, without power of anticipation; and after the death of the survivor of them, upon certain trusts for the issue of the marriage; and if there should be no issue who should attain a vested interest, upon trust for *Tönnies* absolutely. On the 2nd and 5th of March, 1872, *Tönnies* transferred to the trustees some railway shares of the value of £5127, and on the 6th of March he

paid to them a sum of £373, thus making up £5500; and on the 13th of March he paid them a further sum of £500, making £6000 altogether.

In June, 1872, *Tönnies* became embarrassed in his affairs and stopped payment; and on the 5th of July, 1872, a meeting of his creditors was held, at which it was resolved that his affairs should be liquidated by arrangement, and *Henry Bishop* was appointed trustee. No further payment had been made by *Tönnies* in pursuance of his covenant in the settlement. From his books it appeared that on the day of his marriage he had a surplus of assets over liabilities in his business of about £16,000, besides the £5500 paid as before stated to the trustees of the settlement. This surplus, however, partly consisted of debts due to *Tönnies*, which were then believed to be good, but which, to the extent of about £9500, afterwards turned out to be bad. Besides the £5500, and the money employed in his business, and the stock-in-trade, book debts, and effects belonging to it, he was not possessed of any money or property wherein he had at the date of the marriage any estate or interest, whether vested or contingent, in possession or remainder.

The questions stated for the decision of the Court were—

1. Whether the settlement was valid as regarded the £6000 remaining unpaid at the commencement of the liquidation, or whether it was void as against the trustee under the liquidation as regarded that sum?

2. Whether, if the settlement was not void, the trustees had the right to retain the annual income to accrue due during the life of *Tönnies* on the trust funds, and to apply the same towards satisfaction of the unpaid £6000?

3. Whether, if the trustees had such right of retainer, the value of the life interest of *Tönnies* ought to be deducted from the £6000, and the trustees admitted as creditors against his estate for the balance only?

The Chief Judge held that the settlement was valid as to the £6000 remaining unpaid, and that the trustees were entitled to prove for that sum. He also held that the trustees were entitled to retain the income during the settlor's life in part satisfaction of the unpaid £6000, and to prove in the liquidation

L. JJ. 1873 *Ex parte* BISHOP. *In re* TÖNNIES.

for the difference between the £6000 and the value of this right of retainer.

From this decision, so far as it related to the right of proof for the sum of £6000, the trustee under the liquidation appealed.

Mr. *De Gex*, Q.C., and Mr. *Linklater*, for the Appellant :—

The question turns upon the construction of the 91st section of the *Bankruptcy Act*, 1869 (1). This is a covenant to settle money in which *Tönnies* had not, at the time, any estate or interest. To prevent the application of the 91st section, the covenant must be to settle a specific fund, not money which the settlor might or might not have when the time came for performance of the covenant. The section was aimed against such cases as *Ex parte McBurnie's Trustees* (2), and the intention was that a trader should not be able by a marriage settlement to withdraw from his creditors, in the event of his bankruptcy, property which he might acquire after the marriage, though he might so deal with property in which at the date of his marriage he had an actual interest, however remote.

Mr. *Fischer*, Q.C., and Mr. *Winslow*, for the trustees of the settlement, were not called on.

SIR W. M. JAMES, L.J. :—

The Chief Judge has been of opinion, and I cannot entertain a doubt that he was correct in his conclusion, that this covenant is not within the words of the 91st section, or the intention of the Legislature in framing it. I am of opinion that if the Legislature had intended that it should apply to a common covenant to pay a sum of money to trustees of a marriage settle-

(1) 32 & 33 Vict. c. 71, s. 91, provides (*inter alia*), that "Any covenant or contract made by a trader in consideration of marriage for the future settlement upon or for his wife or children of any money or property wherein he had not at the date of his marriage any estate or interest, whether vested or contingent, in possession or remainder, and not being money or property of or in right of his wife, shall, upon his becoming bankrupt before such property or money has been actually transferred or paid pursuant to such contract or covenant, be void against his trustee appointed under this Act."

(2) 1 D. M. & G. 441.

ment, they would have said so. But these words are, "a covenant or contract for the future settlement of any money or property wherein he had not at the date of his marriage any estate or interest, whether vested or contingent, in possession or remainder." The plain intention was to prevent settlements of property expected to accrue at a future time, in which the settlor had no present interest. The appeal must be dismissed with costs.

SIR G. MELLISH, L.J.:—

I am of the same opinion. The object of the Legislature was to provide that specific money or property which but for the section would have gone to the trustees exclusively, should be divided equally among the creditors. A covenant to settle such money or property would in equity have bound it when it came into actual possession, and the intention was that if the covenantor had no interest at the time it should go to the creditors and not to the trustees of the settlement. If this had been a covenant that in case any property was left to the covenantor by his father or any other person, he would settle it, and the covenantor had no interest in it at the time, the covenant would be void against the trustee in bankruptcy, and any property which might be realized would be divisible among the creditors. The word "money," in my opinion, refers to something of the same nature as "property," namely, something specific, and does not apply to that which is a mere debt due from the settlor.

Solicitors for the Appellant: Messrs. *Linklater, Hackwood, & Co.*

Solicitors for the Trustees of the Settlement: Messrs. *Thos. White & Sons.*

L. JJ.
1873
June 20.

Ex parte THORNE. *In re* BUTLIN.

Liquidation by Arrangement—Signing Special Resolution prior to its filing or registration—Bankruptcy Act, 1869, *s.* 125—*Bankruptcy Rules*, 1870, *rr.* 275, 284, 295.

The words "prior to the filing or registration of the resolution," in the 275th rule of the *Bankruptcy Rules*, 1870, mean "prior to the resolution being either filed or registered." Therefore, where a special resolution for liquidation has been filed by the person entrusted with it, it is too late for a creditor to sign it.

The decision of *Bacon*, C.J., reversed.

THIS was an appeal from a decision of the Chief Judge in Bankruptcy, allowing a creditor of *Sarah Butlin*, a liquidating debtor, to sign the resolution for liquidation after it had been brought into the Registrar's office for registration, and allowing the registration of the resolution.

Sarah Butlin, who carried on business as a chemist, filed a petition for liquidation in the *London* Court of Bankruptcy on the 8th of January, 1873. The first meeting of the creditors was held on the 24th of January. Fifteen creditors were present at the meeting. Their debts, for which they tendered proofs, amounted to £634 10*s.* 8*d.* The principal creditor was a Mr. *Wilson*, whose debt amounted to £225. He and another creditor named *Davis* voted against the resolution for liquidation by arrangement; nine creditors signed the resolution; the others did not vote at all. The resolution as thus signed did not shew the necessary statutory majority of three-fourths in value. But the proofs by *Wilson* and *Davis* were objected to at the meeting, and if they were rejected the majority would have been sufficient.

On the 27th of January the resolution was taken to the Registrar's office and left there for registration. Meanwhile the creditors *Wilson* and *Davis* had changed their minds and desired to sign the resolution, and on the same day *Davis* called at the office of the debtor's solicitors, and on behalf of himself and *Wilson* stated that they wished to sign the resolution. He was informed that a clerk had been sent with it to the Registrar's office, and was advised to go there. He and *Wilson* accordingly went there at

once. When they arrived there they found that the resolution had been handed to the Registrar's clerk, and they applied to him to be allowed to sign it, but they were told that they were too late. On the 30th of January Messrs. *Thorne*, who were creditors for £163 17*s*., and had assented to the resolution and had signed it, filed a petition in bankruptcy against the debtor. This petition alleged as an act of bankruptcy the filing of the liquidation petition, and it stated that no resolution had been passed by the proper statutory majority of the creditors. The 18th of February was fixed for the Registrar to dispose of the objections to the proofs, and the hearing of the bankruptcy petition was adjourned till after the objections should have been disposed of. An application was then made on behalf of *Wilson*, the objection to his proof having been withdrawn, that he might be allowed to sign the resolution. The Registrar gave him leave to do so, and he signed it the next day as an assenting creditor, and it was then registered.

The Chief Judge affirmed the order of the Registrar, and the petitioning creditors now appealed from that decision (1).

(1) 1873. April 28. WN(1873)87

SIR JAMES BACON, C.J. :—

It is of very great importance that the Rules should be observed with strictness, but it must be such strictness as is consistent with justice. [His Honour then stated how the votes were given at the meeting of the creditors, and continued :—] At the meeting an objection was taken to the proof of one of the creditors included in the debtor's list. In that state of things the resolutions were brought into the Registrar's office, and all that the Registrar had then to do was to look at the sufficiency of the signatures, and of the proofs of the creditors who had signed. *Wilson* had given no notice that he intended to sustain his proof. No creditor had given any notice to the Registrar, under Rule 295, of his desire to be heard on the matter. Thus the requisite majority in favour of the resolution was plainly supplied, *Wilson's* proof not being admitted by the trustee. There was nothing to prevent the Registrar from proceeding to register the resolution at once. Then, on the very day on which the resolution was taken to the Registrar's office, an application was made with the hottest possible haste by a creditor who had been present at the meeting, to be allowed to sign the resolution. It would be hard to say that he could not then do so. The file, no doubt, begins when the papers are handed to the Registrar. But Rule 275 says that the creditors who have been present at the meeting may sign before "the filing or registration of the resolution." I cannot help thinking that *Wilson* came in good time. On the 27th of January he expressed his desire to sign the resolution. I think it was the intention of the Legislature that the creditors who were present at

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Mr. *French*, for the Appellants:—

The expression "filing" is not used in the *Bankruptcy Act*, 1869, with regard to the resolution under a liquidation petition; the 125th section speaks of presentation to the Registrar for registration. The 275th rule of the *Bankruptcy Rules*, 1870, says, "The signatures of the creditors may be subscribed subsequently to the meeting, but prior to the filing or registration of the resolution." This must mean that the signatures cannot be affixed after the resolution has been presented to the Registrar for registration. The Registrar has no means of identifying the creditors who have been present at the meeting. If an indefinite time is allowed for the creditors to sign, a dissentient creditor can take no steps to protect himself, and a great opportunity for fraud will be offered. The duty of the Registrar is merely ministerial, and he has only to see that the papers brought in are in proper form to place them on the record. When that is done they ought not to be tampered with: *Ex parte Orde* (1); *Ex parte Levy* (2); *Ex parte Davis* (3).

Mr. *Winslow*, for the debtor:—

The resolution ought not to have been taken to the office till the evening of the 27th of January; for under the 284th rule the creditors were entitled to three days on which to sign them. So that it was by a mere accident that *Wilson* and *Davis* did not sign before they were taken to the Registrar. But the admission of

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the meeting should be allowed to change their minds if they have not signed the resolution; they may have voted in the negative, or may have abstained from voting, by reason of imperfect information. Full time is given to them to sign until "filing or registration." If so, *Wilson* was in time on the 27th of January. If, however, the objection to the proof ought to have prevailed, and the Registrar had treated the matter as it then stood, he was right not only in filing but in registering the resolution. If *Wilson's* proof was rejected for all purposes, then there was the statutory majority in favour of the resolution; if it was not rejected, then his vote gave the statutory majority. In either case the resolutions ought to have been registered. *Re Wehner* (20 W. R. 199) shews that the Court will take care in enforcing the letter of the law that its spirit is not evaded. This appeal must be dismissed, but without costs.

(1) Law Rep. 6 Ch. 881.
(2) Ibid. 11 Eq. 619.
(3) Ibid. 7 Ch. 526.

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the signature was quite regular. The terms "filing" and "registration" were used in the 275th rule as equivalent terms: for the filing is not completed till the registration. The word "filing" was probably inserted in order to shew that the signatures might be added while the document remained with the person who had charge of it, as well as at the Registrar's office. *Ex parte Pooley* (1) and *Re Wehner* (2) are in our favour.

SIR W. M. JAMES, L.J.:—

I am of opinion that the order of the Chief Judge in this case cannot properly be sustained. The question really depends upon the meaning of a very few words in the 275th rule. The grammatical meaning of those words is not open to very serious doubt, nor does there seem to me any reason for attempting to alter or qualify the grammatical meaning, in furtherance of the general scope and object of the rule. The rule provides that the creditors assembled at a meeting must give their assent to the resolution by signing it; and then it provides that the creditors who have attended the meeting may have the opportunity of signing the resolution "subsequently to the meeting, but prior to the filing or registration of the resolution." That refers to a certain limited time. What is that time? In my opinion it must be before the resolution is either filed or registered. When it is either filed or registered the matter is at an end. It would open the door to great fraud and serious inconvenience if after the resolution had been taken to the office any person might go in and ask to be allowed to sign his name to it. When it has been filed, in my opinion it ought not to be tampered with. It is not open to the Registrar to alter a document which is filed and has become a record of the Court. A creditor might look at the signatures, and might go away satisfied that there was not a statutory majority; and if afterwards another person, whose proof had been objected to at the meeting, could go in and sign without the other creditors having an opportunity of insisting on the objection, the creditor would be misled and deceived. The result is that the Registrar was wrong in allowing this to be done, and the order of the Chief Judge must be reversed.

(1) Law Rep. 5 Ch. 722. (2) 20 W. R. 199.

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SIR G. MELLISH, L.J.:—

I am of the same opinion. It appears clear to me that "filing" and "registration" in the 275th rule do not mean the same thing. The first question is, what is the meaning of "filing" the resolution? I think that is made clear by the 284th and 295th rules. The 284th rule says that the person to whom the registration of the resolution is entrusted, shall file it in Court within three days after he has received the same. It is clear that something is to be done immediately on the presentation of the document to the Registrar; for the 295th rule says, "Upon presentation of a special or extraordinary resolution for registration, the Registrar shall examine the same, and may hear any creditor who shall have given him notice of his desire to be heard thereon. The Registrar being satisfied that the requirements of the statute and of these rules have been complied with, shall register the same, making a memorandum thereon . . . as follows," &c. And then if he registers or refuses to register the resolution an appeal may be brought from his decision. One reason why the 275th rule must be so interpreted that no signature can be admitted after the resolution has been filed is, that upon the contrary interpretation it would be open to a creditor to come in and sign it, even after the Registrar had refused to register it, and an appeal had been brought against his decision. Having therefore ascertained the meaning of "filing," I am of opinion that the clear meaning of the 275th rule is, that the resolution can only be signed before it is either filed or registered. It is true that it is difficult to say why both words were used, for one of them appears to be superfluous. Perhaps it was thought, when the rules were drawn up, that cases might arise in which a resolution might be registered before it was filed. It is, however, sufficient to say that this is the plain meaning of the words, and that there is no reason for departing from it. I am also influenced by the consideration that it is not at all desirable to allow any alterations to be made in the document in the interval between filing and registration at a time when perhaps litigation may be going on respecting it.

Mr. *French* asked for the costs of the hearing before the Chief Judge.

The LORDS JUSTICES thought that the Appellants were entitled to be paid the costs of the application to the Chief Judge out of the estate.

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Solicitors for the Appellants: Messrs. *Barnard & Co.*
Solicitors for the Respondents: Messrs. *Blachford & Riches.*

Ex parte COBB. *In re* SEDLEY.

L. JJ. 1873 *June* 20.

Bankruptcy—Resolution for Composition—Votes of Creditors—Bona fides—Device to benefit Debtor—Bankruptcy Act, 1869, *s.* 126—*Fresh First Meeting.*

A creditor who votes for a composition with a debtor is bound to vote *bonâ fide* for the benefit of the creditors, and not for the benefit of the debtor.

M., a creditor, voted at a first meeting of creditors for a resolution for liquidation by arrangement. A requisite majority not having been obtained, the resolution was not registered; but the Registrar, on the application of the debtor, directed a fresh first meeting to be called.

Before that meeting was held *M.* sold his debt to *T.* for 10*s.* in the pound. At the meeting *M.*, by *T.'s* direction, voted for a composition of 2*s.* 6*d.* in the pound, and by his vote the resolution was carried:—

Held, that, inasmuch as it appeared clear that the vote in respect of *T.'s* debt was given for the benefit of the debtor, and not of the creditors, the vote ought to be rejected, and the resolution was accordingly set aside.

Semble, the Registrar had no power to direct a fresh first meeting to be called.

THIS was an appeal from a decision of the Registrar, sitting as Chief Judge in Bankruptcy.

On the 7th of December, 1872, Captain *Joseph Sedley*, late of the Indian Navy, filed a petition for liquidation by arrangement.

The first meeting of creditors was held on the 13th of December. At that meeting Messrs. *Maples* put in a claim for £258 13*s.*, which was admitted by the other creditors present. Messrs. *Maples* voted by proxy in favour of a liquidation by arrangement.

All the creditors present signed the resolution except Mr. *C. Taylor* and Mr. *H. Taylor*, the latter of whom was a brother-in-law of the debtor. In consequence of their not signing it, a statutory majority in point of amount of debts was not obtained,

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and when the resolution was presented for registration, the Registrar refused to register it, and gave a certificate to that effect.

On the same day, the 4th of January, 1873, the Appellant, *Thomas Cobb*, and *James Blyth*, creditors of the debtor who had voted in favour of liquidation, filed a petition for adjudication in bankruptcy against the debtor.

On the 25th of January, 1873, the debtor applied to the Registrar for a fresh first meeting, which was granted by the Registrar, with a direction that the proofs of debts made and the proxies used at the original meeting should be admitted at the fresh first meeting, subject to any objection on the part of the other creditors. On the 29th of January, 1873, the hearing of the petition in bankruptcy was adjourned, on the application of the debtor, till after this meeting.

Just before the fresh first meeting was held Messrs. *Maples* sold their debt to Mr. *H. Taylor* for 10*s.* in the pound. The meeting was held on the 15th of February, and an extraordinary resolution was passed by the creditors for accepting a composition of 2*s.* 6*d.* in the pound from the debtor.

At this meeting Messrs. *Maples* stated the fact that they had sold their debt, but as their debt had been admitted at the original meeting they were admitted to vote by their proxy in favour of the resolution. The Appellant, by his solicitor, objected to the vote, on the ground of the debt having been assigned, but the Registrar admitted the vote notwithstanding. It was not denied that the vote was given with *H. Taylor's* knowledge and at his request. If Messrs. *Maples'* vote had been rejected, the resolution would not have been carried. This resolution was confirmed at a subsequent meeting of the creditors, but on the resolution being presented to Mr. Registrar *Keene* for registration, he refused to register it, and an appeal was brought from him to Mr. Registrar *Hazlitt* as Chief Judge. He held that the vote of Messrs. *Maples* was properly admitted, and ordered the resolution to be registered. From this decision *Cobb* appealed.

On the 2nd of April, 1873, *Sedley* was adjudicated a bankrupt, on the petition presented by *Cobb* and *Blyth*.

Mr. *Finlay Knight*, for the Appellant:—

The vote was not given *bonâ fide* for the benefit of the creditors.

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Taylor had given 10*s.* in the pound for a debt for which he would only get 2*s.* 6*d.* in the pound under the resolution. There can, therefore, be no doubt that the transaction was a device to assist the debtor. If the vote had been given without disclosing the fact that the debt had been sold, the vote would have been set aside as a matter of course, and it can make no difference that the facts were known to the other creditors: *Ex parte Cowen* (1); *Hart* v. *Smith* (2).

We also object to the whole of the proceedings at the second first meeting as being invalid. Neither the Act nor the Rules give any authority to convene such a meeting.

Mr. *De Gex*, Q.C., and Mr. *Winslow*, for the debtor:—

There was no *mala fides*. The whole transaction was perfectly open. *Taylor* could not vote himself, because he was not a creditor at the time when the former meeting took place; but the vote was given according to his wish, and the other creditors knew all the circumstances. There is no proof that the composition was not a perfectly fair amount, or that the creditors would have got more or as much by making the debtor a bankrupt. If the other creditors are not injured, why should not a creditor consider the benefit of the debtor in giving his vote?

With respect to the validity of the second first meeting, it is the ordinary practice of the Registrars to summon one when, from any irregularity or accident, the first has proved abortive. It would be very inconvenient if they had not power to do so.

SIR W. M. JAMES, L.J.:—

I am of opinion that Mr. *Keene* was quite right in refusing to register this resolution. I do not know whether we have properly before us the order to hold a fresh first meeting; but I have great doubt whether such a meeting has any validity. I can conceive that where a first meeting is shewn to have been no meeting at all, for instance, from the absence of the proper advertisements, it might be the duty of the Court to direct a fresh first meeting to be held; but to say that because the debtor finds that he could

(1) Law Rep. 2 Ch. 563. (2) Law Rep. 4 Q. B. 61.

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not do what he wanted to do at the first meeting, or because one of the creditors had changed his mind, that is a reason for holding a fresh first meeting, seems to me a confusion of terms.

But independently of that consideration, I think the Appellant must succeed in this case. The real question is, whether in a case where there has been a sale of a debt for a sum which was in fact a distinct bribe by the debtor's friends to vote in a particular way, the Court ought to permit a resolution carried by means of that vote to prevail. The proposition is positively shocking to common sense. It is absurd to suppose that in the present case the vote was given *bonâ fide*. As the creditor gave 10*s.* in the pound for a debt for which he was only to get 2*s.* 6*d.*, he must have bought it for the benefit of the debtor. A majority obtained in that way cannot be held to bind the minority.

SIR G. MELLISH, L.J.:—

I am of the same opinion. The doctrine of the Court is well laid down by Lord Justice *Turner* in *Ex parte Cowen* (1), where he says with reference to deeds of arrangement under the 192nd section of the Act of 1861, "The words of the section seem to me to import that the absence of any taint of fraud, and the *bona fides* of the arrangement with a view to the benefit of all the creditors, were meant to be essential to the validity of the deeds. The deeds are to be binding on the non-assenting creditors, not absolutely, but only as if they were parties to and executed the same, and even creditors who were parties to and had executed the deeds could not, as I apprehend, have been bound by them if they were tainted by fraud or *mala fides*." I am of opinion that it is essential to preserve the same principle as to compositions under the Act of 1869 as was applicable to deeds of arrangement under the Act of 1861, and that the vote ought to be given *bonâ fide* with a view to the benefit of all the creditors. But the vote in this case was clearly given with a view to the benefit of the debtor. I think, therefore, that the resolution cannot stand.

Solicitors for the Appellant: Messrs. *Lumley & Lumley.*
Solicitor for the Respondent: Mr. *E. Froggatt.*

(1) Law Rep. 2 Ch. 567.

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1873
July 4.

[1871 M. 243.]

Plea that Defendant is not an Executor—Renunciation of Probate after Bill filed—Amended Bill—Parties—Debtor made a Defendant to a Creditor's Suit.

A bill filed by a creditor for the administration of a testator's estate alleged that one of the Defendants was named as an executor in the will, and that although he had not proved the will, he had never renounced probate. It also alleged that the Defendant was a debtor to the testator's estate, and that the acting executor was insolvent, and did not intend to enforce the debt against him. The Defendant by his answer did not admit the debt. The Plaintiff then amended his bill by introducing charges tending to prove that the Defendant was a debtor to the estate. The Defendant then pleaded that before the amendment of the bill he had renounced probate:—

Held (reversing the decision of *Malins*, V.C.), that the Defendant was properly made a party to the original bill, and that as no new case had been made by the amended bill, the Defendant's plea could not be sustained.

THIS was an appeal from a decision of Vice-Chancellor *Malins*, allowing a plea to the bill.

The original bill was filed on the 23rd of December, 1871, on behalf of the creditors of *William White*, against *William Thompson White*, *Arnold William White*, and *George Thompson White*, executors and trustees named in the will of *William White*, for the administration of his estate.

The bill stated, as the fact was, that *W. T. White* alone proved the will, but that *A. W. White* and *G. T. White* had never renounced probate, or disclaimed the trusts thereof.

On the 29th of January, 1872, *A. W. White* and *G. T. White* put in their answer, by which they disclaimed all interest in the matters in question in the suit, and stated they had never acted in the trusts or proved the will.

On the 29th of February, 1872, *W. T. White*, the only executor who had proved the will, filed a petition for liquidation by arrangement, and *S. W. Baggs* was appointed trustee of his estate.

On the 20th of April, 1872, the Plaintiff amended his bill, stating the proceedings under the liquidation, and making the trustee a Defendant; and also stating that *G. T. White* was largely indebted to the testator at the time of his death, and that *W. T.*

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White had not taken, and did not intend to take, any steps to enforce payment of the debt. *G. T. White*, by his answer, did not admit the debt.

On the 21st of February, 1873, in pursuance of an order dated the 12th of February, 1873, the Plaintiff re-amended his bill, and introduced charges respecting the advances made by the testator to the Defendant *G. T. White*, and the state of the accounts between them, for the purpose of founding interrogatories to prove the debt due from the Defendant.

On the 18th of March, 1873, *G. T. White* put in a plea, in which he pleaded in bar to the whole of the re-amended bill a deed of disclaimer dated the 11th of February, 1873, which, as the plea alleged, he had filed as a renunciation of probate before the bill was re-amended.

The plea was set down for argument before the Vice-Chancellor, who allowed the plea with costs.

From this decision the Plaintiff appealed.

Mr. *Hemming*, for the Appellant:—

The bill, as originally framed, was perfectly correct in making the executors who were named in the will parties, although they had not proved the will, because they had not renounced probate; and it was also right, as first amended, in continuing *G. T. White* as a party, although he had disclaimed by his answer. He was indebted to the estate, and the executor who had proved was not willing, and, indeed, was not able, according to the rules of law, to bring an action against him for the debt. Then an order was obtained to re-amend the bill on the usual affidavit verifying the amendments, which simply went to matters of detail as to the disputed debt. After this, and before the actual re-amendment of the bill, the Defendant, as he by his plea alleges, renounced probate, and he seeks to take advantage of the re-amendment of the bill to put in a plea that he is not executor. But a Defendant cannot put in a plea to an amended bill which he could not have put into the bill before it was amended, unless the amendments raise a fresh case, which these do not. The answer overrules the plea: *Ellice* v. *Goodson* (1); *Attorney-General* v. *Cooper* (2). But

(1) 3 My. & Cr. 653. (2) 8 Hare, 166.

even if it had been pleaded in time, the plea is no defence to the suit, for the acting executor is insolvent, and declines to enforce the debt; under such circumstances a creditor is always at liberty to make a debtor to the testator a Defendant to a bill for the administration of the estate: *Alsager* v. *Rowley* (1); *Barker* v. *Birch* (2).

Mr. *Bristowe*, Q.C., and Mr. *Kekewich*, for the Defendant:—

The rule that a Defendant cannot raise by demurrer or plea to an amended bill a defence which he might have raised to the original bill is not an inflexible one. In such a case a demurrer was allowed in *Wyllie* v. *Ellice* (3). The circumstances of the present case are peculiar. *G. T. White* disclaimed by his answer, expecting that he would be at once dismissed from the suit. He would have renounced probate and pleaded instead of answering, unless he had been misled by the course pursued by the Plaintiff. But in fact a fresh case has been made by the re-amended bill, for various charges respecting the dealings between the Defendant and the testator are introduced that were not in the bill before.

SIR W. M. JAMES, L.J.:—

I am of opinion that this plea cannot be sustained. A bill was filed by a creditor for the administration of a testator's estate, and was amended, and by the bill as amended it was alleged that a person who was named an executor was a debtor to the estate, and that his co-executor was insolvent and had not taken and did not intend to take any steps to recover the debt, and that the Defendant, who had been named as an executor, had not acted in the trusts or proved the will, but that he had not formally renounced probate. That, in my opinion, was enough to shew that this Court was the proper tribunal for the Plaintiff to enforce the claim against him, because the debt could not be recovered in an action at law. To the bill containing these allegations neither a demurrer nor a plea could have been sustained.

Then, since the date of the amended bill, the Defendant has

(1) 6 Ves. 748. (2) 1 De G. & Sm. 376.
(3) 6 Hare, 505.

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formally renounced probate and disclaimed the trusts, so as to remove the ground on which the bill was sustainable against him. But I know of no authority or principle by which it can be established that when this Court has been properly applied to, because there was no adequate remedy at law, the Defendant can afterwards put in a plea, in the nature of a plea *puis darrein continuance*, to the effect that since he put in his answer to the original bill he had removed the obstacle which prevented the Plaintiff from suing at law. It would be a monstrous result if, after a Plaintiff had rightly commenced proceedings in this Court, a Defendant could say :—"I have now removed the legal difficulty; be good enough to dismiss your bill and sue me at law."

I have considered the question independently of the charges introduced by the re-amendment of the bill. Do these fresh charges affect the question? I am of opinion that they do not. They are only introduced for the purpose of testing the truth of the allegation in the bill that the Defendant was indebted to the estate, and with a view to found interrogatories as to that issue. I am therefore of opinion that, under the existing circumstances, the plea must be overruled with costs, and that the Defendant must put in an answer to the re-amended bill.

SIR G. MELLISH, L.J. :—

I am of the same opinion. It is quite clear that the amended bill shewed such special circumstances as rendered it right for the Defendant to be made a party to the suit. There is an allegation that the Defendant was named an executor, and that although he had not proved he had never renounced probate, and that he was a debtor to the estate. Those facts justified his being made a Defendant. Because unless he renounced probate no action could be brought against him by the other executor. If, then, it had not been necessary to re-amend the bill no objection could have been made to it by demurrer or plea. Then it was found necessary to re-amend the bill in order to set out fresh facts shewing that the Defendant was a debtor to the estate. I know of no authority for the proposition, nor do I see on what ground we can hold that a Defendant should on that account be allowed to plead, so that

after the suit has been properly commenced and expenses incurred the proceedings should be stopped and the Plaintiff obliged to seek his remedy at law.

Solicitors for the Plaintiff: Messrs. *Tyas & Huntington.*
Solicitors for the Defendant: Messrs. *White, Broughton, & Co.*

In re EAST (A PERSON OF UNSOUND MIND NOT FOUND SO BY INQUISITION), AND *In re* TRUSTS OF BELLWOOD'S WILL.

Power to appoint New Trustees—Lunacy—Service.

A power of appointing new trustees provided that if any trustees or trustee should die, or become unwilling or unable to act, the trustees or trustee for the time being, whether continuing or declining to act, might appoint a new trustee or trustees. One of the three trustees became of unsound mind, but was not so found by inquisition, and the other two appointed a new trustee in his room:—

Held, that the power was well exercised.

A petition for an order vesting the trust estate in the continuing trustees and the new trustee having been presented:—

Held, that service on the trustee of unsound mind was not necessary.

THIS was a Petition for a vesting order.

Charles Bellwood by will devised and bequeathed his real and personal estate to three trustees, *Sylvester*, *Parkin*, and *East*, and declared that if his said trustees, or any of them, or any trustees or trustee to be appointed under that provision, should die, or become unwilling or unable to act as trustees or trustee of his will, it should be lawful for *Eleanor Clarke* (the tenant for life) during her life, and after her death for the trustees or trustee for the time being, whether continuing or declining to act, or if none, for the executors or administrators of any deceased trustee, to appoint any fit person or persons to be a trustee or trustees in the place of any trustee or trustees dying or becoming unwilling or unable to act.

The testator died in 1855, and *Eleanor Clarke* in April, 1872. In the latter part of 1872 *East* became of unsound mind, but had not been found so by inquisition. On the 21st of April, 1873, *Sylvester* and *Parkin*, under the power, appointed *Lazenby* to be a

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trustee in his room. *Sylvester*, *Parkin*, and *Lazenby*, and the *cestuis que trust* under the will, then presented a Petition for a vesting order, which Petition was served on *East*. The evidence of his being of unsound mind was of the most conclusive character.

Mr. *J. M. Fletcher*, for the Petitioner, submitted the question whether the appointment was valid, since *East* might be contended to come within the words, "the trustees or trustee for the time being."

THEIR LORDSHIPS held that the power was properly exercised.

Mr. *Graham Hastings* appeared for *East*, stating at the same time, that as *East* had no committee, nor had any guardian been appointed, the appearance was, it was apprehended, nugatory.

THEIR LORDSHIPS were of this opinion, but held that service on *East* was unnecessary; and directed the Petition to be amended by striking out the note at the foot that it was intended to serve it on *East*, and the order to be drawn up *ex parte*.

Solicitor: Mr. *G. F. Smith*.

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In re SOWRY.

Lands Clauses Act, *s.* 69—*Payment to Trustees—Several Applications.*

Land was vested in trustees in trust to sell as soon as the youngest of a class of children attained twenty-one, and to divide the proceeds among such of the children as should be then living, and the issue of such of them as should be dead. Part of the land was taken under the *Lands Clauses Act* before the youngest child attained twenty-one, and the purchase-money was paid into Court. After the youngest child attained twenty-one the trustees and some of the *cestuis que trust* presented a petition, asking that the fund might be paid out to the trustees, or in the alternative, that the shares of those *cestuis que trust* who were petitioners might be paid out, leaving the other shares in trust in the matter of the Act. Vice-Chancellor *Bacon* refused to order payment out to the trustees, but expressed his willingness to make an order according to the other alternative. The petitioners did not

object to this, but the company insisted that the order ought to be for payment of the whole fund to the trustees:—

Held, that as the petitioners did not object to the order proposed, the company could not complain of it.

Whether the Court would in such a case order payment of the whole fund to the trustees if they required it, *quære*.

JEREMIAH SOWRY, by will dated the 12th of January, 1859, devised certain real estates to trustees in fee upon trust as soon as his youngest son should attain the age of twenty-one years to sell the same; and directed the proceeds of the sale and other trust moneys to be divided between such of his children as should be then living and the issue of such of them as should be then dead, such issue taking the shares of their respective parents. And the testator declared the receipts of his trustees or trustee to be good discharges for all moneys received by them.

The testator died in January, 1859.

In 1864 the *Upper and Lower Wortley* Burial Board, under the powers of 16 & 17 Vict. c. 134, and the provisions of the *Lands Clauses Act*, which are incorporated with it, purchased part of the devised estate for £1025. At this time the youngest son was under the age of twenty-one years, and the purchase-money was paid into the bank as provided by the *Lands Clauses Act*, s. 69. On the 26th of May, 1865, the Court, on the petition of the trustees, ordered this sum to be invested in consols, and the dividends paid to the trustees.

The youngest child of the testator attained twenty-one on the 29th of July, 1872. At this time there were living seven children of the testator and two infant children of a deceased child.

The present Petition was by the trustees, by *Rebecca Wharam*, one of the children, by *Yates*, the purchaser of the share of another child, and by the two infant grandchildren, asking that the whole fund might be sold, and the proceeds paid to the trustees; or that two-eighths might be sold, and the proceeds divided equally between *Rebecca Wharam* and *Yates*; that another eighth part of the fund might be carried over in trust in these matters to the account of the infant Petitioners, and the dividends thereof paid to the trustees or the survivor until further order, and that the remaining five-eighths might be carried over in trust in these matters to a separate account, to be intituled, "The shares of

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[names of the children], their assignees or incumbrancers;" and that the burial board might pay the costs of the application.

Some of the remaining five children were in *Australia*, and notices had been received of assignments of the shares of all of them, some absolutely and some by way of mortgage.

Vice-Chancellor *Bacon* refused to order payment of the fund to the trustees, but expressed his readiness to make an order according to the other alternative of the prayer when the evidence of the title of the *cestuis que trust* was completed.

THEIR LORDSHIPS gave leave to have the Petition reheard before them on the application of the burial board, who insisted that the whole fund ought to be paid out at once.

Mr. *Ince*, for the burial board, urged that as the power of sale had now arisen the trustees were persons competent to sell and give receipts, and that the whole fund ought to be paid out to them instead of putting the board to the unnecessary expense of its being paid out on several applications. He referred to the *Lands Clauses Act*, ss. 69, 76, 77, 78; *Re Illman's Will* (1); *Eden* v. *Thompson* (2); *In re Horwood's Estate* (3); *In re Reaston's Estate* (4).

Mr. *Casson*, for the Petitioners, stated that as there would be some difficulty in payment of the other shares, and the trustees if they received the whole fund would probably be obliged to pay part of it into Court under the *Trustee Relief Act*, they did not object to an order in the form proposed by the Vice-Chancellor.

SIR W. M. JAMES, L.J.:—

I am of opinion that the order of the Vice-Chancellor is quite right. It is not necessary to say whether the Court would order payment of the whole fund to the trustees if they asked for it, and had an object in asking for it, though I do not know of any case in which such an order has been made. Here they do not ask for it, but are satisfied with the order as it stands. The ques-

(1) 18 W. R. 962. (3) 3 Giff. 218.
(2) 2 H. & M. 6. (4) Law Rep. 13 Eq. 564.

L. JJ. 1873 ~~ *In re* SOWRY.

tion then is whether the board have any right to object to an order being made for payment out of some shares, leaving the others to be paid out on a subsequent application, and I am of opinion that they have not. No case of vexation is suggested: if any such case arose, the Court would know how to deal with it.

SIR G. MELLISH, L.J., concurred.

Solicitors: Messrs. *Pitman & Lane;* Messrs. *Singleton & Tattershall.*

In re SCARLETT.

L. JJ. 1873 ~~ *June* 7.

Lunacy—Legatees under Will of Lunatic—Liberty to attend.

S. died, leaving a will by which he gave all his property to his widow, requesting her to bequeath certain parts of it to *A.* if living. The widow, immediately after her husband's death, made a will in conformity with this request, and shortly afterwards became lunatic. *T.* and wife (the wife being heiress-at-law, and sole next of kin of the lunatic), were appointed committees of the person, and their eldest son committee of the estate. Letters of administration of the estate of *S.* were granted to Mrs. *T.* for the use and benefit of the lunatic, and during the lunacy. After a few months a new committee of the estate was appointed, and Mr. and Mrs. *T.'s* eldest son filed a bill against Mr. and Mrs. *T.*, the lunatic and the committee of the estate, seeking to make *T.* and the estate of *S.* liable for very large sums alleged to have been improperly received by Mrs. *T.* and the lunatic and their husbands in excess of what they were entitled to as tenants for life under the will of the lunatic's father. *A.* then presented a petition for leave to attend proceedings under the lunacy, alleging that none of the parties were substantially interested in defending the suit:—

Held, that a precedent ought not to be made for allowing persons named in the wills of lunatics to attend the proceedings in Lunacy, and application refused accordingly.

Re Webb (1) distinguished.

GENERAL SCARLETT, by will dated the 24th of June, 1854, gave all his property to his wife absolutely, and appointed her sole executrix, requesting that if she should not find it necessary during her life to expend the principal of such moneys as might stand in his name in the funds, or any shares or securities, she would, by will, bequeath such principal to his nephew, *William*

(1) 2 Ph. 532.

L. JJ. 1873 *In re* SCARLETT.

Frederick Scarlett (now Lord *Abinger*), should he be then living, and if not, then to his nephew, who should be heir to the *Abinger* peerage.

The testator died without issue on the 6th of December, 1871, possessed of a large sum of consols and other property of the nature mentioned in the above request.

Immediately after the testator's death his widow, Lady *Scarlett*, made a will in pursuance of, and in conformity with, the request contained in his will.

On the 22nd of March, 1872, the widow was found by inquisition to be of unsound mind. Her heiress-at-law and sole next of kin was her sister Mrs. *Thursby*. By order dated the 23rd of May, 1872, Mr. and Mrs. *Thursby* were appointed committees of the lunatic's person, and their son, *J. H. Thursby*, committee of her estate. On the 14th of November, 1872, letters of administration of the personal estate of General *Scarlett* with his will annexed were granted to Mrs. *Thursby* for the use and benefit of the lunatic, and during her lunacy.

On the 11th of December, 1872, a report of the Master in Lunacy was confirmed, approving of the substitution of Mr. *Hughes* for *J. H. Thursby*, as committee of the estate.

On the 7th of January, 1873, *J. H. Thursby* filed his bill against Mr. and Mrs. *Thursby*, Lady *Scarlett*, and Mr. *Hughes*, to make Mr. *Thursby* and the estate of General *Scarlett* liable to recoup to the Plaintiff the amounts alleged by the bill to have been received and appropriated by Mr. *Thursby* and General *Scarlett* out of the profits of extensive collieries in excess of the amounts to which Mrs. *Thursby* and Lady *Scarlett* were properly entitled in respect of the collieries as tenants for life under the will of Lady *Scarlett's* father. Under that will the tenants for life had powers of charging to an unlimited amount for the portions of younger children.

Lord *Abinger* now presented a Petition in Lunacy, stating the above facts, and alleging that the effect of the claim made in the suit, if successful, would be to exhaust General *Scarlett's* estate for the benefit of the *Thursby* family, and that as the only persons represented in the proceedings in Lunacy, and by whom the present committee of the estate had been proposed, were the persons who were in respect of the above claims interested adversely to the estate of

the lunatic, the Petitioner ought to be allowed to attend the proceedings, and that proper steps ought to be taken for protecting the lunatic's estate. The Petition prayed that the Petitioner might be at liberty to attend the proceedings, and that all necessary and proper inquiries might be made and proceedings directed for the purpose of ascertaining and setting apart the funds bequeathed in favour of the Petitioner by Lady *Scarlett's* will, and that proper directions might be given for defending, on behalf of Lady *Scarlett*, the suit of *Thursby* v. *Thursby*, and that, if necessary, the Petitioner might be at liberty to take proceedings in Chancery, in the name of Lady *Scarlett*, for all or any of the above purposes.

Mr. *Cotton*, Q.C., and Mr. *Vaughan Hawkins*, for the Petitioner:—

The case of *Re Webb* (1) is an authority for this application.

[The LORD JUSTICE MELLISH:—In that case there were no next of kin.]

In the present case the next of kin has no interest in defending the estate of the lunatic against the large adverse claim which is set up, so the case is equally strong. Lord *Abinger* is the only person who really is in the same interest as the lunatic, and he ought to have an opportunity of seeing that the estate is protected.

Mr. *Southgate*, Q.C., and Mr. *Bedwell*, for Mr. and Mrs. *Thursby*:—

The proposed course will lead to great expense. There is no suggestion of insolvency, improper conduct, or danger to the funds. We ask the Court not to lay down such a rule as that liberty to attend is to be given to a person who claims an interest under an alleged will made just before the lunacy, and thus cause an expense which is perfectly unnecessary, unless on the supposition which ought not to be made—that the committee of the estate will not do his duty.

(1) 2 Ph. 532.

L. JJ. 1873 *In re* SCARLETT.

The *Solicitor-General* (Sir *G. Jessel*), Mr. *Little*, Q.C., and Mr. *E. S. Ford*, for the Plaintiff in *Thursby* v. *Thursby*.

Mr. *Amphlett*, Q.C., and Mr. *Cutler*, for the committee.

SIR W. M. JAMES, L.J :—

There is no doubt that Lord *Abinger* has a large interest in the lunatic's estate; but the funds which form the subject of the precatory words in General *Scarlett's* will can easily be ascertained, and there is no reason to doubt that the committee of the estate and the Master will take care that nothing is done which can prejudice the Petitioner's rights in respect of them. It would, in my judgment, be too dangerous to make a precedent for allowing the persons named as legatees in the will of a lunatic to attend proceedings.

SIR G. MELLISH, L.J.:—

I am of the same opinion. I think it would be a very dangerous precedent if we entered into an inquiry who are the persons interested under a will made by the lunatic.

Solicitors: Messrs. *Warry, Robins, & Burges;* Messrs. *Farrer, Ouvry, & Co.*; Messrs. *Shaw & Tremellen;* Messrs. *Barlow, Bowling, & Williams.*

In re THORPE. *Ex parte* HARTEL.

L. J. M.
1873
March 4.

Bankruptcy—Composition—Injunction—Bankruptcy Act, 1869 (32 & 33 *Vict.* c. 71), *ss.* 72, 127.

Where resolutions accepting a composition payable by the debtor have been duly passed and registered under the *Bankruptcy Act*, 1869, a creditor will be restrained from proceeding at law in order to try the validity of the resolutions.

Order of *Bacon*, C.J., affirmed.

ON the 20th of November, 1872, *T. Thorpe* was served with a writ for £101 at the suit of *H. C. Hartel.*

On the 26th of November *Thorpe* filed a petition for liquidation by arrangement, and on the same day a receiver was appointed.

On the 11th of December the first meeting of *Thorpe's* creditors was held, at which resolutions were passed accepting a composition of 6*s.* 8*d.* in the pound, payable in instalments, to be secured to the satisfaction of two creditors therein named, and appointing the receiver a trustee. Mr. *Hartel's* name as that of a creditor appeared in the statement of affairs then produced.

On the 20th of December the second meeting was held, whereat the resolutions were duly confirmed. The resolutions were registered in bankruptcy, and *Hartel* had received due notice of the proceedings.

On the 20th of December judgment in the action was signed by *Hartel*, and on the 21st of December the goods were seized under an execution issued by *Hartel.*

After some proceedings before the Registrar in Bankruptcy, a motion on behalf of the debtor and the trustee was made before the Chief Judge, who granted an injunction to restrain the execution; the creditor to be allowed to add his costs before the 20th of December to his debt, but to pay all the subsequent costs. The debtor had complied with the resolutions, but the trustee remained in possession.

The creditor, *Hartel*, appealed.

Mr. *Roxburgh*, Q.C., and Mr. *R. V. Williams*, for the Appellant:—

This is not the case of a bankruptcy, and we say that the trustee

L. J. M. 1873 *In re* THORPE. *Ex parte* HARTEL.

had no right to apply for an injunction. He has no estate, and there is nothing to distribute, and the Court will not interfere with the creditor: *In re England* (1). The application is made under sect. 126 of the Act of 1869, but sect. 72 shews that the trustee has no right to interfere. The creditor is not to be interfered with, and the debtor is to defend himself. *In re Hatton* (2) and *Ellis* v. *Silber* (3) shew that where there is no estate in the trustee the Court has no right to interfere. In sect. 125 express power is given to the Court to interfere. We are willing to have the judgment set aside, and to let the debtor plead the resolutions, which we say are bad on the ground of concealment of assets. The other creditors may be paid their composition, but this creditor has, at all events, a right to retain his execution until all his composition is paid. The goods are still the property of the debtor. We say that the resolutions were obtained by fraud, and we wish to be able to dispute them at law.

Mr. *De Gex*, Q.C., and Mr. *Brough*, for the trustee:—

If this action is allowed to go on, composition deeds are useless. The creditors are all bound if the conditions of the resolution are complied with; but if executions are issued, the debtor cannot get in his assets. The intention of the Act of 1869 was that all these matters should be dealt with in bankruptcy.

Mr. *Roxburgh*, in reply.

SIR G. MELLISH, L.J.:—

The questions to be determined in this case are, first, whether the Court of Bankruptcy has jurisdiction, after resolutions for composition have been passed, to restrain a particular creditor from maintaining an action against the debtor for a debt which is included in the composition; and, secondly, if it has jurisdiction, whether it ought, in this particular case, to exercise that jurisdiction?

I am clearly of opinion that the Court of Bankruptcy has, in a case of composition, jurisdiction to restrain a creditor. The question seems simply to depend upon whether, upon a true construction of the 72nd section of the *Bankruptcy Act*, 1869, the word "bankruptcy" includes a settlement by composition subject to the pro-

(1) Law Rep. 12 Eq. 207, 212. (2) Law Rep. 7 Ch. 723.
(3) Law Rep. 8 Ch. 83.

visions of the Act. That section enacts that "Every Court having jurisdiction in bankruptcy under this Act shall have full power to decide all questions of priorities and all other questions whatsoever, whether of law or fact, arising in any case of bankruptcy coming within the cognizance of such Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice" under the provisions of the Act. It appears to me very clear that "bankruptcy" does in this section include "composition." The word "bankruptcy" is a general term, and is used to include all the three modes of settling the debts of a debtor with his creditors which are included in the Act; and the words, "Every Court having jurisdiction in bankruptcy," include, surely, every Court having jurisdiction in a composition. In my opinion, therefore, bankruptcy does clearly include composition.

Then comes the question whether the injunction ought to issue, and I quite agree that when an injunction is applied for some care ought to be used in determining whether it is a fit case for granting an injunction. Unless there is some real reason for granting an injunction, the Court of Bankruptcy ought not to prevent the Courts of Common Law or the Court of Chancery from trying cases proper to be decided by those Courts. But it appears to me that one chief object and principle of this Act was to remove the great evil which had existed under the Act of 1861, by which every creditor who dissented from a composition or winding-up under inspection was entitled to dispute the validity of the deeds of composition or inspection. It was quite notorious that an enormous amount of litigation took place, because any creditor might bring an action for the purpose of trying the validity of the deed of arrangement. Contradictory verdicts were come to by juries, contradictory decisions were given by Courts. When one creditor had succeeded in having it held that a composition was bad, every creditor might proceed to try the same question with the debtor. That was a very great abuse, and in my opinion one of the objects of this Act was, that when a question was raised as to the validity, either of a liquidation or of a composition, the question should be tried once for all in the Court which had jurisdiction over all the creditors and over all the subject-matter, namely, the Court of Bankruptcy. The Court is to try the question, not merely as between the particular creditor

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and the debtor, but generally, so that if the Court of Bankruptcy holds the composition to be good, it is good as to all the creditors; and if it is held to be bad, then it is bad as to all the creditors, and the other remedies in bankruptcy may at once be resorted to.

I am of opinion, therefore, that the Court having jurisdiction does quite right to exercise that jurisdiction when it appears that the only object of the creditor in bringing the action is to dispute the composition generally.

It appears very clearly that this is the case in the present instance. There is no dispute, as I understand, as to the amount of the debt, nor as to the liability of the debtor, nor as to the creditor having his proper name and address and amount of debt entered in the statement of affairs, and therefore if the composition is a valid composition the creditor is clearly bound by it.

The only ground why the creditor wishes the injunction to be dissolved, and why he wishes to proceed with his action, is, that he wishes to try in the Common Law Courts whether there was not some imposition practised, by reason of the real amount of the debtor's assets being concealed from the Court at the time when the resolutions were passed. That is a question going to the entire validity of the composition, and in my opinion this particular creditor must not be allowed to set aside the composition for his particular benefit. If the composition is really bad it ought to be set aside for the benefit of all the creditors, and the creditor ought to make his application to the Court of Bankruptcy, so that if he succeeded in the application, and got the composition set aside, it might be set aside not merely for his individual benefit, but for the benefit of all the creditors. If there really has been fraud, then I think that the registration of the resolution will not be under the 127th section more conclusive in the Court of Bankruptcy than it would be in any other Court, and an application may be made to the Court of Bankruptcy for the purpose of setting the composition aside on the ground of that fraud. Therefore I am of opinion that the order of the Chief Judge was right, and that this appeal should be dismissed with costs.

Solicitor for the Creditor: Mr. *A. G. Ditton.*

Solicitor for the Trustee and the Debtor: Mr. *W. A. Plunkett.*

BERRY *v.* GIBBONS.

L. JJ.
1873
May 28;
June 5.

[1863 B. 329.]

Executrix—Lis Pendens—Administration Decree—Power of Executrix after—Mortgage of Assets.

A decree was made in a creditors' suit for the administration of the personal estate of a testator, but no receiver was appointed nor any injunction granted to restrain the executrix from dealing with the assets. More than two years after the decree, and nearly three years after the death of the testator, his executrix, who was also his sole legatee, opened an account with a bank, headed "*E. G.* executrix of *B. G.*" In the following year, the account being overdrawn, she deposited with the bank a picture belonging to the testator's estate to secure the balance then due and further advances. It appeared that the bankers did not know of the suit, and had no notice of any breach of duty on the part of the executrix :—

Held (reversing the decision of the Master of the Rolls), that the bank had a valid security on the picture, for that the doctrine of *lis pendens* had no application, a decree for administration without any injunction or appointment of a receiver not taking away the power of the executrix to deal with the assets.

THIS was a motion by *Lloyds' Banking Company, Limited,* by way of appeal from a decision of the Master of the Rolls.

William Gibbons died intestate in 1846. His son *Benjamin Gibbons* took out letters of administration to his estate and died on the 3rd of September, 1863, leaving a will by which he gave all his property to his widow, *Emily Gibbons,* and appointed her his executrix. On the 17th of November, 1863, *Elizabeth Gibbons,* one of the next of kin of *William Gibbons,* filed her bill against *Emily Gibbons* for the administration of his estate, asking for accounts of his personal estate received by *Benjamin* as his administrator, and for the administration of *Benjamin's* estate, if assets were not admitted to satisfy what was due from his estate to that of *William.* On the 16th of January, 1864, the suit was registered as a *lis pendens.* Shortly after the institution of that suit *Berry* filed his bill on behalf of himself and all the other creditors of *Benjamin Gibbons* for the administration of his estate, which suit was not registered. On the 13th of February, 1864, the usual creditors' decree was made in *Berry* v. *Gibbons,* and on the 29th a decree was made in *Gibbons* v. *Gibbons* for an account of the personal

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estate of *William Gibbons* received by *Benjamin Gibbons*, and the Plaintiff was to be at liberty to go in under the decree in *Berry* v. *Gibbons* to prove for what should be found due.

After the death of *Benjamin Gibbons*, *Emily Gibbons*, his widow, legatee, and executrix, carried on his business of an ironmaster. On the 17th of July, 1866, she opened with *Lloyds' Banking Company* an account intituled "*Emily Gibbons*, executrix of the late *Benjamin Gibbons*." On the 25th of October, 1867, the sum of £1455 was due from her on this account, and on that day she deposited with the bank as security a picture called 'The Baronial Hall,' being part of the estate of *Benjamin Gibbons*, with a memorandum of that date in the following terms:—

"I, *Emily Gibbons*, of, &c., have this day deposited with *Lloyds' Banking Company, Limited*, an original painting by *Maclise*, intituled 'The Baronial Hall,' to be retained by the company by way of a continuing security to them for payment on demand of all moneys and liabilities already advanced, paid, or incurred, or which the company may at any time advance, pay, or incur to or for me, whether on account current, or by the discount of or otherwise in respect of bills of exchange, promissory notes, or other negotiable securities drawn, accepted, or indorsed by me, together with interest, commission, banking charges, law and other costs, charges, and expenses. And in case I fail to repay the said moneys and liabilities, I authorize the said company three months after they shall have left at my residence written notice of their intention to sell the said picture to sell the same, crediting me with the net proceeds of such sale. This security shall be applicable and extend as well to my separate accounts and liabilities as to my joint account or liabilities with any other person or persons as partner or partners or otherwise."

Emily Gibbons became bankrupt on the 21st of January, 1868. It was not shewn that any person connected with the bank had notice of either of the suits till after this time.

On the 31st of July, 1868, an order was made for the sale of various pictures and works of art belonging to the estate of *Benjamin Gibbons*, and by this order 'The Baronial Hall' was directed to be sold and the proceeds carried to a separate account.

Some difficulty was experienced in selling this picture, but after great delay it was sold for £550, which sum, after deducting the auctioneer's charges, was paid into Court to a separate account. The bank then took out a summons to have this sum paid to them, a larger sum being due to them on the account opened with them by *Emily Gibbons* as mentioned above. The Master of the Rolls held that the pledge of the picture was ineffectual, and refused the application (1).

Mr. *Fry*, Q.C., and Mr. *J. W. Chitty*, for the Bank:—

This was a mortgage of assets by a legal personal representative to persons who had no notice of any breach of duty, and it gave the bank a good security: *Earl Vane* v. *Rigden* (2); *Farhall* v. *Farhall* (3). The Master of the Rolls decided on the ground of *lis pendens*, but if the doctrine of *lis pendens* applies to chattels at all, it can only apply to a suit which seeks to affect a specific chattel: *Ex parte Thornton* (4); *Companies Act*, 1862, s. 114; 30 & 31 Vict. c. 47, s. 1; *Sorrell* v. *Carpenter* (5); 2 & 3 Vict. c. 11, s. 7; *Drew* v. *Earl Norbury* (6); *Bellamy* v. *Sabine* (7).

Sir *R. Baggallay*, Q.C., and Mr. *Bagshawe*, *contrà*:—

We do not rely on the ground of *lis pendens*, but we submit

(1) 1872. Dec. 9. WN(1872) 222.
LORD ROMILLY, M.R.:—

I have no doubt whatever about this case. The doctrine of *lis pendens* would be worth nothing at all if when a suit is registered the application of that doctrine is to be excluded on the ground that the parties do not actually know of the suit, or that the doctrine only applies to real estate. I have always thought, and I still think, the Act respecting *lis pendens* a very beneficial Act, for it was extremely mischievous that purchasers should be affected by a suit the existence of which they had no means of knowing; but now if a purchaser or assignee does not search for *lis pendens* it is his own fault. When a person presents a security to a banker the banker is bound to search for *lis pendens*, and if any is found then to ascertain the nature of the suit. When this executrix offered security to the bankers they ought to have searched for *lis pendens*. If they had done so they would have found a suit in which a decree had been made and the accounts taken, and that this picture, as part of the assets of the testator, was included in the proceedings. I am therefore of opinion that the claim of a separate and distinct lien upon this picture cannot be sustained, and that the picture remains part of the assets of the testator, and that the bankers must come in and prove in the ordinary way.

(2) Law Rep. 5 Ch. 663, 669, 670.
(3) Ibid. 7 Ch. 123.
(4) Ibid. 2 Ch. 171.
(5) 2 P. Wms. 482.
(6) 3 J. & Lat. 267, 282, 293, 305.
(7) 1 De G. & J. 566, 3 Jur. N.S. 943.

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that a security like this cannot be sustained. An executor, no doubt, if there be no suit, may mortgage the assets even for a pre-existing debt; but after a decree for administration has been made, we submit that he cannot mortgage them so as to exonerate a mortgagee from liability to see to the application of the money, and still less can he mortgage them to secure a pre-existing debt, no money being advanced at the time. This is giving a preference between creditors, which it is settled that an executor cannot do after decree. Moreover, it is clear, from the form of the memorandum, that the bankers were dealing with Mrs. *Gibbons* in her individual capacity, and not as executrix, and they can only therefore claim a security on her beneficial interest, if any: *Haynes* v. *Forshaw* (1).

SIR W. M. JAMES, L.J.:—

It is quite clear to me that the Appellants must have the value of the picture. Whether they will ever get anything more is a matter which must be determined hereafter, but I should not be disposed to give any encouragement to a claim for anything more.

It appears that the account opened by this lady with the bank was opened as an executorship account, and the bank had no notice of any breach of trust. They afterwards obtained from her, she being both the executrix and universal legatee, the deposit of a picture as security for the balance of that account and for further advances. Further advances were made, and, in my judgment, the executrix had the legal right to make such a deposit; and in order to deprive them of the benefit of it there must be evidence to shew that they had notice of there being some breach of trust in the transaction. Now it appears to me that the bankers did nothing but what was in the usual course of business, and that there is nothing to fix them with any notice of a breach of trust. The doctrine of *lis pendens* has no bearing on the case, for a mere administration decree, no receiver having been appointed, nor any injunction granted to prevent the executrix from dealing with the assets, would not take away her legal powers so as to invalidate the title of persons claiming under a disposition made by her in exercise of those powers. Under these circumstances, as the order

(1) 11 Hare, 93, 17 Jur. 930

of the Master of the Rolls proceeds entirely on the ground of *lis pendens*, there appears to me to be no sufficient reason for sustaining it; and in my opinion, therefore, it must be discharged.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

Solicitors: Messrs. *Newman, Dale, & Stretton;* Messrs. *Palmer, Eland, & Nettleship.*

HUNTER *v.* CHESHIRE.

[1872 H. 250.]

Will—Construction—Member of a Class dying before the Date of the Will—Substituted Gift.

A testatrix, among other legacies, gave to the children of her late cousin *R. H.*, £1000. The will contained a proviso that if any legatee should die in the lifetime of the testatrix leaving children, such legacy should not lapse, but should be paid to the children of the deceased legatee. One of the children of *R. H.* was dead at the date of the will, leaving children:—

Held (affirming the decision of *Malins*, V.C.), that the children of the deceased child could not take under the proviso in the will, inasmuch as the deceased child was not a "legatee" within the meaning of the clause.

In re Potter's Trust (1) and *Adams* v. *Adams* (2) distinguished.

THIS was an appeal from a decision of Vice-Chancellor *Malins*.

The will of *Ann Sutton*, dated the 29th of October, 1864, contained, among numerous others, the following bequests:—"To the children of my late cousin, *Richard Heely*, £1000, to be divided equally between them: To the children of my late cousin, *William Heely*, £1000, to be divided equally between them." At the end of the will was the following proviso: "And I hereby declare that, in case any legatee shall die in my lifetime leaving a child or children him or her surviving, such legacy shall not lapse, but be paid to the child, if only one, of such deceased legatee, or to the children, if more than one, equally, on their attaining their several and respective ages of twenty-one years."

The testator died in March, 1871.

Richard Heely and *William Heely* had several children who

(1) Law Rep. 8 Eq. 52. (2) Law Rep. 14 Eq. 246.

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survived the testator; but *Ann Hunter*, one of the daughters of *Richard Heely*, and *John Heely*, one of the sons of *William Heely*, died before the date of the will, leaving children.

The bill was filed by the children of *Ann Hunter* and *John Heely* for the administration of the estate of the testatrix, and the question was raised by demurrer whether they were entitled to any interest under the will. The Vice-Chancellor held that the children who died before the date of the will did not come under the term "legatees" in the proviso at the end of the will, and that the Plaintiffs were therefore not entitled to any legacy; and he allowed the demurrer(a). From this decision the Plaintiffs appealed.

Mr. *Pearson*, Q.C., and Mr. *W. Barber*, for the Appellants:—

The words "any legatee" in the clause at the end of the will must be read with reference to each particular bequest. When read with reference to this bequest it means "any child of my late cousins *Richard Heely* or *William Heely*," and that is sufficient to include children who died before the date of the will, and brings the case under the authority of *In re Potter's Trust* (1) and *Adams* v. *Adams* (2). It is said that these cases, both of which were decided by Vice-Chancellor *Malins*, are not reconcilable with *Christopherson* v. *Naylor* (3) and *In re Hotchkiss' Trusts* (4). If so, it is important that the question should be set at rest by the decision of the Court of Appeal. *Phillips* v. *Phillips* (5) and *Loring* v. *Thomas* (6) are in our favour. In the latter case Sir *R. Kindersley* said that it is entirely a question of intention whether a member of a class who had died before the date of the will should be included.

Mr. *Cotton*, Q.C., and Mr. *F. T. White*, for the Defendants, the executors, were not called on.

SIR W. M. JAMES, L.J.:—

I am of opinion that the decision of the Vice-Chancellor was quite right in this case. It is no part of our duty to say whether

(1) Law Rep. 8 Eq. 52.
(2) Ibid. 14 Eq. 246.
(3) 1 Mer. 320.
(4) Law Rep. 8 Eq. 643.
(5) 10 Jur. (N.S.) 1173.
(6) 1 Dr. & Sm. 497.

(a) See 17 W.R. (1872) 8; 21 L.R. 320

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In re Potter's Trust (1) is or not reconcilable with the other authorities. The ground on which the Vice-Chancellor rested his decision in the present case is quite unanswerable. The proviso in the will is, that in case any legatee should die in her lifetime, leaving a child or children him surviving, such legacy should not lapse, but be paid to the child or children of such deceased legatee. A legatee must be a person to whom a legacy is given by the will, and the Plaintiffs are not entitled as legatees either in their own name or as the children of deceased legatees. The words of this will do not, therefore, permit the question to be raised which was discussed in *Christopherson* v. *Naylor* (2) and *In re Potter's Trust*. We must leave that question to be settled on some future occasion when there are words which will admit of its being settled. The appeal must be dismissed.

SIR G. MELLISH, L.J., concurred.

Solicitors: Messrs. *T. White & Sons*; Messrs. *Deane & Chubb*.

ROBERTS *v.* ALBERT BRIDGE COMPANY.

L. JJ. 1873 *June* 11.

[1871 R. 151.]

Practice—Waiver of Contempt—Acceptance of Answer.

A Defendant who was in contempt for non-payment of costs filed his answer and left a copy at the office of the Plaintiff's solicitor. The Plaintiff's solicitor did not return the copy nor move to take the answer off the file, but kept it without reading it till after the time for deeming it sufficient had elapsed:—

Held (affirming the decision of *Malins*, V.C.), that the Plaintiff had waived the contempt, and that the Defendant was in a position to move to dismiss the bill for want of prosecution, if the Plaintiff did not proceed in proper time.

THIS was an appeal from an order of Vice-Chancellor *Malins*. The bill, which related to the ownership of certain shares in the *Albert Bridge Company*, was filed in November, 1871, and interrogatories were served on the company on the 21st of December.

(1) Law Rep. 8 Eq. 52. (2) 1 Mer. 320.

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No answer having been put in, a distringas was issued against the company on the 3rd of May, 1872, which was executed by the Sheriff of *Middlesex*.

On the 27th of May the Defendants, not having paid the costs of the distringas, and while they were in contempt for not so doing, filed their answer, and their solicitor sent his clerk with a printed copy of it to the office of the Plaintiff's solicitor, on the 31st of May, with the following letter:—

"We have filed the answer of the company herein, and left office copy at your office this afternoon, for which you will have to pay us £3. Be good enough to let us know how many printed copies you will require."

The Plaintiff's solicitor was not at home when the copy answer was left there, but on his return he instructed his clerk that if the clerk of the Defendants called again he should say that he declined to receive the copy answer until the costs of the distringas had been paid: and he stated that he afterwards accidentally met the clerk of the Defendants' solicitor, and told him that he would not accept the copy answer. On the other hand, the clerk of the Defendants' solicitor said that he could not remember such a conversation.

The copy answer remained in the office of the Plaintiff's solicitor unread, and no further steps were taken in the cause until the 24th of March, 1873, when the Defendants moved before the Vice-Chancellor to dismiss the Plaintiff's bill, for want of prosecution, with costs.

The Vice-Chancellor made an order to that effect—the Plaintiff declining to give an undertaking to file replication or give notice of motion for decree—but without prejudice to the Plaintiff's right to recover his costs of the distringas. The Plaintiff appealed from this order.

Mr. *Cottrell*, for the Appellant:—

The Plaintiff was in contempt for non-payment of costs, and he had no right to take any steps in the cause without clearing his contempt. The mere tender of the costs is not sufficient: *Green* v. *Thomson* (1). But even that was not done here. If the Plaintiff

(1) 1 S. & S. 121.

had applied for a copy of the answer it would not have been sufficient to waive the contempt: *Woodward* v. *Twinaine* (1); *Attorney-General* v. *Shield* (2). Much less, where the Plaintiff did not apply for a copy, and declined to receive the copy which was sent to him.

Mr. *Pearson*, Q.C., and Mr. *Rendall*, for the Defendants:—

The Plaintiff has not merely received a copy of the answer but he has kept it till the answer has become sufficient. He ought to have moved to take the answer off the file till the contempt was cleared, but as he has not done so, the time runs from the filing of the answer, and it has now become sufficient: *Coyle* v. *Alleyne* (3). Under these circumstances he must be held to have accepted the answer: *Herrett* v. *Reynolds* (4).

Mr. *Cottrell*, in reply.

SIR W. M. JAMES, L.J.:—

The Vice-Chancellor appears to have followed the more recent authorities; and I think that his order was correct. The appeal must therefore be dismissed with costs.

SIR G. MELLISH, L.J., concurred.

Solicitors: Mr. *Weigall*; Messrs. *Mayhew, Salmon, & Whiting.*

(1) 9 Sim. 301.
(2) 11 Beav. 441.
(3) 16 Beav. 543.
(4) 2 Giff. 409.

6 Jun 1880

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June 5, 11.

ERSKINE *v.* ADEANE.

[1871 E. 12.]

Landlord and Tenant—Noxious Plants—Yew Trees—Implied Warranty—Liability to keep up Fences—Parol variation of Lease—Collateral Agreement—Statute of Frauds—Agreement to destroy Game—Damage from Game.

There is no implied warranty on the part of a lessor who lets land for agricultural purposes, that no noxious plants are growing on the demised premises.

There is no implied obligation on the part of a lessor to keep up the fences of closes which he retains in his own hands, and which abut upon land demised to a tenant, so as to prevent the tenant's cattle from straying on to them.

A farmer being in treaty for a lease of a farm, declined to take it on account of the quantity of game. The lessor promised that he would kill down the game, and would not let the shooting, but refused to allow the promise to be inserted in the lease. The tenant accordingly executed a lease prepared by the lessor's solicitor, in which the right to kill game was reserved to the lessor, his friends and servants. The lessor afterwards let the shooting, and did not kill down the game :—

Held, that there was a binding collateral agreement to kill down the game, and that the tenant was entitled to compensation for damage done by the game.

Decision of the Master of the Rolls reversed.

IN this case there were two appeals from a decision of the Master of the Rolls, made in a suit for the administration of the estate of the late Mr. *Henry John Adeane*, of *Babraham Park, Cambridgeshire.*

In the course of the administration a claim was made by Mr. *John Bennett*, a tenant who occupied the home farm under a lease dated the 10th of August, 1868, for damage to the amount of £580, for the loss of cattle which he alleged to have been poisoned by eating yew leaves through the default of the landlord.

The plantations on the farm were reserved to the landlord, and Mr. *Bennett's* first complaint was, that early in the spring of 1869 he lost 36 lambing ewes out of a flock of 220, and about 100 lambs, owing to their browsing the yew trees in one of the plantations, the branches of which extended over the fence so as to be within reach of the cattle in the adjoining field ; and that in 1869 he lost 105

sheep through their eating the clippings from yew trees, which had been thrown by Mr. *Adeane's* gardener upon the field where the sheep were.

Secondly, he complained that, in 1870, after Mr. *Adeane's* death, he had lost a steer and three cows through their eating the clippings from yew trees in a plantation called the *Island*, which the animals were allowed to get at by reason of the insufficient state of the repair of the fence. The *Island* was surrounded by a ditch, eight feet deep, which was generally full of water, but by reason of the dryness of the season the ditch had become dry, and there was no other sufficient fence. Evidence was adduced to shew the poisonous nature of the leaves and branches of the yew, especially of the clippings when dry. There was no proof of any agreement by Mr. *Adeane* to keep up the fence round the plantation called the *Island*.

Mr. *Bennett* made a third claim for £1039 5*s*. 3*d*., as compensation for damage done to his crops and grass by the hares and rabbits in the plantation. He based this claim on a parol agreement between himself and Mr. *Adeane* when he took the farm, that Mr. *Adeane* would kill down the game and not let the shooting during the tenancy. The evidence on this head was contained in the affidavits of Mr. *Bennett* and Mr. *T. Rush*, Mr. *Adeane's* agent. From their statements it appeared that, in June, 1868, *Bennett* went over the farm with *Rush*, and then told him that there was so much game that he would not take the farm, and that *Rush* then assured him that he was authorized to tell him that the game would not be let any more, that it would all be killed down, and that all the keepers had notice to leave; but that as the game was let to Mr. *Rennie* till the end of the season, it could not be altered till that time, and after that only one man would be kept to kill vermin and rabbits. *Bennett* afterwards went with *Rush* to the Hall and saw Mr. *Adeane*, who was in very delicate health, and Lady *Elizabeth Adeane*, his wife, when *Bennett* again expressed his refusal to take the farm, while there was so much game on it. Mr. *Adeane* then said, "Yes, but Mr. *Rush* has told you that the game is to be killed down, and the keepers have all notice to leave, and only one man, a sort of vermin-killer or policeman, is to be employed, and no keepers will be kept, and no game let

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during your lease;" and he added, "there will be only a few winged game kept for shooting for my friends—in fact, what the farm would naturally raise." *Bennett* then asked whether he might kill the hares and rabbits, and Mr. *Adeane* and Lady *Elizabeth* said, "We cannot give you the hares, but will give you the right to kill the rabbits on the farm, but not on the plantations, and then not to shoot them; but Mr. *Rush* has the power of killing the hares and rabbits on his farm, and at any time you can ask him to kill them on your farm, or from the plantations, when you are receiving any damage." Mr. *Adeane* also added, "I do not wish the tenor of the lease to be altered from my other leases respecting the game, but *Rush* is witness that no game will be let and no keepers kept during your lease." Lady *Elizabeth Adeane's* recollection of the conversation differed in some respects from *Bennett's* statement, but the Lords Justices were of opinion that the verbal promise to kill down the game and not to let the shooting was sufficiently proved. Relying on this promise, *Bennett* agreed to take the farm, and a lease was drawn up by Mr. *Adeane's* solicitor, and executed, by which the farm was demised to *Bennett* for eight years, from Michaelmas, 1868, at a rent of £560. The lease reserved to the lessor, his heirs and assigns, the exclusive right to all game and fish, and to preserve the same, and by himself and themselves, his and their friends and servants, to enter upon the premises and to shoot and sport over the same, but so nevertheless that the lessee, his executors, administrators or assigns, should be at liberty to keep down the rabbits on the land otherwise than by shooting.

In the spring of 1869 Mr. *Adeane* let the house and grounds and all the shooting to Mr. *J. Rennie*, who had hired the shooting the previous year, and the keepers were retained on the estate, and the game strictly preserved as before.

Mr. *Adeane* died on the 17th of February, 1870. He was only tenant for life of the estate, and as the lease was granted by him alone the term granted by the lease ceased on his death, but *Bennett* was continued as tenant by the trustees of the estate. The bill was filed on the 9th of February, 1871. *Bennett's* claims came before the Master of the Rolls on an application to vary the Chief Clerk's certificate, and His Lordship declared that

Mr. *Adeane's* estate was liable for the loss sustained by *Bennett* by reason of the sheep and cattle being poisoned by the branches or cuttings of yew trees, and directed an inquiry as to the amount of loss sustained by him; but he refused to make any order as to the claim for compensation for damage done by the game (1). From this decision both Mr. *Adeane's* trustees and *Bennett* appealed.

First, with respect to the cattle that were poisoned by the yew trees which hung over the land demised and the cuttings thrown upon the land,

Mr. *Fry*, Q.C., and Mr. *Bromehead*, for Mr. *Adeane's* trustees, contended that there was no foundation for the doctrine that there is an implied warranty by the landlord that there should be no

(1) 1873. March 12. WN(1873)65.
LORD ROMILLY, M.R. :—

I have had considerable difficulty with respect to the alleged agreement about the game, but I am of opinion that it was not a distinct agreement but an alteration of the original terms of agreement, and if it was intended to be binding it ought to have been inserted in the lease. It was not a separate contract entered into between the landlord and tenant, that if a certain thing was done the tenant would take a lease; nor was it an agreement, which it might have been, for a year to the effect that if the landlord would keep down the game the tenant would pay him a sum of money, in which case it might have been good under the *Statute of Frauds*, but it was a parol alteration of the lease and was not binding. I think, therefore, that Mr. *Bennett* is not entitled to any compensation in respect of that claim.

In respect of the other matter, the result produced on my mind by reading the affidavits is, that the animals were poisoned by the yew, and having come to that conclusion, I think the law is (I do not know whether it has ever been laid down so broadly) that there is an absolute warranty by the landlord that there shall be nothing on his estate to hurt the cattle of the farmer. Consequently it does not depend upon the question of negligence, or whether he has done this or that, but if in fact the cattle have been poisoned by browsing upon shrubs which the landlord has upon his land which happen to be poisonous (though he did not know it), that is included in the warranty, and he is bound to make good the loss to the tenant. That is my opinion on the result of the cases. If you think you can change my opinion upon it I will hear you willingly.

[After some further argument, His Lordship adhered to his opinion, and added :—] With regard to the fencing of the *Island*, it appears that the cattle went over where there was a ditch of about eight feet deep, which was formerly full of water but was dried up by the weather, and the landlord did not put any fencing to prevent the cattle getting over. They accordingly went into his plantation and ate noxious shrubs. I am of opinion that he is answerable for that, and I accordingly hold so.

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noxious trees on the land demised: *Sutton* v. *Temple* (1). With respect to the cuttings which were thrown on the land, if there was any negligence on the part of Mr. *Adeane* or his servants it was the ground of a personal action and was limited by the 3 & 4 Will. 4, c. 42, s. 2, to six months from the death of *Adeane*, a period which had elapsed long before the claim was made.

Mr. *Southgate*, Q.C., and Mr. *Cracknall*, for *Bennett*, argued that the objection arising from the 3 & 4 Wm. 4, c. 42, was taken too late. It was not taken in the Court below; and it was understood by all parties that all claims on the estate should be made in the administration suit. They relied on *Jones* v. *Festiniog Railway Company* (2).

SIR W. M. JAMES, L.J.:—

This claim does not appear to me to rest on any question of warranty. It is a claim against the executors of the deceased tenant for life, for a wrongful act of his, for negligence of him and of his servants with respect to the yew trees, in providing insufficient fencing, and for throwing the cuttings on to the tenant's land. That clearly is a ground upon which at common law, before the statute, no action could be brought by or against an executor of a deceased person. The statute, while giving a right of action, has prescribed a certain time within which a claim must be made, and that time has elapsed. I am of opinion, therefore, that the claim with respect to anything done in the time of the tenant for life must be considered as not available for any purpose in this suit.

SIR G. MELLISH, L.J.:—

I am of the same opinion. The rule of common law was that a personal action died with the person, and that no such action could be brought against his executors or administrators. Now it is clear that this claim, so far as it goes to negligence in keeping up the fences, or negligence in allowing the cuttings from the yew trees to be placed where the cattle could get at them, or the negli-

(1) 12 M. & W. 52. (2) Law Rep. 3 Q. B. 733.

gence in allowing the branches of the yew trees to grow over the hurdles, would all, if they were maintainable at all, be by personal action.

I may say, however, that, in my opinion, as far as regards the yew trees growing over the hurdles, no such claim could be sustained at all.

With respect to what the Master of the Rolls seems to have rested his judgment upon, namely, that there was a warranty that no noxious trees should grow on the demised premises, I have never heard of any such warranty. The law of this country is that a tenant, when he takes a farm, must look and judge for himself what the state of the farm is. Just as in the case of a purchaser of a business the rule is *caveat emptor*, so in the case of taking the lease of property the rule is *caveat lessee;* he must take the property as he finds it. I never heard that a landlord warranted that the sheep should not eat his yew trees. Yew trees, it appears, are not at all times poisonous; and although it is not uncommon for them to grow in plantations, or about a farm, it is very rare for any accident to happen on account of them. In my opinion the lessee must take his chance of such a damage, or ask for an express warranty if he thinks there is reason to fear that his cattle or sheep may be injured. Throwing the cuttings in the way of the sheep might be a different thing; if it were necessary to go into that question, it might be necessary to inquire whether there was not contributory negligence in the servants of the tenant in allowing the sheep to go where the cuttings were thrown. But it is unnecessary to consider that question. These causes of action having died with the person, except so far as the statute enabled an action to be brought, and no action or suit having been brought during the time appointed by the statute, the executors were at the time this bill was filed freed from all liability in respect of it.

With respect to the cattle that had strayed into the plantation called the *Island*,

Mr. *Fry*, Q.C., and Mr. *Bromehead*, contended that there was no obligation in Mr. *Adeane* to keep up a sufficient fence to keep out *Bennett's* cattle. Every occupier of land was bound to keep

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his cattle from straying on to his neighbour's land: *Boyle* v. *Tamlyn* (1); *Lawrence* v. *Jenkins* (2); *Fletcher* v. *Rylands* (3).

Mr. *Southgate*, Q.C., and Mr. *Cracknall*, for *Bennett*, contended that whatever might be the rule as between independent adjoining landowners, it did not apply as between a landlord and his tenant. The tenant had no right to touch the fence of the plantations, and when the tenant covenanted to keep up the fences on the land demised to him, there was an implied contract on the part of the landlord to repair the fences on the part of the property kept in his own hands.

SIR W. M. JAMES, L.J.:—

If this had been the case of two adjoining landowners it seems not to be substantially disputed that no grounds of action would have arisen by reason of the accident, or whatever it may be that has occurred in this case. One piece of property being open to another piece of property cattle have found their way from the lands of one owner into the lands of another owner, on which was some poisonous matter which was left there by the lopping of some yew trees. In that case, there being no obligation by contract or by prescription, as between the landowners, it is clear that no action would lie by reason of the damage that ensued from that which was in fact the trespass of the cattle of the complainer. Now can it make any difference that the relation of the two adjoining landowners is this, that one man is the landowner in fee of the piece of ground which he has retained in his own possession, and the adjoining person is the landowner for a term of years under a lease created by his neighbour? I am of opinion that there is no authority and no principle upon which any distinction can be drawn in respect of the obligations and rights as between an owner in fee simple and a tenant for life, or between an owner in fee simple and a lessee deriving title from the owner; and if there be any obligation between those parties it must arise from a contract express or implied. I can find in this case no contract express or implied that the owner of the piece of ground in ques-

(1) 6 B. & C. 329. (2) Law Rep. 8 Q. B. 274.

(3) Law Rep. 1 Ex. 265. 12 Jur. N.S. 603. 4 H. & C

tion should keep the ditch full of water, or in seasons when the ditch was not full of water should supplement it by a sufficient fence to prevent cattle from trespassing into it. I am of opinion, therefore, that the claim has entirely failed in this respect.

SIR G. MELLISH, L.J.:—

I am of the same opinion. In order to support the claim it must be proved that there was an obligation on the part of the landlord to keep up a sufficient fence between the land which had been let to the tenant and the land which he retained in his own possession. Now, as a general rule an obligation to repair fences must either originate in prescription or in express contract, or it may be created by Act of Parliament, as is constantly done in inclosures of commons, but it must be created in some way or other. Here, of course, there is no prescription, and the only possible question is whether there is any contract between the landlord and the tenant by which the landlord obliges himself to keep up the fence. I will assume that the tenant holds from the trustees upon the same terms as he originally held from Mr. *Adeane*, who gave him the lease. There is no covenant in the lease by which the landlord binds himself to repair these fences; there is a covenant on the part of the tenant which I will assume does not apply to this particular fence, because I think it only applies to those fences which are parts of the fields which are demised to the tenant, and not to the fences of the plantations. The landlord no doubt, for his own protection, will generally repair the fences of his plantations, but he has not covenanted with the tenant that he will keep them in repair. I am not aware of any rule of law by which we can import such a covenant into a lease which does not contain it. The common law of *England* is distinguished from the law of almost all other countries by the fact that it does not imply contracts and agreements to anything like the same extent, but generally obliges those who make contracts to insert in those contracts all the stipulations by which they intend to be bound. No doubt there are cases in which obligations may be implied, but as a general rule the man who wishes to have a particular stipulation for his benefit must take care to

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have that stipulation inserted in the contract. I see no reason why this particular obligation should be excepted from what I consider to be the general law. If the tenant upon looking over the farm thought it was for his advantage to have this done, and to have certain fences which were in the possession of the landlord kept in repair in order that his cattle might be protected, he should have had a covenant inserted in the lease that the landlord would keep those fences in repair, just as the landlord has taken care to insert that the tenant would keep in repair the fences of the fields which are demised to him. Therefore I agree with the Lord Justice that this claim cannot be supported.

Mr. *Southgate*, Q.C., and Mr. *Cracknall*, then opened the appeal with respect to the injury done by the game. They contended that there was clear evidence of a promise by Mr *Adeane* to keep down the rabbits and discharge the keepers, and not to let the shooting again. This was not a parol variation of the lease, but a collateral promise, which was to form the consideration of *Bennett* executing the lease. They relied on *Morgan* v. *Griffith* (1); *Harris* v. *Rickett* (2); *Lindley* v. *Lacey* (3); *Jervis* v. *Berridge* (4). It was said that the promise was not to be performed within a year, and therefore was void under the 4th section of the *Statute of Frauds*. But it is sufficient if the contract is to be performed by either side within a year: *Cherry* v. *Heming* (5); and in this case it was performed by *Bennett* when he executed the lease.

Mr. *Fry*, Q.C., and Mr. *Bromehead*, for the trustees, insisted that there was no satisfactory evidence of any such promise by Mr. *Adeane* as was alleged. The conversation only amounted to a negotiation as to the terms of the lease, and *Bennett* afterwards went to *London* and settled the terms of the lease with Mr. *Adeane's* solicitor. He could not now introduce a parol variation into the lease. Any promise which Mr. *Adeane* made as to the rabbits could not be performed within the year, and ought to have been in writing under the *Statute of Frauds*.

(1) Law Rep. 6 Ex. 70.
(2) 4 H. & N. 1.
(3) 17 C. B. (N. S.) 578.
(4) Law Rep. 8 Ch. 351.
(5) 4 Ex. 631.

(3) SC 10 Jur NS 1103. 34 [illegible]

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ADEANE.

SIR W. M. JAMES, L.J. :—

I am unable to concur with the opinion of the Master of the Rolls on this point. It appears to me that there is abundant evidence, and evidence of such a nature as is satisfactory to obtain, when there is anything in addition, or, as we may call it, collateral, to a bargain which is reduced into writing. We have here the evidence of the claimant himself, and the evidence of the agent of the other contracting party who was present at the negotiation between them; and we have also the statement of the lady, who, in my view, really corroborates all that is material and essential in this case to be averred; that is to say, that while there was an agreement going on for a lease, which was to contain certain stipulations only, a promise was made, or a representation which amounted to a promise, by Mr. *Adeane* that the game of which the tenant was then complaining should be so dealt with as not to amount to a serious nuisance to the tenant. That was the substance of the agreement; it was not that there was to be no game there, or that there was not to be game preserved in a reasonable and moderate way, but that there was not to be an unreasonable quantity of game there; that the landlord was not to keep an army of gamekeepers, but only such an amount of game as one keeper would be sufficient to deal with; and that the hares and rabbits, the principal subject of complaint, were to be dealt with in a particular way, not by the tenant to whom Mr. *Adeane* was not willing to grant power by the lease at all, but by a person named by Mr. *Adeane*. That is a different thing from any power given in the lease to the tenant, merely resulting in a counter claim against Mr. *Adeane* if he should not substantially comply with his bargain, which was that the game should not be a nuisance. I am of opinion that he has a very good claim at law, for I am unable to distinguish it from the case of *Morgan* v. *Griffith* (1) in the Exchequer; I am quite certain there would be a good claim in equity against the estate of Mr. *Adeane*, who has been making money by the game by letting the shooting. That being so, I am of opinion that Mr. *Bennett* must succeed in this appeal.

(1) Law Rep. 6 Ex. 70.

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ERSKINE v. ADEANE.

SIR G. MELLISH, L.J.:—

I am of the same opinion. No doubt, as a rule of law, if parties enter into negotiations affecting the terms of a bargain, and afterwards reduce it into writing, verbal evidence will not be admitted to introduce additional terms into the agreement; but, nevertheless, what is called a collateral agreement, where the parties have entered into an agreement for a lease or for any other deed under seal, may be made in consideration of one of the parties executing that deed, unless, of course, the stipulation contradicts the terms of the deed itself. I quite agree that an agreement of that kind is to be rather closely watched, and that we should not admit it without seeing clearly that it is substantially proved. Indeed I may say that this being a case between landlord and tenant, if there had been no evidence except Mr. *Bennett's* own evidence, and the agreement had been alleged to have been made in an interview between him and Mr. *Adeane* when nobody else was present, I should have probably thought it would have been the duty of the Court to say that this was not satisfactory enough for the Court to act upon. But in this case it appears to me that the agreement is proved in the most satisfactory manner, and it is also proved that it was not intended to be included in the terms in the lease, which were afterwards reduced into writing and made into a deed, but it was intended to be collateral, because according to the evidence, which, to some extent, is confirmed by Lady *Elizabeth Adeane,* it was distinctly said that the lease, as regarded the game, was to be in the ordinary form of Mr. *Adeane's* leases. But nevertheless he stipulated that he himself would behave in a particular way with reference to the powers which were to be reserved to him by the lease. When it has been proved that Mr. *Bennett,* having found a vast quantity of game upon the farm, said it was impossible that he could take it with that quantity of game on it, when, even according to Lady *Elizabeth,* it is quite plain that Mr. *Adeane* said that Mr. *Bennett* need not be afraid of that, because he was in such a state of health that he no longer wanted the shooting himself, and that he was not going to let it again, and that all the keepers would be dismissed except one; and when the lease was executed on the faith

of that agreement, and upon those representations so made, it would be contrary to the ordinary rules of justice if the tenant were afterwards to have no remedy.

There is no imputation against Mr. *Adeane* himself, because I think it appears that he was in so infirm a state of health that he was incapable of managing his affairs, and accordingly it was relet, and the game kept up as much as ever. As to the amount of the damage, that is a matter to be inquired into; all we have to say now is that this is an agreement that is binding in point of law, and assuming that there has been damage sustained, that Mr. *Bennett* is entitled to be paid for it out of Mr. *Adeane's* estate.

Solicitors for the Trustees: Messrs. *Lake & Co.*
Solicitor for Mr. *Bennett:* Mr. *Greenhill.*

L. C.
1873
July 14.

In re ANGLO-MORAVIAN HUNGARIAN JUNCTION RAILWAY COMPANY.

DENT'S CASE.

FORBES' CASE.

Company—Subscriber of Memorandum—Articles of Association—Allotment of Paid-up Shares—Qualification of Director.

17 Eq 173, 6
9 Eq 290
19 Eq 355
20 Eq 508, 510
1 C.L.D. 668
1 C.P.D. 665.
5 Ch.D. 706
3 App Cas 214
12 Ch.D. 197, 8, 202
22 Ch.D 368.

D., one of the seven subscribers to the memorandum of association of a limited company established for working a concession in *Austria*, subscribed for 100 shares. The articles of association recited that *E.*, who assigned the concession to the company, had agreed to cause fully paid-up shares to be allotted to all the persons subscribing the memorandum; and the 5th article provided that the shares of each subscriber to the memorandum should be allotted to him as fully paid up, and that a competent number of shares should be allotted to *E.* in pursuance of the arrangement which had been previously come to.

On the 3rd of October, 1865, the day on which the company was registered, the directors set apart for *E.*, for work already done for the company, 4000 paid-up shares and a large sum in debentures; and *E.* shortly afterwards requested the secretary to allot some of the 4000 shares to persons named, and among others, 100 shares to *D.*, who had no other shares in the company. The company was ordered to be wound up, and the official liquidator placed *D.* on the list of contributories for 100 shares as having subscribed the memorandum for that amount, and made a call on him in respect of them:—

Held (affirming the decision of *James*, L.J., sitting for *Wickens*, V.C.), that the clause in the articles of association providing that the shares subscribed for in the memorandum should be allotted as fully paid-up was inoperative; and that as there was no evidence that *D.* had given any *bonâ fide* consideration for having his shares paid up, he had been rightly placed on the list for 100 ordinary shares, and was liable to pay the call on them.

One of the articles of the company provided that *F.* and three other persons therein named, and any other qualified persons whom they might appoint, not exceeding, with themselves, ten, should be the original directors of the company. It was also provided that every member holding not less than fifty shares should be eligible as a director, and that the office of a director should be vacated if he should cease to hold its qualification. *F.* did not sign the memorandum of association, and refused to subscribe any money for shares, but accepted the offer of *E.* to give him fifty paid-up shares, as the qualification of a director, out of those appropriated to *E.*, in payment of *F.*'s services in making inquiries and reporting concerning the value of the concession in *Austria*. Fifty paid-up shares were accordingly allotted to *F.*, and he had no other shares in the company. On the

company being wound up, his name was placed on the list of contributories for fifty ordinary shares:—

Held (reversing the decision of *James*, L.J., sitting for *Wickens*, V.C.), that *F.* having been named as a director in the articles, the provision as to qualification did not apply to him; and that the paid-up shares having been allotted to him for *bonâ fide* consideration out of those appropriated to *E.*, he was liable to no calls upon them.

THE appeal in *Dent's Case* was from an order of Lord Justice *James*, sitting for Vice-Chancellor *Wickens*, made on an adjourned summons in the winding-up of the *Anglo-Moravian Hungarian Junction Railway Company, Limited* (1).

The appeal in *Forbes's Case* was from an order of the same Judge made in Chambers in the same matter.

The *Anglo-Moravian Hungarian Junction Railway Company, Limited*, was registered on the 22nd of September, 1865, under the *Companies Act*, 1862.

The memorandum of association stated that the object of the company was to construct and work a railway in *Moravia*, in accordance with a concession from the Emperor of *Austria*, and for the execution of other works; that the liability of the members was limited to the amount of their shares; that the capital of the company was £500,000 in 25,000 shares of £20 each; and that the seven persons whose names and addresses were subscribed were desirous of being formed into a company in pursuance of the memorandum of association; and that they had respectively agreed to take the number of shares in the capital of the company set opposite to their respective names.

William Dent was one of the seven persons who subscribed the memorandum and articles of association, and he subscribed for 100 shares.

The articles of association recited that the concession granted by the Emperor of *Austria* had been made to Mr *Raikem* and Mr. *J. B. Even*, who was authorized to act as Mr. *Raikem's* attorney in the assignment of the concession. They also recited that by certain articles of agreement dated the 19th of September, 1865, in consideration of certain work and labour done, and goods and materials supplied and contracts entered into, the

(1) Law Rep. 15 Eq. 407.

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DENT'S CASE.

FORBES' CASE.

said *J. B. Even* agreed to cause to be allotted to certain of the persons subscribing the articles, shares in the company to be deemed fully paid-up shares; and that certain of the persons executing the articles had subscribed for shares in pursuance of the said agreement.

The articles also recited two indentures of the same date with the articles of association, by one of which Mr. *Raikem* and Mr. *Even* agreed to hold the concession as trustees for the company, and by the other Mr. *Even* undertook to construct the works of the railway in accordance with the concession, and the company covenanted to pay him for the construction of the railway and for the purchase of land £515,000, partly in paid-up shares and partly in debentures, in manner therein named.

The following clauses were contained in the articles of association:—

Clause 5. "The shares written in the memorandum of association opposite the name of each subscriber shall be allotted to him as fully paid-up, and a competent number of shares shall be allotted to Mr. *Even* in pursuance of the arrangement thereinbefore recited."

Clause 19 prescribed the form of transfer of shares, which was to be by deed.

Clause 57. "Every member holding not less than fifty shares shall be eligible as a director, provided all calls made on all his shares shall have been paid."

Clause 59. "The directors of the company till the first meeting shall be *W. Dent*, Esq., *W. Forbes*, Esq., Sir *W. G. Ouseley*, and *Lawrence C. L. Peel*, Esq., and any other qualified persons whom they may appoint with them, not exceeding in the whole, including themselves, the number of ten."

Clause 66. "The office of director shall be vacated, (*a*) If he resign his office. (*b*) If he cease to hold its qualification. (*c*) If he become bankrupt or compound with his creditors. (*d*) If his calls remain unpaid."

At the first meeting of the directors they set apart for Mr. *Even* £50,000 in debentures and £80,000 in 4000 fully paid-up shares in part performance of their agreement with him. These shares

were appropriated in accordance with the provisions of the deed of covenant, by which it was agreed that 605 fully paid-up shares should be "allotted at the request of the contractor to persons to whom he was under liability in respect of the preliminary expenses, being certain of the shares for which the memorandum and articles of association of the company had been signed," and the other 3395 shares were to be allotted to Mr. *Even* himself "in respect of works already done and expenses incurred by the contractor in addition to the expenses satisfied by the 605 shares."

On the 3rd of October, 1865, Mr. *Even* wrote to the secretary of the company, requesting him to make out shares in the names of nine persons, including *Dent*, to whom 100 shares were to be allotted, and *Forbes*, to whom fifty shares were to be allotted, and added, "Hereafter I will inform you how I wish the remaining shares to be prepared so as to complete the 4000 shares."

The shares were accordingly entered in the share register in the names of the persons mentioned, as fully paid-up shares. There was evidence that *Forbes* acted as a director of the company.

The company was ordered to be wound up on the 22nd of April, 1870, and the official liquidator, among others, settled *Dent* on the list for 100 shares and *Forbes* for fifty. He afterwards took out a summons for a call of £3 on each share on all the contributories.

DENT'S CASE.

DENT filed an affidavit in opposition to the summons, in which he stated that it was part of the original agreement upon the formation of the company that his 100 shares should be fully paid up; that he signed the memorandum of association upon the faith and in consideration of having the shares allotted to him as fully paid up; that no prospectus of the company was ever issued; that the company was never advertised to the public; that no shares were ever subscribed for by the public; and that the whole of the shares allotted were allotted as fully paid up.

The Lord Justice, sitting for Vice-Chancellor *Wickens*, was of opinion that *Dent's* name was rightly placed on the list of contri-

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butories, and that he must pay the call. *Dent* appealed from this decision.

Mr. *Lindley*, Q.C., and Mr. *Marten*, for the Appellant :—

The *Companies Act*, 1867 (31 & 32 Vict. c. 131, s. 25), does not apply to this case, the company having been formed in 1865. Therefore it was perfectly competent to the directors to issue paid-up shares. The 5th clause in the articles is conclusive as to the right of *Dent* to have his shares fully paid up. The memorandum and articles were registered on the same day, and were part of one transaction, and must be construed together. The articles embodied the agreement which had been previously entered into with *Even*, and the evidence shews that the shares which *Dent* subscribed for were part of those which had been appropriated to *Even*, as part of the bargain with him, as fully paid-up shares. The transaction was not concealed from the public. The agreement with *Even* appeared upon the articles, so that no creditors could be misled: *Lord Londesborough's Case* (1); *Felgate's Case* (2); *In re Baglan Hall Colliery Company* (3); *Drummond's Case* (4); *Pell's Case* (5); *Jones' Case* (6).

Mr. *Dickinson*, Q.C., and Mr. *Cracknall*, for the official liquidator, were not called on.

FORBES' CASE.

FORBES stated in his affidavit that he was asked by Mr. *Even* to become a director of the company, as he was anxious to secure his services in ascertaining the value of the property in *Austria;* that he had declined to subscribe any money for shares, and that then Mr. *Even* had promised that, in return for services to be rendered by *Forbes* in inquiring into the undertaking, he would provide his qualification as a director out of the fully paid-up shares which were to be issued in part payment of the cost of the concession and

(1) 4 D. M. & G. 411.
(2) 2 D. J. & S. 456.
(3) Law Rep. 5 Ch. 346.
(4) Law Rep. 4 Ch. 772.
(5) Ibid. 5 Ch. 11.
(6) Ibid. 6 Ch. 48.

the works executed; that he agreed to these terms, and went to *Austria* and made inquiries respecting the undertaking, and was satisfied that the undertaking would be remunerative. The Lord Justice, however, held that he was also liable to pay the call, and he appealed from this decision.

Mr. *Morgan*, Q.C., and Mr. *Rigby*, for the Appellant:—

This case stands on a different footing from the last. *Forbes* did not sign the memorandum of association. *Even* gave good consideration for the fully paid-up shares to the company, and *Forbes* gave good consideration to *Even*. Therefore, even if *Forbes* was bound to have fifty shares as the qualification of a director, he had them. But we contend that it was not necessary that those who were named as directors in the articles of association should have a qualification. The 57th clause only applies to those subsequently elected. "Eligible" means capable of being elected in future: *Marquis of Abercorn's Case* (1); *Tothill's Case* (2); *Stock's Case* (3); *Lord Claud Hamilton's Case* (4).

Mr. *Dickinson*, Q.C., and Mr. *Cracknall*, for the official liquidator:—

The shares held by *Forbes* cannot be treated as being part of those appropriated to *Even*, for they could not have been transferred to *Forbes* except in the way pointed out by the articles, namely, by deed. *Forbes* acted as director, and held himself out to the public as such. It was clearly intended by the 57th clause that all directors should qualify themselves; the words "other qualified persons" in the 59th clause are a proof of this. Paid-up shares could not form a qualification: *Levita's Case* (5); *Kincaid's Case* (6); *Currie's Case* (7).

LORD SELBORNE, L.C., gave judgment in both cases as follows:—

I am clearly of opinion that Mr. *Forbes* ought not to be held liable to pay this call. As a matter of fact, he never had any

(1) 4 D. F. & J. 78. (4) Law Rep. 8 Ch. 548
(2) Law Rep. 1 Ch. 85. (5) Ibid. 3 Ch. 36.
(3) 4 D. J. & S. 426. (6) Ibid. 11 Eq. 192.
(7) 3 D. J. & S. 367.

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shares except a certain number of *Even's* shares, which were credited to him as fully paid-up, for work and labour on behalf of the company. It is said that they were not transferred by deed according to the 19th clause of the articles of association. But that clause was never intended to apply to the acceptance of an allotment of shares appropriated to another person by the consent of both parties.

The letter from Mr. *Even* of the 3rd of October, 1865, appears to me quite conclusive that the shares allotted to Mr. *Forbes* were some of Mr. *Even's* shares; for by that letter he requests that shares may be made out to certain persons, and to *Forbes* among them, and then adds: "Hereafter I will inform you how I wish the remaining shares to be prepared so as to complete the 4000 shares;" and it is also conclusive that these shares were some of those which were to be allotted to *Even* in part performance of the contract with him. The only question, therefore, is, whether *Even* is entitled to treat the shares appropriated to him as fully paid-up shares. As the agreement with *Even* was before the passing of the Act of 1867, and therefore no objection can arise with respect to that Act, I am of opinion that *Even* was entitled to take the shares as fully paid up, because he had given *bonâ fide* consideration for them, just as if he had paid up the full amount of £20 on each share.

Then it is said that on the very same day when these shares were allotted to Mr. *Forbes* he attended a board of directors, and so must be taken to have accepted the fifty ordinary shares necessary for the qualification of a director. But before *Forbes* had done anything in the matter he had been nominated by the articles an original director of the company, to hold office until the first general meeting. Therefore he was a director by force of the articles of association, and even if he had been required afterwards to take fifty shares as a qualification, he would have been entitled to reasonable time wherein to take them. But I am of opinion that, according to the strict construction of the articles, he was not required to take any shares as a qualification at all. The 57th clause of the articles of association cannot mean that those who are already appointed directors should take a qualification. The word "eligible" must mean capable of being elected at some future

election; and *Stock's Case* (1) is a direct authority that such a clause does not impose the duty of obtaining a qualification on a person appointed by the articles. The argument drawn from the words "or any other qualified person" in the 59th clause, appears to me equally groundless, for those words must mean that any other person besides those named must be a fully qualified person.

The 66th clause does not affect the question; it must be read in connection with the former clause. If a director is named in the articles, and never had a qualification, he cannot be said to cease to hold it. I think, therefore, that Mr. *Forbes* must succeed in his appeal.

I regret that the case was decided in Chambers, and was not argued in Court, and that we are not informed of the grounds upon which the learned Judge founded his opinion. My own experience is that the Judge has a far better opportunity of forming a correct opinion in Court than in Chambers.

As to *Dent's Case*, the circumstances are very different.

Dent subscribed the memorandum, and the *Companies Act*, 1862, speaks of things which must be done, if they are done at all, by the memorandum of association, and which cannot be altered afterwards. One of these things, which is indeed one of the principal objects of the memorandum of association, is that mentioned in the 7th section, which says that by the memorandum of association the amount for which each shareholder is to be liable may be limited. We must not forget the important change made by the Act which introduced limited liability. Before that Act, partners in a trading partnership could not prescribe a limit to their liability. In favour of the shareholders, the Legislature permitted a limit to be placed on the liability, but it prescribed the means by which alone this could be done, and those means must be exactly adhered to; and the Act expressly says that it must be done by the memorandum of association.

Then the 23rd section of the Act provides, that any subscriber of the memorandum shall be deemed to have agreed to become a member of the company, and shall be entered as a member on the register; and the 38th section provides, that the members of the company shall be liable for no more than the unpaid portion of

(1) 4 D. J. & S. 426.

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their shares. All these provisions have reference to the memorandum by which the shares are to be limited. In the present case, the memorandum mentions the limit of the shares; and the effect of a person subscribing the memorandum was to make him liable for £20 on each share, and in some way or other he must pay it. That was laid down expressly in the case decided by Lord Justice *Giffard, In re Baglan Hall Colliery Company* (1), who said that if there were in that respect a contradiction between the articles and the memorandum, the articles must give way. But the Lord Justice truly said, that it is no contradiction if, by the memorandum, the amount of liability is ascertained, and the articles contain a contract as to the mode, being a *bonâ fide* mode, of satisfying that liability. It is only a question of payment. Any honest mode of payment by money's worth is as good as a payment in money.

Then the 12th section of the Act provides, that the conditions contained in the memorandum of association may be modified to a limited extent, if the articles authorize it. But that could only be done (I am speaking of the law as it stood at the time when the question in this case arose) by the increase of capital or the consolidation or division of stock; and then the clause goes on: "but save as aforesaid, and save as hereinafter provided in the case of a change of name, no alteration shall be made by any company in the conditions contained in its memorandum of association." It is quite certain, that under that clause, if there be found anything in the articles limiting the liability of the shareholders in a way inconsistent with the memorandum—anything tending to reduce the liability of the shareholders thereby prescribed—it is simply void. In the present case, there is an express provision in the articles, that all the subscribers of the memorandum, without any exception, should have those shares allotted to them as paid up shares. Now, if it had been shewn that this was founded on anything equivalent to actual payment, I should have been willing to give effect to it in accordance with the case which I have referred to; but I can find no trace of anything of the kind. The previous agreements between *Even* and the company are all before the Court, and I find that in the particular agreement referred to, which is dated

(1) Law Rep. 5 Ch. 346.

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the 19th of September, 1865, certain persons who are subscribers to the memorandum of association, being creditors of the contractor for work and labour done, or money advanced for preliminary expenses in respect of which he had a claim upon the company, are to be paid what is due from him to them in paid-up shares of the company; and I do not say that the Court would not give effect to such an arrangement. I must not be understood as deciding, to the prejudice of any of those persons, that if they were really creditors of the contractor for matters for which he was entitled to be paid by the company, they might not receive under those documents their payment in paid-up shares, and have those shares attributed to their subscription to the memorandum of association: the effect being, to discharge the company from an equivalent amount of debt, due from the company to the contractor. I think that *In re Baglan Hall Colliery Company* (1) and *Drummond's Case* (2) would at least warrant an argument that the agreement was a valid one, provided there was that consideration for it. But *Dent* was not one of those persons. He was not a creditor either of the company or of *Even;* and although *Even* wrote to the secretary, desiring that 100 shares should be put into *Dent's* name, yet I find nothing in the antecedent transactions which shews that the company was a party to any arrangement that the shares for which *Dent* subscribed the memorandum of association were to be paid up by means of the appropriation of any part of the shares which *Even* received in payment of his debt from the company. It is exactly the state of things which the full Court had before it in *Fothergill's Case* (3). The observations which I made in that case will fully apply to the present. I then held that where a man, by subscribing the memorandum of association, contracts a liability to pay to the company the full amount of his shares, and by another contract agrees to receive a certain number of paid-up shares, so that he is to have two sets of shares, one on which he is to be liable, and one on which he is not to be liable, he cannot extinguish his liability on the shares for which he has subscribed by setting off

17 Eq 476

(1) Law Rep. 5 Ch. 346. (2) Law Rep. 4 Ch. 772.
(3) Law Rep. 8 Ch. 270.

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against it that which, although it might be valuable to him, would not increase the capital of the company, and cannot therefore be assumed to be an equivalent, in money's worth, to the payment of his shares. In the present case there is no evidence of the company having acceded to anything beyond what appears on the face of the documents.

I think, therefore, the Lord Justice was right in his decision, and *Dent's* appeal must be dismissed with costs.

Solicitor for the Official Liquidator: Mr. *T. E. Watkin.*
Solicitor for Mr. *Forbes:* Mr. *T. H. Williams.*
Solicitors for Mr. *Dent:* Messrs. *Thomas & Hollams.*

L. C. and L. JJ. 1873 *June* 4, 5.

NOBLE *v.* WILLOCK.

[1871 N. 45.]

*Will of Married Woman—Separate Estate—Appointment—Death of Husband—Assent—After-acquired Property—*1 *Vict. c.* 26, *ss.* 8, 24.

A married woman having separate estate, and having under her marriage settlement a power of appointment in the event of her dying in the lifetime of her husband, made a will with the assent of her husband, and survived her husband:—

Held, that though the will passed the separate estate, it did not execute the power of appointment, nor pass property acquired by the wife after the death of her husband:

Held, that the death of a husband operates as a revocation of his assent to the will of his wife.

Decree of *Bacon*, V.C., reversed.

Observations on *Noble* v. *Phelps* (1).

BY a settlement dated the 17th of April, 1827, made on the marriage of *Maria Dawes*, then *Maria Noble*, with *Henry Dawes*, two sums of £4000 and £10,300, to which *Maria Noble* was then entitled, were assigned to trustees upon trust to pay the income to *Henry Dawes* for life, and after his death to pay *Maria Noble* the income during her life, and from and after the decease of the

(1) Law Rep. 2 P. & D. 276.

survivor to hold the same upon certain trusts for the children of the marriage; and in case there should be no child of the marriage who should attain a vested interest, then "upon trust for the said *Maria Noble*, her executors and administrators, in case she shall survive the said *Henry Dawes*, her intended husband; but if she shall die in his lifetime, then, from and after the decease of the said *Henry Dawes*, upon trust for such person or persons . . . as she the said *Maria Noble*, notwithstanding her coverture, by her last will and testament in writing, or any writing in the nature of or purporting to be her last will and testament, or any codicil or codicils thereto, to be signed and published by her in the presence of two or more credible witnesses, shall at any time or times after the solemnization of the said intended marriage direct or appoint;" and in default of appointment, after the death of *Henry Dawes*, for the next of kin of *Maria Dawes*, as if she had died intestate and unmarried, according to the *Statute of Distributions*.

There were no children of the marriage.

On the 18th of August, 1857, *Henry Dawes* made his will, whereby he devised and bequeathed all his real estate and personal estate to his wife *Maria Dawes*, and appointed her his sole executrix.

Maria Dawes by her will, dated the 20th of July, 1869, purported to dispose of a sum of £3822 11*s.* 11*d.* Consols which she had to her separate use, and she also, in exercise of the power given to her by the above stated settlement, and of every other power, appointed and bequeathed the above-mentioned sum of £14,300 (calling it £14,000). She also purported to devise certain real estate of which she was seised in fee, and her will contained the following clause:—"And as to all the residue of any real and personal estate which I shall possess or have power to dispose of at the time of my decease, I appoint, devise, and bequeath the same, subject as aforesaid, unto my said niece *Maria Willock*, spinster, for her absolute use and benefit;" and she appointed *Maria Willock* and *William Phelps* executrix and executor of her will.

On the 17th of November, 1869, *Henry Dawes* died.

On the 2nd of January, 1870, *Maria Dawes*, his widow, died, before probate of her husband's will was completed; and never having re-executed her own will.

L. C. and L. JJ.
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NOBLE v. WILLOCK.

Soon after Mrs. *Dawes*' death, her executrix and executor propounded her will for probate, but a *caveat* was entered by *William Noble*, one of the next of kin.

The cause as to the probate came on to be heard before Lord *Penzance*, the Judge Ordinary, when it was found, as the result of the evidence, that the sum of £3822 11*s.* 11*d.* Consols mentioned in the will was the separate property of *Maria Dawes;* that *Henry Dawes* her husband "assented to her making a will and knew that she had made a will, which will is the will in question;" that it was not proved that *Henry Dawes* "knew the contents of the said will;" that *Maria Dawes* after she became a widow "intended to adhere to the said will, and intended that the same should operate and have effect as her last will and testament."

The Judge Ordinary thereupon decreed probate of the will of Mrs. *Dawes* to *Maria Willock* and *William Phelps*, "limited to the administration of all such personal estate and effects as she the said deceased by virtue of the powers and authorities, if any, given to and vested in her by the aforesaid indenture of settlement, or by virtue of all and every other powers and authorities, or by virtue of any law or statute her in any way enabling, had power to appoint or dispose of by her will, and has in and by her said will appointed or disposed of accordingly, but not further or otherwise." The case is reported: *Noble* v. *Phelps* (1).

The bill in this suit was then filed by *William Noble* and four others, being five of the next of kin of the testatrix, against *Maria Willock*, the executrix and residuary legatee under the will of *William Phelps*, who was executor of the will, and also a trustee of the marriage settlement, *Richard Gosling*, the co-trustee of the settlement, and others, praying a declaration that the personal estate of *Maria Dawes* (except the £3822 11*s.* 11*d.* Consols.) was not well disposed of by her will, and went to the persons entitled thereto under the *Statute of Distributions*, and that the £14,300 settled by the said indenture of settlement was not well or effectually appointed by the will of *Maria Dawes*, and was now divisible amongst the persons aforesaid; and praying the usual accounts of the personal estate of *Maria Dawes*.

(1) Law Rep. 2 P. & D. 276.

The Vice-Chancellor *Bacon* dismissed the bill, holding that the £14,300 and all the personal estate to which Mrs. *Dawes* was at her death entitled passed by her will (1).

(1) 1873. Jan. 30. WM(18)73)28

SIR JAMES BACON, V.C., after stating the facts of the case, continued:—

The case has been argued at great length, and with much learning and ability on both sides, and many cases under the law as it existed previously to the year 1838 were referred to for the purpose of establishing the proposition, that a married woman was incapable of making a valid will, except so far as such will might relate to her separate estate, or property over which she had express power, during coverture, of appointing; and although it was admitted that the assent of the husband might give validity to any will of personalty made by a wife during coverture, yet it was insisted that such assent could only operate so to affect the marital right in such personal estate, and, therefore, that the husband's assent ceased to have any effect if he should happen to die in the wife's lifetime; and further that he might at any time revoke such assent. Several of the cases, and all the text-books, from *Swinburne* downwards, furnish some ground for these propositions. I have, however, not found any instance in which it has been judicially decided that the assent of the husband to a will in fact made by the wife, once given, could be afterwards revoked, so as to make such a will a nullity. Upon these grounds, however, it was argued that the husband's assent was, in this case, to be disregarded. Among the cases referred to and relied upon by the Plaintiffs was *Scammell* v. *Wilkinson* (2 East, 552) and a case relating to the same will, though in a somewhat different shape, *Stevens* v. *Bagwell* (15 Ves. 139); and as these authorities are claimed on both sides as decisions in favour of each, it becomes necessary to give particular consideration to them, and not the less so because a superficial reading of the cases may possibly give rise to misconception:—[His Honour then stated the facts of these cases.]

It will be seen that there were three distinct subjects which, according to its tenor, were comprised in the will of the testatrix. There was, first, the general residue of all such estate and effects as her husband was empowered to bequeath and had bequeathed in her favour; there was, secondly, the interest derived under her brother Lieutenant *Stevens*' will; and, thirdly, the general residue of all the estate and effects of which she died possessed. It was decided in both the cases, although that which was ultimately disposed of in the Court of Chancery is more pointed and distinct in its details than that which had occurred in the Common Law Court, that what her husband was able to bequeath to her was effectually bequeathed by him, and passed by her will, to which he had assented; that to the beneficial interest to which she was entitled under her brother's will, in so far as it had not been reduced into possession by the husband, his assent had no application, and that without such assent she had power to appoint by her will a representative to the estate of her brother, as she had done; and that, as to the third description of property, being such as he had no interest in, she could derive no power from him, and that as to this her will was to be regarded as that of a *feme covert*, and was therefore inoperative.

These cases, therefore, appear to me

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The Plaintiffs appealed.

The *Solicitor-General* (Sir *G. Jessel*), and Mr. *Amphlett*, Q.C. (Mr. *Bevir* with them), for the Plaintiffs:—

We say that the will is inoperative as to everything but the estate which she had to her separate use. Even if the husband

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to establish this: that the assent of a husband to the will of his wife is not wholly revoked or annulled by the accident of the husband's death in the lifetime of the wife after the making of a will by her during the coverture. I perceive that in the present case it is found as a conclusion of fact, upon which the probate is granted, that "the husband of the testatrix assented to her making a will, and knew that she had made a will, which is the will in question." It remains to be considered what is the effect of the *Wills Act* on such an instrument.

Two other cases were relied upon by the Plaintiffs—*Price* v. *Parker* (16 Sim. 198) and *Trimmell* v. *Fell* (16 Beav. 537), but they have not, I think, any direct application to the question before me. In the first case the wife had power under a settlement to appoint by will, in case she should die during coverture, the fund which, in case the husband should die first, was hers absolutely. During the coverture she made a will in exercise of the power, and by the death of her husband became absolutely entitled to the fund. A probate had been granted, limited to such personal estate as by the settlement the wife had power to dispose of, and had disposed of. The Vice-Chancellor decided that the Ecclesiastical Court had no authority to grant probate of the will to operate as a will only, independently of the power; for it was executed by a lady during her coverture, and, referring to the 24th section of the *Wills Act* His Honour said, "The effect of that is not to make that valid which was invalid in its inception, but to give a rule for the construction of a valid testamentary instrument. The event which happened left no power in the lady for execution, but left the property in her." The case before the Master of the Rolls arose under similar circumstances, and the decision in *Price* v. *Parker* was adopted for the same reasons. Of these cases I say no more than that they do not appear to me to apply to the present question. The judgment of the Vice-Chancellor is expressed to be founded on the terms of the limited probate, and there was no suggestion there of any marital assent which could confer a testamentary capacity on the wife.

The Defendants rest their case mainly upon the construction of the *Wills Act*; and they support the conclusion they draw by the exposition which that Act has received upon two recent occasions to which I will presently refer. But, first, it appears to me necessary to consider the scope and operation of that statute, by which alone, as I conceive, the question before me is to be determined.

It may be properly said that no piece of modern legislation has been framed with greater knowledge, deliberation, and care—by persons most competent to the task—than this statute. The reports of the Real Property Commissioners, the bills which had been previously submitted to Parliament, the lengthened discussions they had

assented, his death revoked the assent. But he cannot be held to have assented when he did not know the terms of the will. To make his assent effectual, it must be an assent to the actual dis-

undergone, shew that public attention as well as consummate legal knowledge had been drawn to a subject of the utmost importance and interest to the whole community. Being completed in the shape in which it now stands, it was generally, and as appears justly, believed to constitute a full and sufficient code of the law testamentary. It begins by defining "a will," and declares (sect. 1) that that expression "shall extend to a testament, and to a codicil, and to an appointment by will or by writing in the nature of a will in exercise of a power," and enacts (sect. 3) that "it shall be lawful for every person to devise, bequeath, or dispose of, by his will . . . all real estate, and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which if not so devised, bequeathed, or disposed of, would devolve upon" his heir, or his executor or administrator; and (sect. 1) it is further enacted that "every word importing the masculine gender only shall extend and be applied to a female as well as to a male."

Then by the 7th section the wills of infants are declared to be invalid; and by the 8th section, upon which the present question mainly turns, it is enacted that "no will made by any married woman shall be valid, except such a will as might have been made by a married woman before the passing of this Act."

After other provisions not necessary to be here referred to, the 24th section introduces a new law, which is of the most useful kind, and which had become almost necessary, having regard to the embarrassing state of the law before it was relieved of the doubts and conflicts and incumbrances to which it had been for centuries exposed. The 24th section enacts that "every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

The contention, then, between the parties is reduced to the construction of the clauses which I have referred to in the *Wills Act*. It is said on the part of the Plaintiffs, and I think correctly, that the statute does not in any respect add to or increase the testamentary capacity which a woman under coverture possessed before the statute. Then what was the testamentary capacity? The statute of *Henry* VIII. prevented her from disposing of her real estate by will. The law prohibited her from disposing of her personal estate (except as I have before mentioned) without the assent of her husband—the foundation and reason of such law being that the husband's marital rights extended over and comprehended all such personal estate. That this disability might be removed by the assent of the husband is the law, established not only by the authorities which have been referred to, but by the very reasons on which the prohibitory law is founded; and it cannot, I think, be properly suggested that the law was made for the benefit in all cases of the next of kin of women who, having been married, should die *discovert* without having made a new testamentary disposition. The cases of

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positions of the will. Lord *Penzance* seems to have been of opinion that the effect of the *Wills Act* is to make the will operate on everything which the testatrix possessed at her death; but we say that it only operated on the property which she had to her

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Scammell v. *Wilkinson* (2 East, 552) and *Stevens* v. *Bagwell* (15 Ves. 159) are instances in which the validity of the will of a married woman, made with her husband's assent, was established (although she had survived him), so far as her rights existing at the date of the will were concerned; and it was held to be inoperative only as to the property she afterwards acquired. But if the 24th section of the *Wills Act* had been then the law, that will, which was held to be valid as a disposition of the husband's property, because of his assent, by which a testamentary capacity was conferred on a *feme covert*, must have been held to be valid in its entirety, and not inoperative as to property afterwards acquired by the testatrix. That the assent of the husband of this testatrix was given to the will which she made, I take to be clearly established as a fact; and this being so, I cannot hesitate to conclude that, within the very words of the 8th section of the statute, the testatrix was of full testamentary capacity when she made her will, and that she thereby made "such a will as might have been made by a married woman before the passing of this Act." It cannot be successfully contended that, because, by the happening of subsequent accidents, that will comprehends larger interests or more extensive property than the testatrix was possessed of at the date of her will, its validity can be impeached or its effect abridged. For the statute in most distinct terms provides against such accidents, and having (sect. 1) defined "a will," and having enacted (sect. 3) what shall be its operation, it enacts (sect. 24) that it shall take effect as to all the real and personal estate comprised in it as if it had been executed immediately before the death of the testator.

The construction of the statute, and most expressly of those parts of it which apply to the case before me, has been expounded with great force and clearness by the very learned judges the Vice-Chancellor *Wood* and Lord *Westbury*, by whom the case of *Thomas* v. *Jones* (2 J. & H. 475; 1 D. J. & S. 63) was decided. [His Honour then read that portion of the judgment of the Vice-Chancellor *Wood* which is given below in the judgment of the Lord Chancellor.]

The judgments delivered in that case would have been entitled to the greatest weight if they had been merely the gratuitous exposition by the eminent Judges who uttered them of this general statute; but, containing as they do distinct decisions upon the subject which is involved in this case, I am not only fortified in the conclusion I have drawn, but I am bound, not unwillingly, to adopt them as clear declarations of the law upon a subject of considerable nicety, and of still greater public interest and importance.

Unless, therefore, I am to disregard the very words of the statute as well as that construction which has been judicially pronounced upon those words, I cannot doubt that the will of this testatrix is in all respects valid, and is operative, according to its tenor, to pass the whole of her personal estate. The Plaintiffs, therefore, cannot sustain the suit, and the bill must be dismissed.

separate use. The testamentary capacity of a married woman is quite different from that of an unmarried woman, and the will of one cannot be made to operate as the will of the other. No doubt she could under the *Wills Act* exercise a general power of appointment; and no doubt before the Act she might by parol have re-published her will, but she could not now by parol re-publish her will. The order of the Probate Court decides nothing and leaves the question open. It is clear that the assent of the husband only enured to her own property, if any, not to that which she afterwards acquired. *Stevens* v. *Bagwell* (1) was a very peculiar case, and does not justify the conclusions which have been drawn from it. *Price* v. *Parker* (2) merely decides that the 24th section of the *Wills Act* does not make that valid which was invalid. The law as to a married woman's will is shewn in *Sugden* on Wills (3); *Sheppard's* Touchstone (4); *Swinburne* on Wills (5). In *Williams* on Executors (6) it is treated as unquestionable. So also in *Roper's* Husband and Wife (7). *Scammell* v. *Wilkinson* (8) was a clear case. In *Thomas* v. *Jones* (9) it was considered that such a will would not be valid; and so it was held, on appeal (10). The form usually employed in framing settlements is bad, the first power should be to appoint by will. *Trimmell* v. *Fell* (11) is very similar.

Mr. *Kay*, Q.C., for *Maria Willock*:—

The first question is as to the power of a married woman to make a will. She was expressly disabled as to lands by 34 & 35 Hen. 8, c. 5, s. 14. She could always appoint, and in after times the doctrine of separate estate arose; as to such estate she could make a will which would in a Court of Equity be valid; then the Ecclesiastical Courts following Equity, granted probate of such a will. She was never under any personal incapacity or inability to make a will of personalty, and the only reason why she could not make a valid will was that there was nothing on which it could ope-

(1) 15 Ves. 139.
(2) 16 Sim. 198.
(3) Page 8.
(4) Page 403.
(5) Vol. i. p. 2, § 9, pl. 8.
(6) Page 53, 6th Ed.
(7) Vol. i. p. 170.
(8) 2 East, 552.
(9) 2 J. & H. 475.
(10) 1 D. J. & S. 63.
(11) 16 Beav. 537.

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rate. The moment she had a power or property she could make a valid will. *Morwan* v. *Thompson* (1) is a distinct authority that the will of a married woman is not revoked by the death of her husband, and would pass whatever she could bequeath. *Dingwell* v. *Askew* (2) and *Stone* v. *Forsyth* (3) shew what the law is as to wills made under powers. Before the *Wills Act* no will would operate in execution of a power which only came to the testator after the will was made, but now a general disposition operates on everything, whether the will is made by a man or by a woman. The will is clearly valid as to the separate estate, and the 24th section makes it valid as to everything which she had power to dispose of at her death. The will is valid, and has been admitted to probate; there is no reason for holding it revoked by the death of the husband, and no reason for stopping the operation of the statute.

Mr. *Wills*, Q.C., on the same side:—

The 8th section of the *Wills Act* refers to the validity of the will and not to that of the dispositions under it. A will may be divisible as to its operation, but not as to the capacity of the testator, and if it is a valid will it must be allowed its full operation.

There was always a distinction between any actual incapacity of a married woman to make any will and her incapacity simply because she had nothing to dispose of. Her power of appointing an executor is a mere arbitrary exception, admitted perhaps by accident. If a man by his will purports to dispose of property which is not his, and he afterwards acquires that property, it passes by his will. As to real estate, she was always actually incapable of making a will, and by the *Wills Act* she is left in the same position.

Mr. *Watson*, with them.

Mr. *Eddis*, Q.C., and Mr. *Shebbeare*, for the executors of Mrs. *Dawes*' will.

(1) 3 Hagg. Ecc. 239. (2) 1 Cox, 427.
(3) 2 Doug. 707.

LORD SELBORNE, L.C.:—

This case has been very fully and ably argued, and I do not think that our judgment could be affected by anything to be further said on the matter.

The effect of a married woman's will as to her separate estate, as I have understood the law, always was the same as if she had not been married. The effect of the doctrine of separate estate was to remove to the full extent to which it prevailed the disability of coverture, and that disability being removed, there was not, as far as I know, any technical difference whatever between the will of a married woman and the will of an unmarried woman with respect either to the construction or to the operation of the will on the matter which it would embrace. Of course, as to real estate, before the *Wills Act*, it was subject to the same limitation as the will of an unmarried woman would be subject to, that is, that it could not pass after-acquired real estate; but there was no limitation as to the separate estate depending in any manner on coverture. So with respect to powers, if the married woman had a power, the rules, as I understand the matter, applicable to a will purporting to deal with property by virtue of a power were the same in the case of a married woman as in the case of an unmarried woman, so that the whole doctrine of disability by coverture was entirely eliminated from questions liable to arise as to the wills of married women, so far as concerned their separate estate, and so far as the wills operated under powers.

That being so, the *Wills Act* (1 Vict. c. 26) was passed; and that Act by the 8th section expressly says, "That no will made by any married woman shall be valid, except such a will as might have been made by a married woman before the passing of this Act;" there being a very similar provision as to an infant in the preceding section. That section appears to leave the whole question of a married woman's will as such—of its validity and of its operation, so far as the effect of marriage is concerned—exactly as if the Act had not passed. It applies only to the effect of marriage on the testamentary capacity and the power of making a will. If she would before the Act have had power, she is still to have the same power. If and so far as, by reason of marriage, she would not before the Act have had power, the Act is to give her no

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power, and no enlargement or extension of her former power. But with respect to all those subjects on which the will of a married woman could have operated before the Act, as to which coverture or marriage produced no disability, there her will, like every other will, is regulated by the Act, both as to the ceremonies necessary to make it a will, and as to other matters. Her testamentary capacity, as a married woman, is neither greater nor less than it was before the passing of the Act.

The effect of the 24th section is this: It enlarges the subject-matter upon which any one having testamentary capacity could operate by a will executed at a certain time. As to real estate it gives the same power of dealing prospectively therewith as previously existed with respect to personal estate. A married woman as to her separate property could previously by law deal prospectively with her personal estate. She could not so deal with her real estate, not because she was a married woman, but because no one could. This 24th section enlarges her power as a married woman over those subjects over which she, as a married woman, might have power of disposition, in exactly the same way, and not otherwise, as it enlarges the power of a man or of an unmarried woman; but in order to give her that power it must be real estate which she as a married woman could dispose of by her will. It enables her to do this prospectively, but still it must be only such real estate as she, continuing a married woman, could dispose of. The same section, as to some specific descriptions of personal estate, lays down a rule of construction which will carry on the description to the time of the death. That is an operation which, being wholly independent of the effect of the coverture, will be the same with respect to the will of a married woman within her power, as with respect to the will of any other person. In like manner the 27th section abolishes the merely technical distinction between property and power, and would give to the will of a married woman having a general power, which she could execute though a married woman, and as to which coverture may be immaterial, the effect of passing it by the same form of words as if it were her own property.

But those sections, read with the 8th, in no degree tend to bring under the testamentary power of a married woman anything which

down to and at the time of her death would not, without them, have been within that testamentary power if she died married. If, by the previous state of the law, a will made by her during marriage could not operate on the property which was acquired by her or possessed by her after she became a widow, there is nothing that I can see in any of those sections in the least degree tending to diminish the effect of the 8th section, which appears expressly to say that the will shall not be valid except it be such as might have been made by her before the passing of the Act.

The argument on the other side, so far as it depends on the Act of Parliament, and not on the doctrine of the husband's assent, must really, to be consistent with itself, go the full length of saying that the 8th section only means, that a will which would have been wholly invalid—which would not have been entitled on any ground whatever to be admitted to probate, and which before the Act could pass nothing whatever—shall not be ratified by the Act; but that if there be any property whatsoever, however insignificant in point of amount, or any power over any property, however insignificant, as to which the married woman could make a will, then the whole operation of the 8th section is displaced, and everything else in the Act, from the 3rd section downwards, must be let in; and she will thus, though married, be able to dispose of property as to which she otherwise had no testamentary capacity. For such a construction I can see no reason whatsoever.

I shall presently consider whether there is any authority on the subject; but before doing that, it is proper to advert to that portion of the argument which depends on the husband's assent. If it were not for the manner in which the case has been viewed by the learned Vice-Chancellor, I own I should have thought that the construction of the statute could not in any way whatever be affected by the husband's assent, and that this case must be dealt with as if the husband had never assented at all.

What is the doctrine of law as to the husband's assent? As I understand all the authorities and all the cases, it means neither more nor less than this, that, as to all the property of the wife of which the husband is purchaser, which, if reduced into possession during the marriage, becomes by law his, and which, if it remains not reduced into possession when the marriage is dissolved

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by the wife's death, becomes also by law his (subject indeed to the necessity of taking out administration to the wife); as to all this property, vested in him in his marital right, he may, if he pleases, waive his right, and so waive it as to give effect to a will made by his wife during the coverture in derogation of his marital right.

If that is, as I think all the authorities shew it to be, the principle as to the husband's assent to the will of the wife, these consequences of course will follow: that the husband is bound only by a conclusive assent, and such an assent as terminates his power of claiming the interest which the law gives to him. Accordingly we find in all or many of the authorities this proposition: that the husband has a *locus pœnitentiæ*, until he has either assented to probate of the wife's will being granted, or has in some manner acted upon the will. Moreover, all the authorities, as I understand them, also lay down this, that if the wife survives the husband, there is an end of any question of the husband's assent, because the husband's right to the wife's property ceases by his death, and the wife herself enters into the sole possession of all her property; and therefore the effect of the husband's assent is entirely at an end in case of his death during the lifetime of his wife. The whole doctrine of the husband's assent rests on a foundation which disappears when that event occurs.

I think that when the cases are examined they will be found, down to the present time, including the opinion delivered by Lord *Penzance* in the present case, to be uniformly consistent with this view of the law.

In the case of *Scammell* v. *Wilkinson* (1), and the same case in a later stage, reported under the name of *Stevens* v. *Bagwell* (2), the sole perplexity, if it can be so called, arose out of a matter which was never brought before the Court.

[His Lordship then stated the facts of that case as reported, and said that it was evident that the form of the probate granted assumed that the husband had given the wife a power to dispose of the residue of his estate, as distinct from the property in it, and her will was recognised as effectual for the execution of such a power. On the application for prohibition it was not disputed, but admitted expressly, that the husband had created a power; and the

(1) 2 East, 552. (2) 15 Ves. 139.

objection was confined to the revocation of that probate, with a view to the grant of a general probate. Whatever was said in the Court of Law, or afterwards in the Court of Chancery, as to the husband's estate, really was said on the footing of what was assumed or taken for granted, or perhaps voluntarily conceded, as between all parties, upon a point which all parties took care not to put into controversy, and not to bring forward for determination.

His Lordship therefore looked upon that case as deciding nothing whatever either as to the construction of the husband's will, or as to the result if it had been determined that according to the true construction of the will it did not give power, but passed the property to the wife. Laying that aside, as to everything else, the case was conclusive of the present question, so far as the subject of the husband's assent was concerned. The Vice-Chancellor *Bacon* seemed to have thought that the case of *Stevens* v. *Bagwell* (1) depended merely on the doctrine that subsequently acquired personal estate, that is, personal estate acquired after the determination of the coverture, could not be disposed of by a will made during coverture. But the case of *Stevens* v. *Bagwell* did not relate to after-acquired personal estate at all. It related to a share of the residue of the estate of a brother of the testatrix whose will had been made, and who had died, and under whose will she was executrix, during the coverture. The property in controversy was prize money, not made available to the brother's estate until some time after his death, and also after the death of the husband and wife; but Sir *W. Grant* decided that it was to be considered as if it had been actually a part of the brother's property at the time of his death. The consequence was that his residuary legatees, who died after him, but before the money was received, were entitled to it. The property, therefore, was not in possession, only because it could not be reduced into possession on account of its accidental position. It was like property in which the wife had an interest which was reversionary during the coverture, that reversionary interest not being settled to her separate use.]

Those cases determined, that the husband's assent does not

(1) 15 Ves. 139.

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operate in any degree on the wife's property after the husband's death. That opinion was also the opinion of Lord *Penzance* in the present case. He said, (I must own, on very slender evidence, if there was any evidence at all), that he thought the assent of the husband was made out. I will not go into that, because I entirely agree with what he went on to say (1): "It is needless to inquire how far this state of facts would have affected the validity of her will if he had survived her; for he died first, and this event appears to me, according to the authorities on this subject, to have extinguished once for all whatever support, authority, or efficacy his wife's will might have derived from his concurrence." To that I entirely agree; but there seems to be a variance between the opinion of Lord *Penzance* and the opinion of the Vice-Chancellor *Bacon*, to which variance I attribute the judgment of Vice-Chancellor *Bacon* in this present case. Vice-Chancellor *Bacon* seems to have thought that the effect of the husband's assent was, in some manner, which I do not think is very clearly explained in His Honour's judgment, to set up the wife's will, although she survived him, as to property in which she had not a separate estate, and over which she had no power;—in a manner in which it would not have been set up under the 8th clause of the *Wills Act*, if the husband had not assented.

I am bound to say that I agree with Lord *Penzance*, in holding that the husband's assent ought in the present case to be laid aside altogether as an entirely immaterial element. Being of that opinion, I doubt very much whether I am not entitled to suppose that the Vice-Chancellor, if he had taken the same view in that respect, would have concurred in the judgment, which is the judgment of my learned brothers as well as myself, that the *Wills Act* does not extend the operation of the will to the property over which she had not during coverture any testamentary power; because I find that the Vice-Chancellor says this: "It is said on the part of the Plaintiffs—and, I think, correctly—that the statute does not in any respect add to or increase the testamentary capacity which a woman under coverture possessed before the statute;"

(1) Law Rep. 2 P. & D. 282.

and His Honour only gets at the testamentary capacity for the purposes of the judgment by the aid of the doctrine of the husband's assent. He also cites from the judgment delivered by Lord *Hatherley*, in the case of *Thomas* v. *Jones* (1), this passage, in every word of which I entirely concur: "The true construction, I apprehend, of the 7th and 8th sections is, that the statute does not give capacity to those who have no testamentary capacity; but when persons have capacity to will, as in the case of married women, with a testamentary power, then you must deal with the will so made according to all the rules of construction which are laid down by the Act as to wills in general. That is the conclusion to which I come upon that part of the subject." Then he touches the question of power being afterwards acquired: "A man has no capacity to make a gift under a power before he has acquired it. Nevertheless, when a testator makes a general bequest, and afterwards acquires a power, that power takes effect by virtue of the general bequest, and the rule applies equally to a married woman. The construction I give to the 8th section is, that it disables a married woman from doing anything which before the passing of the Act she could not have done by reason of her coverture. It preserves the incapacity of coverture as it stood before the Act, but as regards any incapacity arising from matters independent of coverture, applicable to men and women alike, the statute was not intended to draw a distinction between married women and other persons."

I entirely subscribe to every word of that. Nor do I find in any part of the judgment of Lord *Westbury* on appeal in the same case (2) anything at all inconsistent with it. There, the woman died married, and, therefore, the question of her testamentary capacity, no one attempting to extend it to anything which she had not for her separate use, or subject to her general power, did not arise in any way at all. The sole question was whether, as to those subjects over which she had testamentary power as a married woman down to the time of her death, the will which she had made was or was not to be read according to the rule of construction laid down in the 24th and 27th sections. In

(1) 2 J. & H. 483. (2) 1 D. J. & S. 63.

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the present case, if the view, which undoubtedly received some degree of countenance from the extra-judicial opinion of Lord *Penzance*, were to prevail, the consequence would be that if a woman had a chain, or a necklace, or a single article of jewelry, as to which she could make a will, and used in her will general words of disposition as to all her property, then her real and personal estate of any magnitude whatever, although acquired after the cessation of the coverture, would pass by that will. In my opinion, that is inconsistent with the true effect and meaning of the 8th section of the Act, and, therefore, the present appeal must be allowed.

SIR W. M. JAMES, L.J. :—

I entirely concur in the judgment, and the reasons which the Lord Chancellor has given for that judgment. I have, during the argument of the case, wished, if it were possible, to find some ground for distinguishing the gift of the £14,300 over which she had power of testamentary appointment from the other property. She clearly had, under the settlement, power to dispose by will of that property. If she did dispose of it by will, the probability is she would have wished that will to be carried out. In fact, it was a testamentary power of appointment. The £14,300 did become part of her personal property, and, of course, an effectual will of that would not constitute a will of any other portion of the property.

SIR G. MELLISH, L.J. :—

I am entirely of the same opinion; and I should not have made any observation at all except for the large amount of property which is involved, and the extreme importance of the general question. It appears to me that the real and great question to be determined is, whether a married woman can make a will during her marriage which, if she survives her husband and becomes a widow, will operate upon the property of which she may die possessed. Neither of the learned counsel, Mr. *Kay* or Mr. *Wills*, as I have understood their argument, have gone to the full length of what I understand was the opinion of Lord *Penzance*. As I understand what he says, he did not confine his opinion to a case

where a married woman might happen, because she had property settled to her separate use, to have power to make a will, but he appears to have been of opinion that in all cases whatever, if a married woman made a will, that will would operate on property of which, if she became a widow, she might die possessed. As I understand his opinion, he thought that taking the 8th section and the 24th section together, and notwithstanding the words of the 8th section, the will of a married woman was, under the 24th section, to be read exactly as if it had been made immediately before her death. Of course if the will of a widow is read, although made when she is a married woman, as if it were made immediately before her death, it would then be the will of a person who had a full capacity to make a will, and would carry any property which she might bequeath by it. He puts the question: Does the will of a married woman, made during coverture, speak and take effect, with reference to the property comprised in it, as if it had been executed immediately before her death? Now certainly I should be far from saying that that would not have been a very reasonable thing to enact if the Legislature had enacted it, because, no doubt, it very often happens that the husband and the wife grow old together, they both become ill together at the same time almost, and possibly it might be a very convenient thing if a married woman might make a will anticipating the time when she should become a widow, and effectual in that event. After her husband's death she might be in a state practically incapable of making a will until she herself died.

In my opinion, the law has not gone to that extent. It is admitted on all hands that before the *Wills Act* she could not have made such a will, and the only question is whether the 24th section of the *Wills Act* gives her a power to make a will in that case. That really depends upon the construction of the 8th section, which, to my mind, must plainly apply to every will made by a married woman, whether she survives her husband or not, and whether she is a married woman or a widow at the time she dies; and it appears to me that the very plain construction of it is that she is to have the power of willing that property which she could will at the time of the passing of the Act, but is not to have the power of leaving by will any other property. The property which

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she had power to will at the time of the passing of the Act was property settled to her separate use, and property over which she had a right to make a will given under a power. Those properties she still can leave by her will, and as respects those properties all the sections of the Act will apply, but no other property could she will. She could not will her general property, whether it was her *choses in action* not reduced into possession at that time, or whether it was property of which she might afterwards become possessed as a widow; and in my opinion it is quite clear that this section does not give her power to will that.

Then, if that is clear, are we to adopt the distinction which has been so strongly contended for by Mr. *Kay* and Mr. *Wills*. Now, I must say, that although I think the construction which Lord *Penzance* put upon the Act, if it could have been got out of the Act, would have been a very sensible and reasonable construction, yet what has been contended for would be a most unreasonable construction, and so unreasonable that it appears to me very unlikely the Legislature could have intended it, because the contention is that if from the circumstance of a married woman having some property settled to her separate use, she could make a will of some kind, that then her will was to operate after she became a widow upon all property which she might die possessed of. Now, I cannot conceive the smallest reason for enacting that a married woman who happens to have some property settled to her separate use should have any greater power not over that property but over any other property which might afterwards come to her than any other married woman whatever. That would be a most senseless construction, and not a construction which we can suppose the Legislature could have intended, and I see no reason for saying that the 8th section should be so construed. It seems clear to me that the 8th section is to be construed as saying that what property she could leave before the Act she may leave subsequently to the Act, and all the sections of the Act are to apply to that property, but she is not to have any greater power of leaving property after the Act passes which she could not have left before the Act.

With respect to all the other questions I do not think it necessary to make any further remark.

As respects the ground upon which the Vice-Chancellor proceeded as to the fact of the husband having given his assent, I entirely agree with what has been said by the Lord Chancellor, and in the quotation which he has made from the judgment of Lord *Penzance*, and with the quotations from *Roper's* Husband and Wife (1), and from *Williams* on Executors (2), the decision of Sir *Cresswell Cresswell* in the case of *In re Smith* (3), and with all the old authorities, which seem to make it perfectly clear that whatever effect the assent of the husband of a married woman making a will may have, that effect is terminated by his death, and does not make the will in any degree operative after his death.

MINUTES :—Discharge the decree of the Vice-Chancellor.

Declare that the general personal estate of *Maria Dawes*, except the sum of £3822 11*s.* 11*d.* bonds, was not well disposed of by her will, and is now divisible amongst the persons entitled thereto under the *Statute of Distributions*.

Declare that the £14,300 was not well or effectually appointed by the will of *Maria Dawes*, and at her death formed part of her general personal estate, and as such was undisposed of by her will and passed to the persons entitled thereto under the *Statute of Distributions*. Usual accounts of the personal estate of *Maria Dawes*. Costs of all parties as between solicitor and client out of the estate.

Solicitors for the Plaintiffs: Messrs. *Routh & Stacey*.

Solicitors for the Defendants: Messrs. *Wilde, Berger, & Co.; W. H. Bennett*.

(1) Page 170. (2) Page 53, 6th Ed.
(3) 1 Sw. & Tr. 125, 127.

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BROPHY *v.* BELLAMY.

Trustees—Maintenance—Discretion.

Trustees were by will authorized, if they thought fit, to apply the income of shares to which children were presumptively entitled towards the maintenance of the children, notwithstanding the father of the children might be of sufficient ability to maintain them. A suit was instituted for the administration of the estate of the testator:—

Held, that the Court would not control the discretion of the trustees, and that, if they thought it fit that the income should be paid to the father for the maintenance of the children, an order would be made for payment accordingly.

NICHOLAS WINSLAND by his will devised the residue of his estate, real and personal, to three trustees, and directed the trustees, after the death of his wife, to stand possessed of that his residuary estate upon trust for all his children, in equal shares. But as to the share of each daughter, the trustees were to hold her presumptive share, and pay the income thereof to her during her life; and from and after the decease of such daughter, then—as for and concerning the principal or capital of the share of such daughter—in trust for the child or children of such deceased daughter, who being a son or sons should live to attain the age of twenty-one years, or being a daughter or daughters should live to attain that age or be married with the consent in writing of her or their guardian or guardians, which should first happen; and if there should be two or more such children as lastly mentioned, to be equally divided between or among them; and in case there should be only one such child, then in trust for such one child. And he directed that the trustees or trustee for the time being of that his will should in the meantime, after the decease of such daughter, pay or apply the annual income of the presumptive shares for the time being of her children respectively not then entitled to a vested interest in the said trust premises, or so much of such annual income as such trustees or trustee should think proper for or towards the maintenance and education of such

children, until their respective shares should become vested, or they should respectively previously die; and such annual income might be so applied as last aforesaid, if such trustees or trustee should think fit, notwithstanding the father of such children might be living, and of sufficient ability to maintain and educate them without the aid of such annual income. And the will contained gifts over in the event of there being no such children.

The testator died in 1846, leaving three children, one of whom died an infant, and took no interest under his will. Another daughter, after the death of the testator, married Mr. *Hannen* (afterwards Sir *J. Hannen*), and died in 1872, leaving six children, one of whom, *J. C. Hannen*, had attained the age of twenty-one years.

A suit was, in 1849, instituted for the administration of the estate of the testator, in which suit part of the residuary estate was sold and the proceeds were brought into Court.

A Petition in the suit was now presented by the two surviving trustees, praying (amongst other things) that one-sixth of one moiety of the fund might be paid to *J. C. Hannen;* and that the income of the remaining five-sixths might be paid to Sir *J. Hannen*, he undertaking to apply the same for the benefit of his infant children. The trustees stated that they considered it proper, and for the benefit of the children, so to apply the income.

The Lord Chancellor, before whom, sitting for the Master of the Rolls, the Petition came on for hearing, doubted whether the discretion of the trustees was not put an end to by the suit; and he wished the Petition, so far as it related to the payment of the income, to be brought before the full Court.

Mr. *Elphinstone*, for the trustees.

Sir *R. Baggallay*, Q.C., and Mr. *J. W. Chitty*, for Sir *J. Hannen*:—

It is clear that the trustees had power to pay this income without regard to the ability of the father, and if the trustees choose to do so, the Court will not control them: *Lewin* on Trustees (1). The rules of the Court are shewn by *Livesey* v. *Harding* (2);

(1) Page 538. (2) Taml. 460.

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Collins v. *Vining* (1); *Cafe* v. *Bent* (2); *Costobadie* v. *Costobadie* (3); *Sillibourne* v. *Newport* (4); *Ransome* v. *Burgess* (5).

Mr. *Kekewich*, and Mr. *P. V. Smith*, for other parties.

LORD SELBORNE, L.C., said that he would not overrule the discretion of the trustees, and considered that the order for payment of the income might be made.

SIR W. M. JAMES, L.J., was of the same opinion.

SIR G. MELLISH, L.J., said that the object of the testator was plainly to avoid any inquiry into the circumstances of the father, which might be difficult and disagreeable and lead to disputes. He had left it to the trustees, and there was no reason why the Court should control them.

Solicitors: Messrs. *Domville, Lawrence, & Graham;* Messrs. *Nicholson & Herbert;* Mr. *Strangways.*

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In re BLAKELY ORDNANCE COMPANY.

BRETT'S CASE.

In re ORIENTAL COMMERCIAL BANK.

MORRIS' CASE.

Contributory—Past Member—Release of Debts—Dividend—Amount of Liabilities—25 & 26 Vict. c. 89, s. 38.

A past member or B contributory of a company, in which the property and the money obtained from the A contributories were insufficient for the payment of the debts, bought up and caused to be released to the company the only debts due when he had ceased to be a member of the company, and remaining due when the winding-up order was made:—

Held, that no call could be made upon him in the winding-up.

Order of the Full Court of Appeal affirmed on rehearing.

In estimating the debts for which a B contributory is liable, all dividends

(1) C. P. Coop. Rep. 1837, 472.
(2) 3 Hare, 245.
(3) 6 Hare, 410.
(4) 1 K. & J. 602.
(5) Law Rep. 3 Eq. 773.

paid in respect of these debts under the winding-up must be deducted; but the funds contributed by the B contributories form part of the general assets of the company, and are not to be applied preferentially or exclusively to the payment of those debts which existed before that contributory ceased to be a member of the company.

Order of the Court of Appeal varied on rehearing.

Webb v. *Whiffin* (1) considered.

THE House of Lords in *Webb* v. *Whiffin* (1) decided that, in a winding-up, the funds contributed by a B contributory form part of the general assets of the company, and are not to be applied preferentially or exclusively to the payment of those debts which were incurred before that contributory ceased to be a member of the company. The official liquidator of the *Blakely Ordnance Company, Limited,* and the official liquidator of the *Oriental Commercial Bank, Limited,* considered that this decision affected the decisions in *Brett's Case* (2) and *Morris' Case* (3), and accordingly presented petitions of rehearing as stated below.

BRETT'S CASE.

MR. *BRETT* had, on the 10th of June, 1865, 150 shares in the *Blakely Ordnance Company, Limited.* These shares he transferred on the 30th of July, 1865, and the transfer was registered on the 4th of August, 1865. On the 28th of July, 1866, an order was made for winding up the company, and *Brett's* name was placed on the B list of contributories, being the list of past members. The transferee of his shares failed to pay the calls made in respect of those shares. The debts of the company due when *Brett* transferred his shares and remaining due at the winding-up were two debts amounting to £10,162, and two small debts of £14 each. Each of the creditors for the larger debts had assigned, in pursuance of a compromise made with *Brett* or a friend of *Brett's,* their respective debts to one *Russell,* an agent for *Brett;* and *Russell,* by deeds-poll dated the 20th of October, 1870, purported to assign these debts to the company and the liquidator; the deeds expressing that they were to the intent that the contributories

(1) Law Rep. 5 H. L. 711. (2) Law Rep. 6 Ch. 800.
(3) Law Rep. 7 Ch. 200.

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might be exonerated from all further liability in respect thereof by dividend or otherwise. Either the creditors or *Russell* had previously received dividends on these debts.

It was not disputed that *Brett* was then aware that the total amount of the money raiseable from the present shareholders would be insufficient to pay the debts of the company, and that a call would shortly be made upon the B contributories. In November, 1870, the official liquidator applied that a call might be made on *Brett* to the full extent of the capital unpaid on each share formerly held by him, which would amount to £20 on each of the 150 shares.

Amongst the debts stated by the official liquidator as due by the company, and in respect of which the call was made, were the four above-mentioned debts. *Brett* offered to pay the two small debts in full, and contended that there would then remain no debt to which he was liable. The Master of the Rolls held that *Brett* was not liable to pay the call, and the full Court of Appeal affirmed that decision, as reported (1). The official liquidator presented a petition of rehearing, which now came on to be heard.

Sir *R. Baggallay*, Q.C., and Mr. *Higgins*, Q.C. (Mr. *Whitehorne* with them), in support of the petition of rehearing:—

The decision in this case has been virtually reversed by that in *Webb* v. *Whiffin* (2). It is further clear from sects. 98, 102, and 103 of the Act 25 & 26 Vict. c. 89, that there is to be no marshalling in winding up. We contend that a shareholder is liable for all debts which existed when he parted with his shares and remained at the winding-up, and that nothing done afterwards can release him. The creditors then acquired a right to so much of the unpaid capital as was then liable to payment of debts, and no shareholder can deprive them of that right. All the judgments in *Webb* v. *Whiffin*, except perhaps that of Lord *Hatherley*, go to that extent. The old creditors come in and take dividends rateably with the new creditors, and the new creditors take a share in the contributions of the past members. The funds available for the creditors at the winding-up are: first, the property of the company; secondly, the

(1) Law Rep. 6 Ch. 800. (2) Law Rep. 5 H. L. 711.

contributions from the then members; and thirdly, the contributions from the past members, and no member can alter that state of things. If the whole state of the company and of its members was known at the time of the winding-up, the proper calls would be made on the next day; the only reason for delay is the impossibility of ascertaining all these things, but that is no reason why the fixed rights of the creditors should therefore be altered. The moment that it has been decided that these are general assets all doubt on the subject is ended. Unless this money is paid, how can the contributions be arranged? It is impossible to frame any scheme for payment of the creditors on any other system. At all events the costs of the liquidation have to be provided for, and why are the past members not to bear their share? They are often the persons most to blame for the losses. If this scheme is allowed the creditors in every case will receive their dividend, and the debtor, by paying them a very small sum more than they would receive as further dividend, will induce them to release their debts.

The *Solicitor-General* (Sir *G. Jessel*), and Mr. *F. Harrison*, for *Brett*:—

The amount of a shareholder's liability is limited by the amount due when he left the company and remaining due at the winding-up. Nothing done in respect of any new debt can be made the medium of a call upon him. If some one voluntarily paid all the old debts, can it be contended that the past member still remained liable to calls for the payment of non-existing debts and for the benefit of new creditors. A company may, when wound up, have enormous old liabilities in the shape of indorsed bills, but as they are taken up they run off and are no longer liabilities. Yet they were so at the date of the winding-up, and the past member might as reasonably be asked for contributions on that account. A call cannot be made for an old debt when that debt is gone, and what difference can be made by the mode in which the debt is taken off? The company cannot insist that a man is a creditor when he says he is not. The shareholder is only liable to contribute for the payment of existing debts, and if no debt exists what is he to contribute to? No doubt his contributions go to the assets of the company, but he is not to contribute when there is no

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debt to contribute to. The past shareholders have a right to call on the present shareholders to pay all the debts, and it is only when they fail that the past members are liable. The House of Lords have certainly decided that what the past members pay is to go to some one else besides the old creditors, but have not decided that the liability of the past members is thereby increased. Any other decision would be inconsistent with sect. 133. It is nowhere said that past members are to contribute to a nominal amount of debts. There are no equities between the A contributories and the B contributories, and the B contributories cannot be called upon to pay merely because it would assist the liquidation. It is the real indebtedness and not the gross which they are to contribute to, and if at the time when the call is made the indebtedness is reduced the shareholders have the benefit.

Sir *R. Baggallay*, in reply:—

Contributions are to be made for payment of the debts, and also for the adjustment of the rights of the contributories. The rights of the creditors generally are fixed, and cannot be defeated by any arrangement between contributories and any class of creditors. Sect. 75 shews when the liability accrued.

Their Lordships reserved judgment.

MORRIS' CASE.

MR. *MORRIS* was the holder of fifty shares in a company called the *Oriental Commercial Bank, Limited.* On the 6th of November, 1865, he duly transferred these shares to *Demetrio Pappa*, who was the registered holder at the commencement of the winding-up of the bank in 1866. *Pappa* had paid no calls, and £800 remained to be called on the shares which *Morris* had formerly held.

At the date of *Morris'* transfer the bank was indebted to a large amount, as also at the time of the winding-up; but the debts existing at the time of *Morris'* transfer and remaining due

at the time of the winding-up amounted to £642 only. The assets of the bank, including the moneys actually raised by calls on the A contributories, were sufficient to pay 15*s.* in the pound on all the debts; but it was found that nothing more could be obtained from the A contributories; and a call on the B contributories became necessary.

The Lords Justices, reversing the decision of Vice-Chancellor *Bacon*, held, that in estimating the debts for which the B contributories were liable, all dividends paid in respect of those debts in the course of the winding-up must be deducted; and that in estimating what sums had been so paid the assets (including the calls on the A contributories) were to be treated as applied in payment *pari passu* of all the debts. They also held that the contributions of the B contributories were to be applied in payment of the debts to which the B contributories were respectively liable, as reported (1). The official liquidator presented a petition of rehearing, which now came on to be heard.

Mr. *Kay*, Q.C., and Mr. *Jackson*, Q.C., in support of the petition of rehearing:—

It is clear that as to the application of the contributions the order made in the case must now be varied. The question, however, remains whether in estimating the debts the amount already received by the creditor is to be taken into account, and we say that it is not. If it depended on natural justice it might be so; but the whole of the rights and liabilities are created by Act of Parliament, and the House of Lords has decided that all these questions are to be determined accordingly. The Court calls on all to contribute to the general assets, and there is no equity in the matter. The original sum is that which fixes the liability. The 25th rule of the Gen. Ord. under the Act of 1862 shews that the time when the rights are fixed is the winding-up of the company. The statute is arbitrary, and the enactment is not founded on any personal liability between the creditor and the past member. The past member may be called upon to pay all that his transferee fails to pay, and the other A contributories have a right to the full amount.

(1) Law Rep. 7 Ch. 200.

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Mr. *Eddis*, Q.C., and Mr. *Higgins*, Q.C., for the creditors' representative.

Mr. *Fry*, Q.C., and Mr. *Westlake*, for *Morris*, were not called upon, but their Lordships reserved judgment.

Aug 6. LORD SELBORNE, L.C., now delivered judgment in both cases:—

These cases have been reheard before us by reason of the decision of the House of Lords in *Webb* v. *Whiffin* (1). The points which may be regarded as settled by that decision are:—first, that the liability of a past member of a company under section 38 of the *Companies Act*, 1862, is a liability to contribute to the general assets of the company in the event of its being wound up, and not a liability to contribute to a fund appropriated (so far as creditors are concerned) for the payment of any particular debts of the company; and, secondly, that the rights of creditors of the company, at whatever time their debts may have been contracted, are, as against the company and its assets (including all contributions made to its assets by past members), similar and equal; or, in other words, that such creditors are not divisible into classes with different rights against different funds; and, as a necessary consequence, that there is neither occasion nor room for any marshalling of assets between them. In one of the cases before us (*Morris' Case*) a different view of the law had been taken by the Lords Justices, and in that respect the order in *Morris' Case* must of course now be altered so as to make it conformable to the judgment of the House of Lords.

But there remain two other questions which it is necessary for us to determine—the one (a question arising both in *Brett's Case* and in *Morris' Case*), whether, when the assets of a company which is being wound up are insufficient to discharge its debts and liabilities and the costs of the winding-up, without recourse to past members, calls can be made on past members in respect of debts or liabilities contracted by the company before they ceased to be members, to

(1) Law Rep. 5 H. L. 711.

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the same extent as if those debts or liabilities had not been reduced by any dividends paid thereon after the winding-up out of the property of the company, independently of calls, or by means of calls upon present members; the other (which arises in *Brett's Case* only), whether calls can be made upon past members in respect of any debt or liability of the company contracted before they ceased to be members, which has been released or extinguished between the date of the winding-up order and the time of making such calls, and which, therefore, cannot participate in any dividend which may be made out of the proceeds of such calls. Neither of these questions came before the House of Lords for decision in *Webb* v. *Whiffin* (1), but observations bearing more or less upon them were made by four of the noble and learned lords who then advised the House, and some variety of opinion may be traced in those observations. Certain passages in the speeches of Lord *Chelmsford* and Lord *Cairns* have been relied upon before us, as favouring the view, that the measure of the liability of a past member under the 38th section, so far as it depends upon the existence of debts of the company contracted before he ceased to be a member, ought to be determined solely by the amount of such debts as they stood at the commencement of the winding-up, without reference to any subsequent event by which that amount may have been reduced or even wholly extinguished. On the other hand, it seems clear, that Lord *Westbury* and Lord *Hatherley* would have returned a negative answer to the first, and Lord *Hatherley* (at least) to the second also, of the questions now requiring our decision. In this state of things, it cannot be said that any binding or authoritative exposition of the law upon these points is derivable from the case of *Webb* v. *Whiffin;* and we are unable to escape from the necessity of deciding them according to the best of our own judgment.

There is this peculiarity in the liability of past members of a company, that (whatever may be its measure and extent) it is created entirely by statute, and does not result from any contract. It does not result from any contract between the past members and the company; on the contrary, the contract of the present members, who alone constitute the company for the time being, is to bear the whole burden, to the complete exoneration and indem-

(1) Law Rep. 5 H. L. 711.

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nity of all the past members. Nor does it result from any contract between the past members and the creditors; for the contract of each creditor is (as was pointed out by Lord *Cairns* in *Webb* v. *Whiffin* (1)) with the company, and not with its individual members; and although it is true, that the creditors are entitled to work out the payment of their debts by enforcing the liability of all persons liable to contribute to the assets of the company when it is wound up, the House of Lords has determined, that there is no separate liability of past members to those creditors whose debts were contracted before their shares were transferred or forfeited. It is, however, consistent with all principle and all authority to hold, that the words of sect. 38, with respect to past members, ought so to be construed and receive effect, as to make them, as far as possible, conformable to the rules of reason, justice, and equity. It was in this spirit, that the provisions of this and other statutes *in pari materiâ* were examined by the highest tribunal in the cases of *Oakes* v. *Turquand* (2) and *Williams* v. *Harding* (3); and to these (if it were necessary or useful) other authorities might be added. Reason, justice, and equity appear to me to require, that, as to all the matters for which, under sect. 38, a liability is cast upon past members, the liability of all the present members should be first exhausted, or (which is the same thing) ascertained to be insufficient; and, accordingly, we find it expressly so provided in the 3rd sub-section, which says that "no past member shall be liable to contribute to the assets of the company unless it appears to the Court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of this Act;" those contributions being such, that, if satisfied in full, they would leave nothing to be otherwise provided for.

Again, with respect to the liability of past members to contribute to the assets of the company to an amount sufficient for payment (besides debts and liabilities) of "the costs, charges, and expenses of the winding-up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories among themselves," it is, I think, impossible to suppose, that the Legislature, when comprehending "every present and past member" under this

(1) Law Rep. 5 H. L. 711. (2) Law Rep. 2 H. L. 325.
(3) Law Rep. 1 H. L. 9. 12 Jurist 457

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general formula, intended to give to present members a right to exact through the Court or the official liquidator contributions from past members towards any fund which might be required, after all costs had been paid and after all the debts and liabilities of the company had been satisfied, for the adjustment *inter se* of the rights of present members. It seems equally impossible to imagine that if there were no debts contracted before the past members left the company, and remaining unpaid, they were under this formula meant to be made liable to contribute, till a fund had been formed sufficient for the payment of all the costs, charges, and expenses of the winding-up; which by sect. 110 ought to be paid "as the Court thinks just," and which, under sect. 144, in the case of a voluntary winding-up, are to be paid out of the assets of the company, in priority to all other claims.

If, indeed, there were any debts contracted before the past members left the company, in respect of which they ought to be called upon to contribute, it might possibly happen that this might involve some costs, and perhaps also some adjustment of mutual rights of past members *inter se*, in respect of which it might be just and reasonable to call on them for further contributions. But this could be no ground for including in the measure of their total liability any costs to which they were not justly liable to contribute, or any sums necessary for the adjustment only of the rights of present members. Applying the same principle to debts, I am of opinion that when the Legislature said, "no past member shall be liable to contribute in respect of any debt or liability of the company contracted after the time at which he ceased to be a member," it was meant, that, if the question of contribution arose as to past members, (which could only be, under the 3rd sub-section, after the inability of the existing members to satisfy the contributions required to be made by them had been ascertained,) no debt or liability of the company was to be regarded or taken into account for any purpose whatever, directly or indirectly, except such of the debts and liabilities contracted before the time when each past member left the company as might at that time constitute part of the indebtedness of the company. To swell the amount of that indebtedness, by the fictitious process of treating as then due and unpaid any part of the original amount of those debts and liabilities

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which might have been previously satisfied by dividends out of the property in hand, or by the contributions of present members, or any part thereof which might have been previously released or extinguished—to do this (as it necessarily would be done in such a case as *Brett's*) for the sole purpose of increasing the dividends of those other creditors whose debts were contracted after these past members had left the company, would, as it seems to me, be a violation both of the letter and of the spirit of the 2nd sub-section. It would be introducing, for the benefit of the subsequent creditors and to the prejudice of the past members, that very principle of marshalling which (when proposed to be introduced for the benefit of the prior creditors) was excluded by the decision of the House of Lords in *Webb* v. *Whiffin* (1). In this section, and in sects. 74, 75, "liability to contribute to the assets of the company in the event of the same being wound up" appears to me to be merely another expression for liability to calls under sect. 102; and those calls are to be made, to the extent of the liability of the several contributories, for payment of all or any sums which the Court deems necessary to satisfy the debts and liabilities of the company—that is to say, in the case of past members—debts and liabilities contracted before they ceased to be members, and still constituting part of the indebtedness of the company when the calls are made. This, with such costs and adjustment moneys (if any) as may be properly incident thereto or consequent thereon, is, in my opinion, the extreme measure and limit of the liability of past members to contribute to the assets of the company under sect. 38. To enlarge that limit, because the fund, when contributed, will be divisible *pro ratâ* among all the creditors of the company, at whatever time their debts may have been contracted, would, as it seems to me, be at least as much against the express words and the real meaning of sect 38, sub-sect. 2, as the appropriation of the fund contributed by past members to the payment of the particular class of creditors in respect of whose debts they are called upon to contribute could possibly be against the letter or spirit of sects. 98 and 133.

The time when the call is made must necessarily be looked to, and the payments of present members after the commencement of

(1) Law Rep. 5 H. L. 711.

the winding-up must necessarily be taken into account, for the purpose of giving effect (in the case of a limited company) to another material qualification of the liability of past members, contained in the 38th section, viz. :—that "no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member." Why, then, are not the payments made after the commencement of the winding-up equally to be regarded, when the question has reference to the amount of the debts and liabilities of the company, in respect of which a past member is required to contribute?

Let it be supposed, that, after a winding-up order, all the debts due when the latest transfer by a past member was executed were absolutely released by the creditors, or voluntarily paid off by a stranger in exoneration of the whole company, before the payment of a dividend by the company upon any part of them. How could a call on past members "in respect of" these debts—a call the proceeds of which would create a fund for division exclusively among the subsequent creditors—be justified under such circumstances by the statute? What would be true in that case of all the prior debts seems to be equally true of any prior debt, or any part of a prior debt, in any lawful manner released, paid off, or extinguished; and, as the property in hand at the date of the winding-up, and the contributions of all the present members, were primarily and justly liable to pay all the debts of the company rateably and equally, as far as they would extend, before any liability of past members could arise, I am unable to perceive any sound distinction between the effect of a part payment so made, and a reduction to the same extent of the same debts by any other means.

My conclusion is, that, both in *Morris'* and in *Brett's* case, the liability of past members to contribute in respect of debts contracted before they ceased to be members could not exceed the amount of the "residuum" of those debts, to use Lord *Westbury's* expression, after writing off from them the full amount of the dividends paid out of the property in hand and the contributions of present members; and that in *Brett's Case*, the entire claim as to all this residuum, and as to all future dividends thereon, having been in substance and effect released and discharged to the company, no

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call in respect of such debt could properly be made. In *Brett's Case* I agree in result with the original conclusions of the full Court of Appeal, and in *Morris' Case* with the original conclusion of the Lords Justices on both these points, though some of the reasons assigned by the learned Judges at the original hearing have been displaced by the decision of the House of Lords in *Webb* v. *Whiffin* (1).

SIR W. M. JAMES, L.J. :—

I entirely agree in the judgment which the Lord Chancellor has pronounced, and also in the reasons which he has assigned for it. I have fully considered the speeches of the noble and learned lords delivered in the House of Lords in the case of *Webb* v. *Whiffin*. I still think that our decision in *Brett's Case* remains unaffected by them, and also our decision in *Morris' Case*, except of course a part of that decision. I am therefore of opinion that with that exception the decisions in those cases should stand as they were originally pronounced.

SIR G. MELLISH, L.J. :—

I am of the same opinion.

Solicitors in *Brett's Case:* Messrs. *Lewis, Munns, & Longden;* Messrs. *Harrison, Beal, & Harrisons.*

Solicitors in *Morris' Case:* Messrs. *Ashurst, Morris, & Co.;* Messrs. *Uptons & Co.;* Messrs. *Crosley & Burn.*

(1) Law Rep. 5 H. L. 711.

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July 28.

[1871 C. 51.]

Portions—Satisfaction—Advances in Lifetime—Gift by Will—Words, "Advance or Pay"—Benefit under Family Settlement.

A testator devised real estates upon trust for his daughter, *E. C.*, for life, with remainder to her husband, *W. C.*, for life, with remainder to trustees for 1000 years to raise £30,000 for portions for younger children, with remainder to *E. C.'s* eldest son for life, with remainders over. And he directed that if *E. C.* or *W. C.*, or either of them, should at any time during their joint lives or the life of the survivor of them advance or pay any sum or sums of money for the use or benefit of any younger child or children for whom portions were provided, then and in such case, unless the contrary should be directed by *E. C.* and *W. C.*, or the survivor of them, by deed or writing to be sealed and delivered in the presence of one or more witnesses, the sum or sums so advanced should be taken in satisfaction *pro tanto* of the portion or portions of such child or children.

E. C. had several children, one of whom, *J.*, was of weak mind; and while she was still under age *W. C.* and *E. C.*, and their eldest and second sons, executed a deed whereby they covenanted that if the share of *J.* devolved upon them, or any of them, they would divide it among the other younger children. *J.* attained twenty-one and died, and her share thus devolved on her father, *W. C.*, and became subject to his covenant.

W. C., having survived his wife, made a will whereby he gave legacies to his younger children, and gave the residue of his personal estate for the benefit of two of them:—

Held (reversing the decision of the Master of the Rolls), that none of the gifts under *W. C.'s* will were to be taken towards satisfaction of the portions of the younger children:—

Held, also (affirming the decision of the Master of the Rolls), that the division of the share of *J.* was not to be taken towards satisfaction of the portions of the younger children.

Twisden v. *Twisden* (1), *Leake* v. *Leake* (2), *Onslow* v. *Michell* (3), and *Golding* v. *Haverfield* (4) commented on.

THIS was an appeal from a decision of the Master of the Rolls.

John Cooper, by his will, dated the 21st of October, 1817, devised his *Bedfordshire* estates to trustees during the life of his daughter *Elizabeth*, the wife of *William Dodge Cooper Cooper*, in trust to pay

(1) 9 Ves. 413.
(2) 10 Ves. 477.
(3) 18 Ves. 490.
(4) 13 Price, 593.

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the income to her for her separate use, with remainder to the use of *William Dodge Cooper Cooper* for life, with remainder to trustees for a term of 1000 years, and subject thereto, to the use of *William Cooper Cooper*, the eldest son of his daughter *Elizabeth*, for life, with remainder to the first and other sons of *William Cooper Cooper* in tail male, with remainders over. And after devising his *Cheshire* and *Essex* estates in manner therein mentioned, for the benefit of the second son of his daughter *Elizabeth*, the testator declared the trusts of the term of 1000 years to be, in case there should be three or more younger children of his daughter *Elizabeth* (except such son as should succeed to his *Cheshire* and *Essex* estates), to raise £30,000 out of his *Bedfordshire* estates to be divided equally between such younger children, the shares of sons to vest at twenty-one, and those of daughters at twenty-one or on marriage.

The testator then directed as follows: "That in case my said daughter *Elizabeth* and *William Dodge Cooper Cooper*, or either of them, shall at any time or times during their lives, or the life of the survivor of them, advance or pay any sum or sums of money to or for the use or benefit of any younger child or children for whom a portion or portions is or are hereby intended to be provided, then and in such case, and unless the contrary shall be directed by my said daughter *Elizabeth* and *William Dodge Cooper Cooper* respectively, or the survivor of them, making such advancement as aforesaid, in and by any deed or writing, deeds or writings, to be sealed and delivered by them, her, or him respectively, in the presence of, and attested by, one, two, or more credible witness or witnesses, the same sum or sums of money so to be advanced to or for the use of any such younger child or children as aforesaid shall be deemed, accepted, and taken to be in full or in part satisfaction, as the case may be, of the portion or portions to which such child or children would have been entitled under the provisions of this my will; and to the intent (unless the same shall be directed to the contrary by my said daughter *Elizabeth* and *William Dodge Cooper Cooper*, or the survivor of them, making such advancement as aforesaid, to be expressed in manner aforesaid) to exonerate and discharge the *Bedfordshire* estates from the portion or share of the younger child or children to whom such advancement shall be

made as aforesaid, or so much and such part of the same portion or share as such sum or sums of money shall amount to, anything herein contained to the contrary notwithstanding."

The testator died in 1824.

The testator's daughter *Elizabeth* died in 1856. She had seven children, namely: *William Cooper*, who succeeded to the *Bedfordshire* estates; *James Lindsay Cooper*, who succeeded to the *Cheshire* and *Essex* estates; *Jane Cooper*, who was of weak mind; *Elizabeth*, who married the Count *Van der Burch*; *Amelia Cooper*, who married *Moses Tearl*; *Caroline Cooper*; and *Lucy Cooper*, who married Sir *Henry Robinson*.

The Count and Countess *Van der Burch* were married in 1828, on which occasion a settlement was executed, to which the father and mother of the Countess were parties. It contained a recital that the Countess, as one of the five daughters of *William Dodge Cooper Cooper* and *Elizabeth* his wife, was entitled to one-fifth of the sum of £30,000 raiseable out of the *Bedfordshire* estates after the death of her father and mother, and to a further share of the same in the event of the death of her sisters under age and without leaving issue; and such one-fifth share, and all other the part or share and interest present and future, vested and contingent, of the Countess, was therefore assigned to trustees upon trust to pay the income to the Countess for her life for her separate use, and after her death upon trusts for the benefit of the Count *Van der Burch* during his life, and subject thereto, upon trusts for the benefit of the children and other issue of the marriage. And *William Dodge Cooper Cooper* and *Elizabeth* his wife thereby joined in demising the *Bedfordshire* estates to the trustees of the settlement for a term of ninety-nine years, determinable on the death of the survivor of them, to secure an annuity of £500 to be held upon the same trusts as the share of the £30,000 thereby assigned.

On the occasion of the marriage of Sir *Henry* and Lady *Robinson*, a deed of family arrangement, dated the 13th of July, 1842, was made between *William Dodge Cooper Cooper* and *Elizabeth* his wife, *William Cooper Cooper*, and *James Lindsay Cooper*, of the one part, and the Count and Countess *Van der Burch*, Mrs. *Tearl*, then *Amelia Cooper Cooper*, *Caroline Cooper Cooper*, and Lady *Robinson*, of the other part, whereby the parties thereto of the first part cove-

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nanted that in case the said marriage should take effect, and in case *Jane Cooper Cooper's* share of the £30,000 should in any manner devolve upon any of them, the said *William Dodge Cooper Cooper* and *Elizabeth Cooper* his wife, *William Cooper Cooper*, and *James Lindsay Cooper*, their executors or administrators, they should, at the request of the Count and Countess *Van der Burch*, Mrs. *Tearl*, *Caroline Cooper Cooper*, and Lady *Robinson*, execute all such deeds as the Count and Countess *Van der Burch*, Mrs. *Tearl*, *Caroline Cooper Cooper*, and Lady *Robinson*, their executors or administrators, should require for the purpose of vesting in them *Jane Cooper Cooper's* share of the £30,000, or such part thereof as they should as her next of kin become entitled to.

By an indenture dated the day following (to which indenture *William Dodge Cooper Cooper* and *Elizabeth* his wife were parties, and which contained a recital similar to that in the Countess *Van der Burch's* marriage settlement) Lady *Robinson's* share of the £30,000 was assigned to trustees upon trust to pay the annual sum of £80 to her during her life, and subject thereto to pay the income thereof to Sir *Henry Robinson* during his life, and after his death upon trusts for the benefit of Lady *Robinson*, in case she should survive Sir *Henry*, and subject as aforesaid, upon trusts for the benefit of the children or grandchildren of the marriage. And *William Dodge Cooper Cooper* and *Elizabeth* his wife thereby joined in demising the *Bedfordshire* estates for a term of ninety-nine years, determinable on the death of the survivor of them, to secure an annuity of £300, to be held by the trustees of the settlement upon the same trusts as were thereby declared with respect to the share of the £30,000 thereby assigned.

Mr. and Mrs. *Tearl* were married in 1848, on which occasion a settlement was executed, of which *William Dodge Cooper Cooper* was one of the trustees, whereby Mrs. *Tearl's* one-fifth share of the £30,000 was settled upon trusts for the benefit of herself during her life, and after her death upon trusts for the benefit of the children of the marriage. And Mr. and Mrs. *Tearl* covenanted that Mrs. *Tearl's* after-acquired property should be settled upon trust for such persons as she should by deed or will appoint, and in default, upon the trusts of the settlement.

Jane Cooper Cooper attained the age of twenty-one, and died

intestate in 1856, and letters of administration of her estate and effects were granted to her father, *William Dodge Cooper Cooper*, as her sole next of kin in 1857.

William Dodge Cooper Cooper paid, up to the time of his death, the annuities of £500 and £300 secured to the Countess *Van der Burch* and to Lady *Robinson* respectively by their marriage settlements. He also made an allowance of £300 per annum to Mrs. *Tearl* from her marriage until his death, and he gave £1000 to Sir *Henry Robinson* on the occasion of his marriage.

In 1846 *W. Dodge Cooper Cooper* and his wife executed a deed declaring that the annuity of £300 payable to Lady *Robinson* and the £1000 paid to Sir *H. Robinson* were to be in addition to Lady *Robinson's* share of the £30,000, but no such declaration was made as to the benefits given to his other children.

William Dodge Cooper Cooper made his will (dated in 1855) and two codicils thereto, and thereby gave the following legacies:— £300 to the Countess *Van der Burch;* £200 to Mrs. *Tearl;* £500 to *Caroline Cooper Cooper;* £300 to Lady *Robinson;* £100 to *William Cooper Cooper;* and £200 to *William Smith Cowper Cooper*, the only son of *William Cooper Cooper*, and tenant in tail in remainder of the *Bedfordshire* estates; and he bequeathed the residue of his personal estate, in equal shares, to *Caroline Cooper Cooper* and the trustees of Mrs. *Tearl's* settlement, and directed the moiety bequeathed to the trustees to be held by them upon the trusts of that settlement. He then devised all the residue of his real estate not already disposed of by his will to *Nathaniel Charles Milne* in fee during the joint lives of *Caroline Cooper Cooper* and Mrs. *Tearl*, and the life of the survivor, as to one-third in trust for Mrs. *Tearl* for her separate use, and as to the remaining two-thirds in trust for *Caroline Cooper Cooper* for her separate use, with remainder to the survivor for life, with remainder after the death of the survivor to *William Cooper Cooper* for life, with remainder to *William Smith Cowper Cooper* in tail.

William Dodge Cooper Cooper died in 1860.

Various questions arose out of these deeds and transactions as to the effect of the benefits given by *W. Dodge Cooper Cooper* to his daughters in diminishing the shares payable to them out of the

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£30,000 charged on the *Bedfordshire* estates. The present bill was filed by *Caroline Cooper Cooper*, Mr. and Mrs. *Tearl* and their children, against *W. Cooper Cooper* and *W. Smith Cowper Cooper*, his eldest son, and the other members of the family, for the purpose of determining these questions.

W. Cooper Cooper and his son admitted that the annuity payable to Lady *Robinson* and the £1000 given to Sir *H. Robinson* were not to be taken in part satisfaction of Lady *Robinson's* portion, but they made the following claims:—

That as to *Caroline Cooper Cooper*, her legacy of £500 and her share of the residue given by *W. Dodge Cooper Cooper's* will, and also the life interest in the real estates, should be considered as given in satisfaction *pro tanto* of her share in the £30,000.

That as to Mrs. *Tearl*, the value of the allowance of £300, the legacy of £200, and the share of the residue given to her trustees, and also the value of the life interest in the real estates, should be deducted from her share.

That as to Lady *Robinson*, her legacy of £300, and as to Countess *Van der Burch*, the value of her annuity of £500, and also her legacy of £300, should be deducted from their respective shares.

They also contended that the effect of the family arrangement respecting *Jane Cooper Cooper's* share was, in the event which had happened, to release the *Bedfordshire* estates from an amount equal to such share, and they said that such release was, in fact, the consideration for their concurrence in the arrangement made by that deed.

The Master of the Rolls was of opinion that none of the annuities given by *W. Dodge Cooper Cooper* to his daughters on their marriage, nor the division of the portion of *Jane Cooper Cooper* among them, were advances within the proviso contained in *John Cooper's* will, and therefore that they were not to be taken in satisfaction of their respective portions. He also held that the interest in real estate devised by *W. Dodge Cooper Cooper* to *Caroline Cooper Cooper* and Mrs. *Tearl*, and the share of the residue given to Mrs. *Tearl's* trustees, were not within the proviso; but he was of opinion that he was bound by the authorities to hold that the legacies given to the daughters, and the share of the residue given to *Caroline*

Cooper Cooper, were within the proviso, and must be taken *pro tanto* in satisfaction of the portions (1).

(1) 1873. Feb 10. W.N. (1873) 33.

LORD ROMILLY, M.R., after stating the facts of the case, proceeded as follows:—

In considering these cases it is important to notice, in the first instance, whether the donor of the benefit which is claimed to be satisfied by subsequent benefits stands in the place of a parent or in the place of a stranger. If he stands *in loco parentis*, the presumption of equity being against double portions, the presumption of satisfaction arises at once, and includes everything that the father gives which he intended to be in satisfaction of his previous promised benefit; and evidence is admissible for the purpose of rebutting or sustaining the presumption against double portions, which in that case is in favour of satisfaction. In the case of a stranger, the presumption against double portions does not arise at all. It is wholly a question of construction, and no evidence is admissible either to sustain or rebut any presumption, for the reason that none arises.

In this latter case the question of satisfaction never arises except upon the express words of the donor, and whether the gifts said to be given in satisfaction are given by a father or a stranger is wholly immaterial, and it is solely a question whether the original benefactor intended that his benefit should be diminished or adeemed by benefits derived from any other source, and if so, what other source. This may be shewn pointedly in a case where the gifts supposed to be a satisfaction of the original gifts are gifts of land. In the case of a parent or person *in loco parentis*, land would be no satisfaction of a covenant to pay money. The presumption against double portions does not arise in such a case. This is shewn by a series of cases. But if the original gift was to a stranger, the doctrine of satisfaction becomes applicable according to the words of the original donor. Then the question is whether the words he has used, fairly interpreted, meant the gifts of land as satisfaction of the benefits he has bequeathed or previously conveyed. It is, therefore, of paramount importance to consider in all cases, and particularly in this, whether the doctrine of presumption against double portions, or the doctrine of construction of instruments is that which applies to the present case. It is clear here that the doctrine which is to be applied in this case is that of construction. The original testator, *John Cooper*, was, as regards this question, a perfect stranger to the Plaintiff. The fact of his being their grandfather does not alter the question, and so long as they had a father who took care of them he could not stand *in loco parentis*, though, if they had been orphans or perfect strangers in blood, he might have taken care of them, and might have sustained that position. It is clear in this case, that if it had not been for the proviso in *John Cooper's* will, no question of satisfaction could have arisen. The evidence of intention, therefore, of the grandfather, and still more of the father, is in this case inadmissible, and could not be regarded if given to the Court; and consequently all the cases, of which many have been cited, where the gift of the father was taken in satisfaction of his own liability by covenant to settle by will or otherwise, have nothing whatever to do with this case. It is a mere question of construction as to the meaning of the proviso contained in *John Cooper's* will:—[His Lordship

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From this decision appeals were presented both by *W. Cooper Cooper* and his son and also by the daughters of *W. Dodge Cooper Cooper* and their children.

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then read the proviso in the will, and continued :—]

This being in derogation of his own gift, must, I think, be construed strictly, and I think that this cannot apply to the transaction entered into on the 13th of July, 1842, relating to the share of *Jane*. This was a family arrangement; it was no advance, it was no gift at all. It is a transaction of barter for value; and to hold that this was a gift by the father, because he happened to survive the daughter, is in fact to say that such a proposition prohibits transactions of the purchase or barter of interests for value between a father and his daughter. So that if a mere stranger had left a farm to her, and the father had purchased it from her, others could say that the purchase-money was money advanced or paid to her within the meaning of the proviso. Equally so, if there was any arrangement upon an uncertain event between the father and the daughter, that would have been treated as a payment made to her. But, in my opinion, that is not the meaning of the words of the settlement, and it could not be so treated between the father and the daughter. In addition to that, *William Cooper Cooper* and *James Lindsay Cooper* were parties to the deed of 1842, and duly executed it, and are bound to give effect to it; and it would be a breach of their covenant to attempt to destroy the real object and effect of it. I therefore wholly dissent from the 15th paragraph of the answer, and hold that this transaction of July, 1842, created no question of satisfaction at all.

With regard to the marriage settlements of the one fifth shares of the £30,000, I am of opinion it is not competent for the persons, under colour of an advancement subsequently made, to destroy a settlement for value, entered into with a stranger, under which the husband and children of the marriage are purchasers for value; and, consequently, I am of opinion that the proviso did not extend, and was not intended to extend, to such a case; and that the settlements upon the marriage of Count *Van der Burch*, Sir *Henry Robinson*, and Mr. *Tearl*, are binding upon the settlors, and cannot by any subsequent act of *William Dodge Cooper Cooper* be affected so as to injure the husbands and the issue of the marriage.

But I find it impossible to get over the decided cases as to the legacies. The legacies given by the will of the father were, under these cases, sums of money advanced or paid by him in the words of the proviso. But I go no further than that. The devise of land by the will is clearly not an advance or payment of money, and does not fall within the proviso; and the share of residue given to Mrs. *Tearl's* trustees was not money paid or advanced to her within the strict words of the proviso, but is given to them, not for her, but for the persons interested under the settlement, whoever they may be, which might possibly exclude her.

I think that the real and fair meaning of the proviso does not reach or extend to the money given by the father for the support and maintenance of the daughters. If an allowance is given to them for dress of £100 or £200, that is not to be treated as an advance, whether before or after mar-

Mr. *Southgate*, Q.C., and Mr. *Vaughan Hawkins*, for *W. Cooper Cooper* and his son:—

We complain of the decision of the Master of the Rolls principally on the ground that he has not allowed the share in the portion of *Jane Cooper Cooper*, which was divided among the other daughters, to be taken in part satisfaction of their portions; and that he has come to the same conclusion with respect to the share of residue of personalty bequeathed by *W. Dodge Cooper Cooper* to Mrs. *Tearl's* trustees. We uphold the decision in so far as it directs the share of residue of personal estate given by *W. Dodge Cooper Cooper* to the Plaintiff *Caroline Cooper Cooper*, and the legacies given to her and the other daughters, to be taken in part satisfaction of their portions.

With respect to the portion of *Jane Cooper Cooper*, the family arrangement involved a gift from the father, and was not the less an advancement because it originated in a bargain, nor because it was uncertain whether the share would become part of the father's estate or not: *Edwards* v. *Freeman* (1); *Plunkett* v. *Lewis* (2).

With respect to the gifts by will, although the testator, *John Cooper*, was not strictly *in loco parentis* towards his grandchildren, yet the presumption against double portions existed nevertheless, for it is clear what his intention was. He was settling the estate for the ultimate benefit of his daughter's eldest son and his issue, and his object was that the burdens on it should be as light as possible: *Duke* v. *Doidge* (3); *Scarisbrock* v. *Lord Skelmersdale* (4). Whatever might be said if the matter were *res integra*, it is now too late to argue that a gift by will has not the same effect as advancement in the lifetime. It was held to be an advancement in *Richman* v. *Morgan* (5); *Twisden* v. *Twisden* (6); *Folkes* v.

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riage, and it would be difficult to draw the line and say whether a sum of a particular amount, or any other, should be that which should act as a satisfaction of the legacy.

The result is that I only extend the doctrine of satisfaction to the legacies and the share of the residue given to the daughters personally.

(1) 2 P. Wms. 435, 447.
(2) 3 Hare, 316.
(3) 2 Ves. Sen. 203, n.
(4) 4 Y. & C. (Ex.) 78.
(5) 1 Bro. C. C. 63; 2 Ibid. 394.
(6) 9 Ves. 413.

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Western (1); *Leake* v. *Leake* (2); *Onslow* v. *Michell* (3); *Golding* v. *Haverfield* (4); *Bengough* v. *Walker* (5). These cases have been treated as settling the question, in a long course of text-books and precedents in conveyancing. It is so laid down in *Matthews* on Portions (6) and *Roper* on Legacies (7). In *Barton's* Conveyancing (8) the clause against double portions is given thus: "In case [the husband] in his lifetime, or by his last will and testament, or any codicil thereto, shall give or advance," &c. But in *Saunders* on Uses (9), *Martin's* Conveyancing (10), *Crabb's* Precedents (11), *Prideaux's* Conveyancing (12), *Jarman's Bythewood* (13), and *Hayes'* Concise Precedents (14), it is simply: "In case [the husband] in his lifetime shall give or advance," or "give and advance," or "advance," shewing that it was considered by the authors of all those books that no special allusion to a gift by will was necessary. A contrary decision would now cause great perplexity among conveyancers. The decision in *Douglas* v. *Willes* (15), which might be cited against us, turned on the contrast between the first and second clauses of the proviso in that case.

The *Solicitor-General* (Sir *G. Jessel*), Sir *R. Baggallay*, Q.C., and Mr. *Cookson*, for the Plaintiffs; and

Mr. *Joshua Williams*, Q.C., and Mr. *Waller*, Mr. *Fry*, Q.C., and Mr. *Charles Hall*, for Defendants in the same interest with the Plaintiffs, were not called on.

Mr. *Bury*, for the trustees.

LORD SELBORNE, L.C.:—

We all think that upon the terms of this particular will, whatever may or may not be the effect of former decisions upon other wills of different import, we are not obliged to hold, contrary

(1) 9 Ves. 456.
(2) 10 Ibid. 477.
(3) 18 Ibid. 490.
(4) 13 Price, 593.
(5) 15 Ves. 507.
(6) Page 217.
(7) 4th Ed. p. 1098.
(8) 3rd Ed. vol. ii. p. 347.
(9) 5th Ed. vol. ii. p. 272.
(10) Vol. ii. p. 301.
(11) 5th Ed. vol. ii. p. 1381.
(12) 7th Ed. vol. ii. p. 284.
(13) Vol. ix. p. 232.
(14) 3rd Ed. p. 601.
(15) 7 Hare, 313.

to the natural and reasonable interpretation of the words which the testator has used, that a gift of a share of residuary estate by the will of his son-in-law is an advancement or payment to the residuary legatee in the son-in-law's lifetime.

Supposing the case were entirely free from authority, for my part, I could not entertain the slightest particle of doubt as to the meaning of these words. A settlement is made of real estate by the will of the grandfather—for these questions arise as to the interests of persons in the third generation—and the eldest son and the male heirs of the elder line are to succeed to those estates. A term is created, out of which, in the events which have happened, portions to the amount of £30,000 are raiseable for the younger children, of whom there are five, all being daughters.

Then it is directed, that, in case the testator's daughter and son-in-law, or either of them, "shall at any time or times during their lives, or the life of the survivor of them, advance or pay any sum or sums of money to or for the use or benefit of any younger child or children, for whom a portion or portions is or are hereby intended to be provided, then and in such case, and unless the contrary shall be directed by the testator's said daughter and son-in-law respectively, or the survivor of them making such advancement as aforesaid, in and by any deed or writing, deeds or writings, to be sealed and delivered by them, her, or him respectively in the presence of and attested by one, two, or more credible witness or witnesses, the same sum or sums of money, so to be advanced to or for the use of any such younger child or children as aforesaid, shall be deemed and accepted and taken to be in full or in part satisfaction, as the case may be," of the portion or portions to which such child or children would have been entitled under the provisions of the said testator's will; "and to the intent" (unless the same should be directed to the contrary by the testator's said daughter and son-in-law, or the survivor of them making such advancement as aforesaid, to be expressed in manner aforesaid) "to exonerate and discharge the said *Bedfordshire* estates from the portion or share of the younger child or children to whom such advancement shall be made as aforesaid."

The first question, then, is, whether or no a share of residue given to one of the granddaughters by the will of the son-in-law, who

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was the last survivor of the two, was "an advancement or payment" in the lifetime of the son-in-law of the testator, within the meaning of this clause. Now, as I have said, if the matter were entirely free from decision, I could not feel a doubt about it. If there be anything familiar in the world, it is the distinction between acts *inter vivos* and acts taking effect *post mortem* by testamentary instruments, and the English equivalent of the Latin words *inter vivos* is, "during their lives or the life of the survivor of them." The word "pay" does not indicate the execution of an instrument which takes effect after death, but, as is admitted, implies the handing over, or that which is equivalent to the handing over, of money in the lifetime of the person making the payment. And the word "advance," in my judgment, implies an act which, when done in the lifetime, either by anticipation puts money or money's worth into the hands of the party who would otherwise not receive it, or in the lifetime operates as an advancement by conferring a present benefit, whether actually dependent upon some previous interest to be first exhausted or not. But, in either way, those two words, "advance" or "pay," appear to me to be words inapplicable to the mere execution of an instrument inoperative in the lifetime, and to be applicable only to something which operates immediately in the lifetime as an advancement or as a payment.

That is very much fortified by the words which follow, shewing that any intention to the contrary is to be expressed by a sealed instrument, and one delivered in the presence of witnesses. It is in the last degree unlikely that if it had been meant that the advance might be made by a testamentary instrument operating only *post mortem*, requiring no seal, and not, in the ordinary course of things, likely to be sealed, such a clause should have been introduced, requiring a solemnity foreign, in that case, to the character of the instrument by which the thing was to be done, and causing, therefore, even the most express accompanying declaration of intention to fail, if such an instrument were not executed with formalities alien to its proper character.

Now this combination of circumstances has not occurred in any other case. The other cases of this class, upon which decisions have been given or opinions expressed, have been cases in which—

I am speaking of the strongest of them—you have such words as "give or advance," "give or settle;" which words, in some of those cases, were taken to include—what I will admit by possibility in some contexts they might mean—the execution in the lifetime of an instrument which would operate, when it came into operation, as a settlement or as a gift. And Sir *William Grant*, in the case before him of *Onslow* v. *Michell* (1), laid no inconsiderable stress upon the force which he thought in that respect might be ascribed to the words "give and settle," which you have not in this instrument. The same or similar words also occurred, I will not say in every one of the cases which were cited, but in almost all of them, and in all those upon which material stress was laid, particularly the case of *Golding* v. *Haverfield* (2), in the Court of Exchequer, and the original case, which in other respects also was distinguishable, of *Richman* v. *Morgan* (3).

In that state of things, I think we should be extending those authorities much farther than they have ever yet been carried, and to a case in which the natural and proper meaning of the words used would make it particularly unfit so to apply them, even if the authorities referred to were themselves satisfactory. But, when examined, these cases are found to present a most remarkable example of the extraordinary manner in which the use of precedents has, sometimes, caused the Courts of this country, first to slide into manifest error, and afterwards to follow that error under the notion that they are bound to do so. The history of the doctrine now relied upon as being established by the authorities is this: In the case of *Richman* v. *Morgan*, before Lord *Thurlow*, there were words which said, that if, during a man's life, or at his death, he should do a certain thing, a certain effect should follow; the word "give" being there used, and not "advance" or "pay." It was perfectly manifest that in that case what was done by the will took effect at his death, and was within the plain words of the instrument; and nothing was decided in that case, or even said, as far as I can see, which would lead to anything farther.

Then came the case of *Twisden* v. *Twisden* (4) in 1804, before Lord *Eldon*, in which *Richman* v. *Morgan* was referred to in the

(1) 18 Ves. 490.
(2) 13 Price, 593.
(3) 1 Bro. C. C. 63; 2 Ibid. 394.
(4) 9 Ves. 413.

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argument; and Lord *Eldon* expressed, on the whole, an opinion to the effect, that, notwithstanding what had been stated tentatively, and not at all confidently, in the argument on this subject, the natural interpretation of these words was the right one, and that a thing was not to be held to be done during the lifetime of a man, which only took effect after his death. Lord *Eldon* there said (1), "If the law is, that what is to be taken under a will is not an advancement in the life of the party, it is very difficult to say that what is taken under an intestacy shall be an advancement. And though it is true the will must be made in the life, it is equally true nothing is advanced or given to the party to take till after the death."

Therefore the expression of his opinion, as far as it goes, is this: he first concludes that what is taken under a will is not an advancement in the life of the party, and then says, *à fortiori*, what is taken by way of intestacy is not an advancement in the life of the party; which is the particular point decided in that case. Then comes *Leake* v. *Leake* (2) in the very next year, also before Lord *Eldon*; and in that case Sir *Samuel Romilly*, and other counsel for the Plaintiffs, who were interested in contending that there was no satisfaction, said that they did not mean to argue the point, which had arisen in the former cases. The words attributed to them are these: "The Plaintiffs cannot contend that a provision by will must not be considered a provision given in the lifetime of the testator after *Richman* v. *Morgan* (3) and *Twisden* v. *Twisden* (4); though if that distinction can be maintained, two of these children, *George* and *Ann*, had nothing advanced in the life of their father, and have no provision except by the will." And then they went on with other arguments, which prevailed in the result, and upon which, for reasons which I do not feel called upon to attempt to explain, they preferred to rely.

But the only thing that is material for us is, that those eminent and learned counsel said, they could not contend that a provision by will must not be considered as if it were given in the lifetime of the testator, after *Richman* v. *Morgan* and *Twisden* v. *Twisden*. We have referred to those two cases, and we find in them

(1) 9 Ves. 426.
(2) 10 Ibid. 477, 481.
(3) 1 Bro. C. C. 63; 2 Ibid. 394.
(4) 9 Ves. 413.

no warrant whatever for that general proposition. Then Lord *Eldon*, the point not having been argued before him, and having the year before, in *Twisden* v. *Twisden*, expressed a different opinion, is reported to have said (1): "It is truly said that a provision by will is to be considered as an advancement in the lifetime of the party. That has been repeatedly decided, and is not to be disturbed." It had been so put before him by counsel, but the matter had not been argued; and I suppose even Lord *Eldon* was capable, when counsel treated a thing as not arguable, but as decided, of placing confidence in the grounds of that statement. The learned reporter was unable to find anything but *Richman* v. *Morgan* and *Twisden* v. *Twisden* to support that doctrine; and it is very remarkable, that, when Lord *Eldon* came to deliver his final opinion in that very case, he used language which drew the distinction; for he says (2): "My opinion, rather than a judgment, upon this case is, that, according to the real intention and legal effect of all the instruments, money advanced by the father as preferment on marriage or on any other occasion, is an advancement within the proviso; that the devise and bequest of the real and personal estate is not in this case an advancement in the life of the father." He had determined expressly, as I understood him, that of two constructions which in that case were possible, (a narrower construction, which would exclude every advancement not upon a marriage in the lifetime of the father, and a wider construction, which would take in not only an advancement upon marriage, but every kind of provision made for the children by their father, on any occasion), the larger was to be preferred; and so it had been argued before him. And he found, that an intention, that the provision actually made by will should *not* be taken in satisfaction of the portion, was in that case sufficiently manifested. It was not, therefore, in any point of view, a necessary ingredient in the judgment that Lord *Eldon* should entertain or express the opinion there attributed to him on the general question. Sir *William Grant* examined the matter afterwards in *Onslow* v. *Michell* (3), where he relied on the words "give and settle," and said he could find no foundation for the general doctrine, except those two cases of *Richman* v. *Morgan* and *Twisden* v. *Twisden*,

(1) 10 Ves. 489. (2) 10 Ves. 492. (3) 18 Ves. 490.

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which, however, evidently were not authorities for it; but Sir *William Grant* said that he thought it was involved in Lord *Eldon's* decision, not adverting to the fact that the material words, in *Leake* v. *Leake* (1), were "or otherwise provided for;" and that the lifetime of the father had been expressly mentioned only in connection with an advancement on marriage. The particular decision, after all, of Sir *William Grant* is rested on the force of the words "settle and give." *Golding* v. *Haverfield* (2) is also rested on a somewhat exaggerated weight given not merely to the extra-judicial opinion of Lord *Eldon* in *Leake* v. *Leake,* but to the fact that the counsel for the Plaintiff in that case did not argue the point. Whether or no, for the reasons which have been so ably argued by Mr. *Southgate* and by Mr. *Hawkins,* or for any other reasons, the Court would feel that, upon an exactly similar form of words to those which are found in the cases cited, a construction had been placed which was right, or which could not be disturbed, it might be improper for us on this occasion to determine; for that is not the case before us. Here we have different words. We have not the word "settle," we have not the word "give," we have not the words "provide for;" we have the words "advance or pay;" and we have the indication of intention, contained in that reference to a deed or sealed writing as the necessary and the only mode of declaring the true intention with which this act should be done. I, therefore, am of opinion that in this particular case there was no advancement by means of the gift of the shares of the residue.

With regard to the other point that was argued, that the deed executed by the father in his lifetime, and by the children, relinquishing in favour of the four children who were not of unsound mind their chances of succession to the share of the daughter of unsound mind, who was at that time living, I am most clearly of opinion that was neither an advancement nor a payment within the meaning of this clause. So far, therefore, my judgment is that the present appeal must be dismissed.

SIR W. M. JAMES, L.J.:—

I am of the same opinion. Independently of authority, I could not have brought my mind to doubt what the meaning of the

(1) 10 Ves. 477. (2) 13 Price, 593.

clause in the will of the original testator is; and it is to be borne in mind, which it appears to me has not been borne in mind in any of the cases, that in putting a strained and unnatural meaning upon words in a proviso of this kind, the greatest possible violence is done to that which I have always considered one of the cardinal rules of construction in this Court, namely, that where you have an interest given and vested, the words by which that is to be defeated and taken away must be reasonably clear and certain. In this case the interest is clearly given to these children. It must be taken away, as it seems to me, by equally clear words, or words indicating an equally clear meaning. It appears to me that nobody would say it was according to the ordinary use of the words that a thing left by the will was "advanced or paid," and I do not feel myself constrained by the authorities to put upon these two wills, having regard to all the words of the first will, the construction which is contended for by Mr. *Southgate's* clients.

I cannot help noticing, in addition to the observations of the Lord Chancellor, that it is very singular that the case having been left in the position in which it was by Lord *Eldon*, with two judgments singularly inconsistent with each other, namely, *Leake* v. *Leake* (1) and *Twisden* v. *Twisden* (2), as far back as the years 1804 and 1805, there never has been any opportunity for the Court of Chancery to make any comment on those cases except in *Onslow* v. *Michell* (3), before Sir *William Grant* in 1812, where he felt himself obliged, in order to arrive at a conclusion consistent with what was decided in *Leake* v. *Leake*, to place the whole of the judgment on the meaning of the words "give and settle." Lord *Eldon* lived himself a great many years afterwards, and held the great seal, but he appears never to have had an opportunity of again expressing his opinion upon the subject, or of explaining those two decisions. Under these circumstances, I agree with the Lord Chancellor in thinking that we are not obliged to extend the doctrine, such as it is, any further.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

(1) 10 Ves. 477. (2) 9 Ves. 413. (3) 18 Ves. 490.

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COOPER v. COOPER.

MINUTES OF DECREE :—Declare that notwithstanding the payments made out of the income of the estate, derived by *W. Dodge Cooper Cooper* under the will of *John Cooper*, the testator, in favour of the Plaintiff *Amelia Cooper Tearl* and the Defendants *Elizabeth Cooper Van der Burch* and *Lucy Cooper Robinson*, and, notwithstanding the distribution between the Plaintiffs *Caroline Cooper Cooper* and *Amelia Cooper Tearl* and the last-named Defendants, or those claiming through them respectively, of the sum of £6000 in the bill mentioned, in respect of the share of *Jane Cooper Cooper*, deceased, in the sum of £30,000 charged on the estate of the testator, *John Cooper*, in the county of *Bedford*, and notwithstanding the advance made to the Defendant Sir *H. Robinson* as in the bill mentioned, and notwithstanding the provisions made for the Plaintiff *Caroline Cooper Cooper* and her three married sisters by the will and codicils of the said *W. Dodge Cooper Cooper*, the full sum of £24,000, residue of the said sum of £30,000, is now raiseable out of the same estate for the benefit of the Plaintiff *Caroline Cooper Cooper* and her said married sisters, their respective husbands and children, together with the interest thereon as from the last respective dates of payment of such income, less income tax, the amount of such interest to be verified by affidavit. Then followed directions for taxation of the costs of all parties as between solicitor and client, and for raising the said sum of £24,000, interest, and costs, by sale or mortgage of the said estate; and if by mortgage, then order that out of the moneys so to be raised, such respective costs and interest be paid to the respective parties entitled thereto, and that the balance of such moneys be divided into four equal parts, and that one of such parts be paid to the Defendants the trustees of the settlement, made on the marriage of the Defendants Count *Van der Burch* and *Elizabeth Cooper* his wife, and that one other of such parts be paid to the surviving trustee of the settlement made on the marriage of the Plaintiffs *Moses Tearl* and *Amelia Cooper* his wife, and that one other of such parts be paid to the Plaintiff *Caroline Cooper Cooper*, and that the remaining part be paid to the Defendants the surviving trustees of the settlement on the marriage of the Defendants Sir *H. Robinson* and *Lucy Cooper* his wife; but in case it shall be necessary to sell the said hereditaments, or any part thereof, for the purposes aforesaid, such sale is to be made with the approbation of the Judge, and the moneys to arise therefrom to be paid into Court subject to the further order of the Court; and in case of such sale the further consideration of the cause to be adjourned, to be heard by the Master of the Rolls.

Solicitors for the Plaintiffs: Messrs. *Milne, Riddle, & Mellor.*

Solicitors for the Defendants: Mr. *J. R. Bailey;* Messrs. *Farrar, Ouvry, & Co.*

In re LAND CREDIT COMPANY OF IRELAND.

L. JJ.
1873
April 16, 23, 24.

WEIKERSHEIM'S CASE.

Contributory—Past Member—Registration in the Name of a Firm—Errors in Registration—25 & 26 Vict. c. 89, ss. 25, 38.

One of two partners in a foreign firm of bankers lent to *L.* in this country a sum of money, *L.* executing, by way of security, a transfer to the firm of shares in a company, which was executed by the above-named partner in the name of his firm, and the transfer was approved of by the directors. *L.* at that time held transfers of a corresponding number of shares, but the transfers were not registered. Some time afterwards the transfer deeds were left at the office of the company, and the transfers were registered, the registration of the transfer to the bankers being dated before the registration of the transfers to *L.*, and being in the name of the bankers as a firm. The loan was afterwards repaid, and the shares were re-transferred to *L.* by the same partner, he executing the deed in the name of the firm, and the transfer was duly registered. Within a year from this time an order for winding up the company was made:—

Held, that under the circumstances the one partner could accept shares so as to bind the firm:

Held, that shares can be sufficiently registered in the name of a firm:

Held, that under the circumstances the errors and irregularities in the registration did not affect the liability of the firm:

Held, that the firm of bankers were, in respect of these shares, liable as past members of the company.

Decision of the Master of the Rolls affirmed.

IN August, 1864, *David Leopold Lewis* borrowed, in *London*, from Mr. *Brandeis Weikersheim*, who was one of the two members of the firm of *M. H. Weikersheim & Co.*, bankers at *Vienna*, the sum of £7000, agreeing to transfer, by way of security, 1400 £50 shares, £5 paid, in the *Land Credit Company of Ireland*. A deed purporting to be a transfer by *D. L. Lewis* of 1400 shares (no numbers given) was executed by *D. L. Lewis* and by Mr. *B. Weikersheim*, signing as "*M. H. Weikersheim & Co.*" This deed was, on the following day, taken to the office of the company, and was, at a meeting of the directors on the 23rd of August, approved of; and it was registered as of that day in a book called the "Members' Ledger," and under the name "*M. H. Weikersheimer & Co., Vienna*, Bankers." *Lewis* had not at this time any shares registered in his name, but he had transfers of 1400 shares from forty different

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holders. These transfers were registered as on the 30th of August, 1864, but it appeared from entries in the books that they had not been left in the office until the 5th of September. The money was repaid by *Lewis* in September, 1864, and Messrs. *Weikersheim* executed a blank transfer of shares to *D. L. Lewis*. The transfer bore date the 27th of December, 1864, and the numbers of the shares were inserted when it was left for registration, and it was registered on the 7th of March, 1865.

An order was, in July, 1865, made for winding up the company. The liabilities were for some time considered to be very small, but a debt of £131,000 to *Overend, Gurney, & Co.* having been established, it became necessary to resort to the past members. *D. L. Lewis* was dead, insolvent; and the name of "*Weikersheim, M. H., & Co., Vienna,* Bankers," was placed by the Master of the Rolls on the B list of contributories in respect of 1400 shares.

Messrs. *M. H. Weikersheim & Co.* now moved, by way of appeal, that the order of the Master of the Rolls might be discharged.

It appeared that the company kept one book called the "Register of Members," in which were entered only the names of the original allottees of shares; and when one of them transferred his shares the date of registration of the transfer was entered in this book, with a reference to the page in another book called the "Members' Ledger." In this book the names of transferees of shares were entered, with references to the pages in the Register of Members. The Members' Ledger shewed the date when each transferee became a member, the number of shares held by him, and the amount due from him in respect of calls made on those shares, also the payments made by him in respect of calls, and the dates of the transfers, if any, made by him of his shares, with the distinguishing numbers of the shares so transferred, also a reference to the folio or folios of the Register of Transfers in which the transfers were entered.

The *Solicitor-General* (Sir *G. Jessel*), and Sir *R. Baggallay*, Q.C. (with them Mr. *Higgins*, Q.C., and Mr. *Rowcliffe*), for the Appellants:—

In no case yet has a firm been made liable as contributories. It has been decided that a corporation can be a shareholder, *Ex parte*

(1) See W.N. (1873) 83.

Contract Corporation (1), but not a firm. Even the name of the firm has been incorrectly entered.

But we contend that there has been no entry in the register directed by the Act to be kept, and therefore Messrs. *Weikersheim* are not liable as shareholders. The Act 25 & 26 Vict. c. 89, s. 25, is precise as to the register of members, and the object is clear, that those who wish to ascertain who are shareholders may be able to do so at once. It is absurd to say that persons are to be liable as shareholders because somewhere in the numerous books of a company their names will be found: *Sichell's Case* (2). The company neglected its duty, and now in fact asks the Court to rectify its omissions and to enter the name in the register of members.

Moreover, it is clear that at the time when *Lewis* professed to make these transfers he had not the shares; in fact the transfers were not taken to the office of the company until the 5th of September. It is certain that the registration could not have taken place when it purports to have taken place. How can a transfer of shares be validly registered on the 23rd of August when the transferor was not registered as the holder of those shares until the 30th of August? It is a very hard case on Messrs. *Weikersheim*, and the Court will not supply the omissions of the company in order to make Messrs. *Weikersheim* liable.

Mr. *Southgate*, Q.C., and Mr. *Jackson*, Q.C. (with them Mr. *Shebbeare*), for the company:—

The real question is, whether the transactions between *Lewis* and Messrs. *Weikersheim* were such as to make Messrs. *Weikersheim* liable to contribute. There is no suggestion in the affidavits that Mr. *Brandeis Weikersheim* had not authority to bind the firm. An English banker could bind his partners, and no doubt that is the law in *Austria* also, and in every trading country: *Sandilands* v. *Marsh* (3); *In re Asiatic Banking Corporation* (4), and the firm may remain as contributories. As to any return to the Registrar, the company did not last long enough for a return to be made. The deed purported to be a purchase deed, and there was

(1) Law Rep. 3 Ch. 105.
(2) Ibid. 119.
(3) 2 B. & A. 673.
(4) Law Rep. 4 Ch. 252.

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nothing to shew that it was in fact a mortgage. No doubt the clerks of the company were careless, but substantially everything was done which need be done to make Messrs. *Weikersheim* shareholders. The time when the transfer was actually registered does not signify: *Ex parte Contract Corporation* (1); *Masters' Case* (2).

Sir *R. Baggallay*, in reply:—

No doubt, as between us and *Lewis*, the transfer was complete; but the question is, whether it was complete as between us and the company. We say that no proper register of members was kept on which we appear as shareholders. Sect. 53 of the Act is precise on the subject. The name of *Weikersheim & Co.* does not appear in the register of members; and, moreover, until *Lewis* was registered in respect of these shares, no dealings with them by him would be effectual. As to our not having previously repudiated the transaction, there was no occasion to do so, as we did not anticipate any liability.

SIR W. M. JAMES, L.J.:—

Now that the facts of this case have been made reasonably clear, it seems to me that there are two very short points only which require decision.

The Act of Parliament, 25 & 26 Vict. c. 89, in sect. 38, says that the present and past members are to contribute, the past members, of course, with certain exceptions in their favour. For the present purpose we have to consider whether the Appellants, who are the individuals constituting a firm of bankers at *Vienna*, were past members of the company. The Act of Parliament also says, in the 23rd section, that the subscribers shall be members; and also that "Every other person who has agreed to become a member of a company under this Act, and whose name is entered on the register of members, shall be deemed to be a member of the company."

Now, did these gentlemen agree to become members of the company? In my opinion it is clearly made out that they did agree to become members of the company. It was a transaction connected with a loan of money from the firm of bankers at

(1) Law Rep. 3 Ch. 105. (2) Law Rep. 7 Ch. 292.

Vienna to *David Leopold Lewis*, in which he agreed to transfer, and purported to transfer, and they agreed to accept, and purported to accept, 1400 shares in the company. If the document containing this agreement was signed by the Appellants, or by their authority, then there is evidence that they did become shareholders in the company to the extent of 1400 shares.

It is said that there is no evidence that the document was signed by them or by their authority, although it purports to be signed in the name of the firm. It is suggested that, according to the law of merchants and the law of partnership in this country, and it must be presumed to be the same in *Vienna*, one partner in a banking firm can have no authority to accept shares for a partnership, or to bind the partnership to accept such shares.

If it were necessary to decide the question, I must say that it appears to me that one partner in a banking firm would have a right to accept a transfer of shares by way of security for a loan of money, as such a transaction would be a part of ordinary banking business. But, independently of that question, I am in this particular case satisfied, looking at it as a matter of fact, and dealing as a jury would deal with the question, that what the lender did he did with the authority of his partner because his partner of course knew what he had done and knew everything connected with it. The Appellants, comprising as it is admitted they do, the very man who signed the document in the name of the firm, have never, during the years in which this question between them and the company has been more or less discussed, said, either upon oath or otherwise, that the document was signed by one partner without the authority of his other partner or partners. Moreover, they have themselves produced an affidavit which must of course be taken to be a representation which they make to the Court for the purposes of this suit, and in that affidavit they refer to the very signature as a signature of the firm, and refer to the document as executed by the firm. It appears to me impossible for them, with any chance of success, now to say at this bar that the company has not strictly discharged the *onus probandi* which was cast upon them of proving the authority of one partner to put the name of the firm, which would of course include the names of the other partners.

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The firm, therefore, it seems to me, must be considered to have authorized that signature, and to be bound by that signature, and also by the subsequent execution of the re-transfer by the same firm and executed in the same way, of the shares which they had agreed to accept. It appears to me that the first proposition is made out, and that the Appellants did agree to become members of the company under the Act.

Then are their names entered on the register of members? It is said that they are not entered on the "Register of Members," inasmuch as their names do not appear in the book so called, that being in fact equally true of every person in this company except the original members to whom the shares were originally allotted.

But on the part of the company it is said that, though the names are not inserted in the book which bears on the outside the title "Register of Members," yet that is because the company has inserted no names in that book except the names of the original shareholders. They say, further, that in that very book there is a plain, unmistakeable reference to another book, which other book the company says—and I agree with what the company says on that subject—is, in fact and in truth, a second volume of the register of members. The books do, in truth and in substance, and it appears to me also in form, give the whole information which was intended by the Act of Parliament to be given by the register of members. That is the book, and in fact the only book, from which a person having occasion to ascertain anything with regard to the state of the company could get the information which he desired to have.

It begins with an index, upon which the name of every person who ever has been a member of this company appears. Then, when we turn to the name of any member, we find recorded the exact position of that member from the beginning to the end—what shares he originally held, what shares he had acquired, and what shares he had parted with by transfer. It appears to me impossible to conceive any book which does more completely give the information which the Act of Parliament requires to be given to any person having occasion to inspect the books of the company, and I am satisfied that it was intended to be the register of

members subsequent to the list of the original members, and that it was honestly kept.

Of course it was made long before any question could have arisen, or have been thought of as likely to arise, in any winding-up, or in any other way. It was honestly kept as the list in which the members were registered from time to time, and not merely these gentlemen, but every other person who became a member by transfer of shares; and it was the book which, if any one had gone to the office and had asked to see the register of members, would have been produced to him as giving him the information which he was desirous of having.

That being so, it appears to me that their names are entered in that which, in my opinion, is a very complete and very satisfactory and efficient register of members, and that their names were so entered by the company as a registration of the title of the members as between them and the company. The company after that could not have disputed the right of any person entered therein on the ground of his not being registered as a member, and I am of opinion that the member could not dispute the fact that he was entered on that book as a member registered and having the rights and liabilities of a member in the company.

It is said that there is some mistake in the register—that there is some little confusion between the dates of the 23rd of August and the 30th of August. That mistake, in my opinion, does not avoid any part of the transaction. That possible inaccuracy does not, in my opinion, prevent the names from being on the register. If any material question should arise as to whether they ought to be considered as having become members on the 23rd or on the 30th, that will be a question to be raised whenever it becomes material. That would result in a rectification of the register or an alteration in it, which those gentlemen would have to obtain, on an application of their own, if they think they are in any way prejudiced by there being any inaccuracy in the date. That, however, does not affect the present question, which is, whether they were or were not members entered on the register of members of this company.

[His Lordship then expressed his opinion that the entry in the ledger was a sufficient description of the individuals who then

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constituted the firm, and that the objection was as immaterial as if any individual shareholder in this company were entered by his name of office or by his title as a peer, instead of being entered by his Christian name and surname. It was a sufficient description for the purpose, and it would be really idle to hold that any defect —if it was a defect—in that particular entry was to have the effect of depriving the persons who were so entered of any rights, or of relieving them of any liabilities arising from the contract into which they had entered.]

I am of opinion, upon every ground, that the objections which have been made to the order of the Master of the Rolls have failed, and that these appeals must be refused, and refused with costs.

SIR G. MELLISH, L.J.:—

I am of the same opinion. The only question of substance is, whether these gentlemen did ever really agree to become, and did become, the transferees of these shares. I am of opinion that if bankers lend money to a shareholder, and agree with him to take a certain number of shares in a limited company as security for that loan, and those shares are transferred to them, they become shareholders in the company. I am also of opinion that if money has been lent by a banking firm to a shareholder in a company, one partner in that firm has authority to take a transfer of shares in the company as security for that loan; and by the laws of this country if a transfer is under those circumstances made and registered, the members of that firm do, to all intents and purposes, become shareholders in the company.

These are in substance the questions raised in this case. It appears to me that upon the evidence there is no doubt that these gentlemen did agree to become shareholders by way of obtaining security for a loan which they had made to *David Leopold Lewis*. The other questions are, to a certain extent, merely technical questions, as to which I agree in all the observations made by the Lord Justice.

But there is one point to which I wish further to allude. It does appear to me that on the 23rd of August there was this difficulty, that *David Leopold Lewis* had not on the register 1400 shares

which he could transfer to Messrs. *Weikersheim*, and therefore, notwithstanding they held a transfer executed by *David Leopold Lewis* professing to transfer 1400 shares to them, and the directors passed a resolution approving that transfer, yet even if the company had at that moment (which upon the evidence I do not think they had) inserted these bankers on the register as shareholders, I confess I have some doubt whether that would make them shareholders. As it appears to me, it would only make them shareholders by way of estoppel.

Then what was the effect of these proceedings? I think it was impossible for the directors to make a valid registration of the transfers from *David Leopold Lewis* to Messrs. *Weikersheim* until the transfers to *David Leopold Lewis* from the real shareholders had been produced for the purpose of being registered. Therefore, in my opinion, there was no valid registration of the transfer until there was a valid registration of the transfers to *David Leopold Lewis*, and if there was not a real valid registration they did not really become shareholders—at any rate not until the 30th of August. I am also clearly of opinion that, as far as they are concerned, it is totally immaterial whether they became shareholders on the 23rd of August, the 30th of August, the 5th of September, or any other day prior to the time when they made the re-transfer, because the extent of their liability depends upon the time when they made the re-transfer, and not on the time when they took the transfer of the shares.

How the mistake originated appears to me plain enough. When transfers have been sent in to be registered, and the directors approve of them, they ought to be registered forthwith. But apparently it was the ordinary practice of the company to date the registration back to the time when the directors accepted the transfer: and it appears to me not to be an improper practice for the sake of convenience, because the clerks have not time to make the actual entry, which may not be made for some days or possibly for some weeks afterwards. Therefore, when this particular entry was made, inasmuch as the clerks found a resolution of the directors approving the transfer on the 23rd of August, they entered it as of the 23rd of August, whereas if they had looked properly and found what the real transaction was, they would

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have seen that it was impossible that *David Leopold Lewis* could have transferred those shares until he himself had become possessed of the shares, and therefore the registration ought to have been postponed. In fact, if everything had been done accurately, I suppose that on the 23rd of August the secretary ought to have written to Messrs. *Weikersheim* to say that the directors had approved of the transfer to them, but that the transfer to *David Leopold Lewis* had not yet come in, therefore the registration could not take place until it did come in. It is to be observed that when we look at the transfers themselves, the transfers to *David Leopold Lewis* are prior in point of date to the transfer by *David Leopold Lewis* to Messrs. *Weikersheim*. The ordinary presumption is that they were executed at their dates, and I see no reason to believe that, as far as these shareholders were concerned, they did not execute their respective transfers at the respective dates which they bear, and which are all, as I understand, either in the month of July or the month of August, prior to the 18th, which is the date of the transfer from *David Leopold Lewis* to Messrs. *Weikersheim*.

It may be that *David Leopold Lewis* himself had not executed the transfers at that time. That, I think, is very likely; and that the real cause of the delay was that he had not paid the money; and that although the transfers had been executed by the respective shareholders, and were in the hands of their brokers to be delivered to the brokers of *David Leopold Lewis*, he had not got the money, and they would not hand over the transfers until the money was actually paid, and that caused the delay.

It appears to me that the only real result of all these proceedings was, that until those shares came in to be registered there could be no valid transfer. In my opinion that makes no difference; but if it did make a difference, we might even now, if it were necessary (although I do not think it necessary), rectify the register.

I do not think it would come within *Sichell's Case* (1). It would not be a case where the directors had refused to register, and through their neglect there had been no registration. It would be a case where they intended to register, but by some mistake the

(1) Law Rep. 3 Ch. 119.

wrong date had been put in by the clerk who actually made the entry. In such a case as that, if it were material, the error might in my opinion, be rectified.

On all the other points I entirely agree with the Lord Justice. I am of opinion that the decision of the Master of the Rolls must be affirmed with costs.

Solicitors: Messrs. *Gregory, Rowcliffes, & Rawle*; Mr. *H. Gover.*

MIDLAND RAILWAY COMPANY *v.* GREAT WESTERN RAILWAY COMPANY.

[1871 M. 107.]

Railway Company—Delegation of Statutory Powers—Agreement by one Company to work the Line of another—Ultrà Vires Act—Railway Clauses Consolidation Act, 1845, *ss.* 87, 92—*Right to use Junction.*

The *H. Railway Company*, whose line ran into the Defendant company's line at *B.*, had a Parliamentary right to use the Defendants' station at *B.*

The Plaintiff company had running powers over the Defendants' line, and were anxious to run trains through the *B.* station over the *H.* line. The *H. Company* applied to Parliament for power to lease their line to the Plaintiffs, but through the opposition of the Defendants the proposed bill was thrown out. The *H. Company* then entered into an agreement with the Plaintiffs, terminable on six months' notice, by which they agreed to allow the Plaintiffs to use the *H.* line and all its stations, sidings, &c., and to afford them every facility for so doing; the Plaintiffs to keep the line in repair, and appoint and pay their own officers, and fix the rates and fares of through traffic, paying to the *H. Company* a proportion of the through rates and fares by way of commuted toll. It was also provided that if the *H. Company* should desire the Plaintiffs to undertake the local traffic of the *H.* line the Plaintiffs would do so, paying the *H. Company* a proportion of the fares.

The Plaintiffs under this agreement claimed the right to run their trains over the Defendants' junction at *B.*, and filed their bill to establish the right, which the Defendants resisted, on the ground that the agreement between the Plaintiffs and the *H. Company* was *ultrà vires* and illegal:—

Held (reversing the decision of the Master of the Rolls), that the agreement was not *ultrà vires* or illegal, and that the Plaintiffs were entitled to the relief prayed.

THIS was an appeal from a decree of the Master of the Rolls dismissing the Plaintiffs' bill with costs.

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The object of the suit was to establish the right of the Plaintiffs, the *Midland Railway Company*, to use a station of the *Great Western Railway Company* at *Hereford*, called the *Barton* Station. The *Hereford, Hay, and Brecon Railway Company*, hereinafter called the *Hereford Company*, was incorporated by an Act passed in 1859, which was amended by another Act passed in 1860. By the latter Act they were empowered to make a junction with the *Newport, Abergavenny, and Hereford Railway* (which was afterwards incorporated with the *Great Western Railway*) at *Barton*.

By an agreement dated the 20th of August, 1864, and made between the *Great Western Railway Company* and the *Hereford Company*, it was agreed that the *Great Western Company* should construct a new siding, or junction, in substitution for the existing *Barton* junction, and that the *Hereford Company* should have a right to use the substituted junction and the *Barton* station, paying a certain rent for the privilege. It was provided that this agreement should be determined upon giving three months' notice by either company. The substituted junction was constructed and used by the *Hereford Company*, but the agreement was terminated in 1867 by notice given by the *Hereford Company*. The *Great Western Company* insisted that the *Hereford Company* had no further rights in the *Barton* junction, and a bill was filed by the *Hereford Company* in 1870 in which a decree was made by Vice-Chancellor *James* that, notwithstanding the determination of the agreement of August, 1864, the *Great Western Company* were bound to maintain the substituted junction and to permit the *Hereford Company* to use it as freely as they would have been entitled to use the original junction.

By an agreement dated the 17th of March, 1863, which was confirmed by the *Great Western Railway (West Midland Amalgamation) Act*, 1863, the Plaintiffs obtained running powers over the *Great Western Company's* line from *Worcester* to *South Wales*, passing through the *Barton* Station. In order to complete their system the Plaintiffs were anxious to obtain a lease of the *Hereford Company's* line so as to run trains over it on to the *Great Western* line at the *Barton* Station. For this purpose they applied for an Act of Parliament in 1869, but the bill was opposed by the *Great Western Railway Company*, and was thrown out.

The Plaintiffs accordingly entered into an agreement with the *Hereford Company*, dated the 14th of September, 1869. The agreement recited that the *Midland Company* having expressed their desire to enter into a contract with the *Hereford Company* for the passage over or along the railway of the *Hereford Company* of their engines and carriages, and it appearing to the *Hereford Company* that an arrangement for that purpose would be of mutual advantage to the two companies, the *Hereford Company* agreed with the *Midland Company* that the *Midland Company* might use their railway for the purpose aforesaid, and that the *Hereford Company* would afford them every reasonable facility for such use for the period and upon the conditions thereinafter mentioned. (Clause 1.)

That the *Hereford Company* should keep the line in good repair, and provide an efficient staff at the stations for the traffic of the *Midland Company*. (Clause 2.)

That the *Midland Company* should be entitled to use all stations, sidings, roads, offices, signals, and other works and conveniences of the *Hereford Company*. (Clause 3.)

That the *Midland Company* should fix their own rates and fares for all descriptions of traffic over the *Hereford* line in *Midland* trains, and should pay to the *Hereford Company*, by way of commuted toll for the use of the railway, a mileage proportion of the through rates and fares charged (after deduction of the usual clearing-house terminals, or of such other sum for terminals as might be agreed), less such a percentage of the mileage proportion for working expenses as should eventually be agreed or settled by an arbitrator, such percentage not to be less than 25 per cent. nor more than 30 per cent. of the said mileage proportion. (Clause 5).

That the *Midland Company* should have a right to place their own clerks and agents at all the stations of the *Hereford Company*, and if the *Midland Company* should perform their own cartage and invoicing an allowance should be made to them at the rate therein mentioned. (Clause 6.)

That if the *Hereford Company*, with a view to economy and for the purpose of affording consistently therewith the greatest amount of accommodation to the public, should desire the *Midland Company* or their agents to haul in their trains local traffic of the *Hereford Company*, the *Midland Company* would do so upon the

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Hereford Company paying to them for such haulage 15 per cent. of the passenger fares charged and 20 per cent. of the rates charged for goods traffic after the deduction of 15 per cent. of the gross rate at each end for terminals; and, subject to such deduction, the *Midland Company* would account and pay over to the *Hereford Company* at the end of each calendar month all moneys received by them for and in respect of such local traffic. (Clause 9.)

That all claims for compensation arising upon traffic brought upon the line by trains of the *Midland Company* should be paid or satisfied by the *Midland Company*, and all claims arising upon any local traffic of the *Hereford Company* which the *Midland Company* might pick up and set down for them under the provisions of clause 9 should, failing agreement, be paid in such proportions as an arbitrator should decide. (Clause 10.)

That the agreement should take effect from the 1st of October, 1869, and be terminable by a six months' notice, with power of appealing to an arbitrator in case the *Midland Company* should not fairly carry out the agreement. (Clause 14.)

The Plaintiffs gave notice of this agreement to the *Great Western Company*, and claimed the right of using the *Barton* junction and station in the same way as the *Hereford Company* might use it. But the directors of the *Great Western Company* refused to acknowledge their right, alleging that the agreement was *ultrà vires* and invalid.

The bill prayed that the substituted junction and station at *Barton* might be declared to form part of the *Hereford Company's* railway and undertaking, and that the *Great Western Company* might be restrained from obstructing the Plaintiffs' trains from passing over the junction into their main line. The *Hereford Company* were made parties as Defendants.

The Master of the Rolls was of opinion that the agreement was *ultrà vires*, being an attempt to grant a lease under colour of a working agreement, and dismissed the bill with costs (1). From this decision the Plaintiffs appealed.

(1) 1873. Feb. 11. WN(1873)38

LORD ROMILLY, M.R., after stating shortly the terms of the agreement of the 14th of September, 1869, continued:—

After carefully considering this agreement I have arrived at the conclusion that the agreement is *ultrà vires* of the *Hereford Company*, and that unless

The *Solicitor-General* (Sir *G. Jessel*), Mr. *Southgate*, Q.C., and Mr. *Jackson*, Q.C., for the Appellants:—

The agreement of September, 1869, is valid under the *Railways* sanctioned by Parliament the agreement is wholly illegal, both at law and in equity.

I come to that conclusion upon these grounds: It is quite settled that a railway company, authorized by Act of Parliament to exercise certain powers, cannot delegate the powers entrusted to them to another person or company. One company cannot say to another: "The powers given to us by Parliament shall be exercised by you, and you shall pay us for the use of it according to a scale to be settled between us."

This is very clearly laid down in several cases which appear to be distinct upon this subject. The first is the case of *Winch* v. *Birkenhead, Lancashire, and Cheshire Junction Railway Company* (5 De G. & Sm. 562), where Lord Justice *Turner*, then Vice-Chancellor, lays the rule down distinctly. [His Lordship read the marginal note, and continued:—] I do not think it makes a material difference that in that case the bill was filed by a shareholder and in the present case by a company. The question is, whether the agreement is a legal agreement or not, and if it is not, then I think anybody who is interested in it can come to the Court to restrain the execution of it. The other case is a case of *Beman* v. *Rufford* (1 Sim. (N.S.) 550), where a railway company constituted under an Act of Parliament agreed with two other railway companies that the whole concern, without incumbrance, when completed should be worked by those two companies, who should have perfect control and exercise all the rights of the first-mentioned company, and who should find the stock and work the concern for twenty-one years; and the Court held that the agreement was illegal, as being in violation of the Act under which the first-mentioned company was constituted, and that it could not be carried into effect. There are several other cases, which I will abstain from referring to or citing, upon the subject. At the same time this rule is certainly subject to various qualifications: for instance, a railway company having to convey passengers and goods from one point to another, in doing which it would be essential to pass over an intermediate line, may do so by arrangement with the company possessed of that intermediate line, which may delegate its powers for that purpose, and may also, considering the necessity of stopping at various stations on the intermediate line, take up and set down passengers at those stations for the purpose of through traffic, all being settled by arrangement between the two companies. But if the company working the through train should work the local traffic also with the intermediate trains, then it becomes an offender against the law regulating this subject. Of course it is not always easy to distinguish between the two cases, and almost impossible, in the abstract, to lay down the exact line where the cession of power by the company possessing the intermediate line delegates the exercise of its Parliamentary powers, and where it only allows another company to pass over the line of which it retains itself the complete control.

Now I am of opinion that in the case of this agreement the *Hereford Company* have given up the entire control

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Clauses Consolidation Act, 1845, s. 87. It contains no evasion of the Act: the *Hereford Company* did not give up all control over the line. It was not an exclusive agreement; it did not prevent

of their railway to the Plaintiffs; the Plaintiffs are to have the stations, to fix the fares, to have their own clerks, their own officers; nay more, under the provisions of this agreement it is clear that the *Hereford Company*, though it may reserve the power, will not in truth reserve to themselves the real working of the line, or any part of it, or anything upon it. They will have no carriages, receive no fares, retain no stations, hire no servants; but, struck apparently with the objection that this would obviously leave the *Hereford Company* without the power of working the local traffic, there is a clause which, leaving, in appearance, the working of the local traffic to themselves, enables them in fact to give the local traffic also into the charge of the Plaintiffs. The 9th clause appears to me to amount to nothing less than a lease of the line. [His Lordship read the clause.] This appears to me to be a species of Parliamentary legislation. Unless it is intended to conceal and evade the real object between the parties, I venture to say that if this agreement were carried into effect as it stands the *Hereford Company* would never, unless after complete revocation of the clauses of this agreement, run a train along the line or work its local traffic. It is obvious that if this agreement stands good any railway company may, by extending the same principle, give up the sole and entire management of the whole line constructed under the Parliamentary powers conferred on them, and deliver all buildings, all carriages, and all liabilities to another company, and receive a regular percentage, or toll, or rent, whatever it may be called, for the use of the line, which they may divide among the shareholders, provided they only put in one or two conditions or provisions at the same time, pointing out under what circumstances the stranger company is to act and use the delegated power. For instance, reading the first words of this clause, it provides that the *Hereford Company* are to be entitled to receive all the moneys after making certain deductions, and if the *Hereford Company* should think it to be for the public benefit, they can give the whole of the power to the *Midland Company* to do the hauling exactly as they should think fit, without themselves keeping a single carriage.

I am, therefore, of opinion that this is a colourable evasion and mode of abandoning this line, or delegating the use and working of it to the *Midland Company*, and that this agreement is invalid.

The Plaintiffs, however, contend that if this agreement of September, 1869, is invalid they can rely upon the agreement of the 17th of March, 1863, which was not originally insisted on by the bill, and which is only put in as an afterthought. The object of the agreement is thus stated in the recital: "Whereas it would be to the advantage of the companies themselves, and also to the public, that the lines of the company should be more fully used for the accommodation of each other by mutual facilities, through booking, the efficient working of trains at convenient times, and, as far as practicable, in due connection, so as to satisfy the reasonable requirements of the public and develop the traffic to be interchanged, and that

the *Hereford Company* from making any other working agreement with another company: *London, Brighton, and South Coast Railway Company* v. *London and South-Western Railway Company* (1); *Hare* v. *London and North-Western Railway Company* (2); *Shrewsbury and Birmingham Railway Company* v. *London and North-Western Railway Company* (3); *Great Northern Railway Company* v. *Eastern Counties Railway Company* (4).

Even if the agreement is *ultrà vires* and invalid, the Defendants cannot avail themselves of that defence. The right of the *Hereford Company* to run through the station is established, and they have a right, and indeed might be compelled, to permit other companies to use their right on payment of tolls. If we have a right to get on the line, it makes no difference whether we have a mere easement or a right under an agreement: nor with what object we came there. Independently of the agreement with the

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such arrangements should be made at the junctions, stations, and in transit, as shall carry out the above objects." That is a key to the meaning of the agreement. It was an agreement entered into between the *Midland Railway* and the *Great Western Railway* and *West Midland Railway Companies*, which, for the purposes of the agreement were to be considered as one company, and with which agreement the *Hereford Company* have nothing to do, and it provided that the *Midland Company* should thenceforth be entitled to use, with engines, carriages, and otherwise, the *Hereford* and *Newport* sections of the *West Midland Railway* (which are no part of the *Hereford* line), and all such other parts of the *West Midland Railway* as lie between *Worcester* and any place in *South Wales*, and also certain other parts therein specified, and any station on all such last-mentioned railways or portions of railways, and all the works, watering-places, and other conveniences thereof. Well, the object of that is quite clear, and it is also clear that if this provision applies to the agreement made with the *Hereford and Hay Railway* it would apply to any railway with which the *Midland Railway* might think fit to make an agreement hereafter. That is to say, two railway companies might agree together to give to one of them power over a railway belonging to another company, which was never contemplated by that company. I think that is contrary to all the rules of construction acted on by this Court. I am, therefore, of opinion that the Plaintiffs are not entitled to do what they claim to do under any or either of these agreements, and that the consequence is the bill must be dismissed with costs. The Plaintiffs are attempting to do without an Act of Parliament that which can only be done by an Act. They must apply to Parliament, and Parliament, no doubt, will grant them the powers, provided it is proper that they should have them.

(1) 4 De G. & J. 362.
(2) 2 J. & H. 80.
(3) 6 H. L. C. 113.
(4) 9 Hare, 306.

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MIDLAND RAILWAY CO. v. GREAT WESTERN RAILWAY CO.

Hereford Company, we have an agreement with the Defendants for running over their line to *Worcester* and *South Wales*, and we have a right to use the *Barton* station for that purpose.

Sir *J. Karslake*, Q.C., Mr. *Fry*, Q.C., and Mr. *Speed*, for the Defendants, the *Great Western Railway Company*:—

The agreement of the 14th of September, 1869, was *ultrà vires*: and being absolutely illegal, it cannot be set up for any purpose. It is an attempt to delegate their statutory powers to another company by a private agreement, which cannot be done without the sanction of the Legislature: *London, Brighton, and South Coast Railway Company* v. *London and South-Western Railway Company* (1); *Beman* v. *Rufford* (2); *Simpson* v. *Denison* (3); *Charlton* v. *Newcastle and Carlisle Railway Company* (4).

The 87th section of the *Railways Clauses Consolidation Act* does not authorize such an agreement to be made, it only gives to a company a limited power to arrange with another company to run over its line when necessary for its own purposes: *Winch* v. *Birkenhead, &c., Railway Company* (5). The money payable to the *Hereford Company* under the agreement is not in the nature of tolls; it was in fact a lease of the line, and the Plaintiffs were to work the line and take the tolls.

The Plaintiffs have endeavoured to evade the law by the special form of the agreement, but the Court will look at the substance of the transaction, which was to hand over the line to the Plaintiffs and give them the entire control over it. With respect to the agreement of August, 1864, the rights thereby given were for the benefit of the *Hereford Company* only, and could not enure for the benefit of the *Midland Company*: *Allan* v. *Gomme* (6); *Hemming* v. *Burnet* (7); *Lawton* v. *Ward* (8); *Colchester* v. *Roberts* (9); *Dand* v. *Kingscote* (10).

Mr. *B. B. Rogers*, for the *Hereford Company*.

(1) 4 De G. & J. 362.
(2) 1 Sim. (N.S.) 550.
(3) 10 Hare, 51.
(4) 5 Jur. (N.S.) 1096.
(5) 5 De G. & Sm. 562.
(6) 11 A. & E. 759.
(7) 8 Ex. 187.
(8) 1 Raym. 75.
(9) 4 M. & W. 769.
(10) 6 Ibid. 174.

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SIR W. M. JAMES, L.J.:—

Although the result at which I have arrived in this case is different from that at which the Master of the Rolls arrived, I agree entirely with him in his conclusion that the only question is whether the agreement is *ultrà vires;* and whether, it being *ultrà vires*, the Plaintiffs are precluded from having the relief they ask.

A great many other questions have been argued at considerable length, perhaps at not greater length than the importance of the case required; but in my opinion they may be very shortly disposed of. First of all it was said that this communication which has been made is something which is neither in fact part of the *Hereford* line nor of the *Great Western* line; that the effect of the communication was to bring the carriages going along the *Hereford* line to something which was a siding upon the *Great Western* line, but which was no part of the *Great Western* line, and that that bit could not be used without some special agreement, or some new agreement granting some new right over the *Great Western* line. I am of opinion that the communication so made was in truth, under the circumstances of this case, part of the *Hereford* line, and that the plain effect in law of the right to make that junction was to make the two lines, the *Great Western* and the *Hereford*, one continuous line of railway, so that the public should have the power of using it as one communication; and that kind of continuous communication which, by the 2nd section of the 17 & 18 Vict. c. 31, every railway company is bound not to obstruct in any way.

I am of opinion that this being a communication which was part of the undertaking of the *Hereford Company*, the *Midland Company*, if they had lawful power to use that line of railway for the purposes of their traffic, had that lawful power for the purpose of getting on to the main line of the *Great Western Railway* for the purpose of lawfully using the *Great Western* line, if under the general law, or under any special agreement with that company, the *Midland Company* had the right to use that line. I am of opinion, and I entertain no doubt whatever, that under the working arrangement to which they obtained the sanction of Parliament in the year 1863, the *Midland Company* did get a lawful right to come to and from the *Great Western* line by any means which they

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could acquire, just as if they had been landowners or had bought a piece of land and made a branch for themselves. If they acquired the power to come to or from the railway by any branch or any communication or any other means, then they had a right under the running powers which they so obtained from the *Great Western Company* to use any portion of the *Great Western* to and from the point at which they entered, or at which they were minded to depart, and that they had running powers up to that branch, and thence over that communication to the *Hereford* line. It appears to me that it is idle to say that the two lines are to be separated by some pieces of rail or some other piece of property of the *Great Western Company* which was to prevent the *Midland Company* from using the *Great Western* line from that point forward. Therefore, if there were nothing in this agreement with the *Hereford Company* that would deprive the *Midland Company* or any other company or person using the *Hereford* line of their rights—nothing making it illegal to do so—I am of opinion that the *Hereford*, and every company, and every person using that line, would have the right to use the communication for the purpose of getting on to the *Great Western* line; and then when they got upon it the rights would be determined by the general law, or by the special agreement which existed between them for the purpose of using the line of the *Great Western*.

The point determined adversely to the Plaintiffs by the Master of the Rolls was upon the effect of the agreement between the *Midland* and the *Hereford Companies*. The Master of the Rolls was of opinion that that agreement was *ultrà vires*. Now, if it were necessary to determine the point, I should require very much further consideration before I should be prepared to affirm, as a general principle of law, that it would be competent for the *Great Western Company* to justify an obstruction of that communication upon the ground that there was something *ultrà vires* in the contract between the *Midland* and the *Hereford Companies*. No doubt there are authorities which it would be necessary very carefully to consider before we affirmed it was not competent to allege that illegality; but sitting now as we are sitting, both as a Court of Equity and a Court of Law, bound to determine any legal question that arises in exactly the same way

as a Court of Law would decide it, I should say for myself that I should desire very much further consideration before I arrived at the conclusion that to an action for obstructing the trains of the *Midland Company* using the line of the *Hereford Company*, it would be competent for the *Great Western Company* to say, "You are using the *Hereford* line, it is true, by the permission of the company, the owners of that line, but you have some agreement with that company under which you are using it, which agreement is against the policy of the law." It appears to me it is not necessary to determine that point, or to say to what extent the cases that have been cited in this Court would apply to a case of this kind; because, having heard the arguments that have been addressed to us on the part of the Defendants the *Great Western Railway Company*, and having read and considered the judgment of the Master of the Rolls, I am bound to say I have arrived at the conclusion, without any doubt whatever in my own mind, that there is nothing whatever in this agreement that is illegal, or that is in any way beyond the powers of either company, or that is in any sense against that very elastic phrase, public policy. The *Midland Railway Company* and the *Hereford Railway Company* enter into arrangements which, upon the face of them, seem to me to be perfectly consistent with every obligation of either company. The *Hereford Company* say they will give every facility for the through traffic of the *Midland*, which is precisely what it has been the policy of the Legislature in all these numerous Acts, not only to encourage, but to prescribe, namely, that every company shall give every facility to every other company for using their respective lines, with a view to the convenience of the public. It is said they are going to delegate their authority, or some of their powers, to the *Midland Company*, that it is in effect a lease or a transfer or a delegation of the powers of the *Hereford Company* to the *Midland Company*. I see nothing whatever in this agreement which amounts to any such delegation. I agree that, practically, the *Hereford Company* will for the present, and it may be for a long time, having provided for the convenience of the public and their own profit in the way they have done, find it not worth their while to set up carriages of their own and become carriers upon their own line. They are not obliged to become carriers,

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and if ever it shall appear to the directors of the *Hereford Company*, or their shareholders, that it will be for their convenience to be carriers themselves, there is nothing in this agreement which either expressly or impliedly throws the slightest difficulty or obstruction in the way of their becoming such carriers. And supposing any other company were minded to use this line of the *Hereford Company*, there is nothing in this agreement that prevents the *Hereford Company* from making an exactly similar agreement with other companies, as, for instance, with the *Brecon and Merthyr*, and the *Mid-Wales Companies*, which lines, we are told, open into their line, as they have done with the *Midland*; and if the *Hereford Company* should be unwilling to enter into such agreement it is open to any one of those companies to compel, under the general law, the *Hereford Company* to give all the facilities which the law compels one company to give to another; and if a private proprietor of mines, or the owner of works, or any landowner adjoining the line, should be minded to make a branch into the line from his land, there is nothing to prevent his enforcing that right, and there is nothing in this agreement which appears to me either expressly or impliedly to give the *Midland Company* a voice in the performance of any one of the duties which will be cast upon the *Hereford Company* under those circumstances. The *Hereford Company* are bound to work and maintain the line, and to provide everything requisite for the convenience of the public, and they would be liable to a mandamus if they omitted to perform any duty cast upon them, and I can see nothing whatever in this agreement which transfers to the *Midland Company* one single duty of any kind whatever which the law has cast upon the *Hereford Company*. It is said that this agreement enables the *Midland Company* to fix their fares—that is to say, the remuneration of the *Hereford Company* is to be dependent upon what the *Midland* themselves will get for the use of the line. I cannot find anything in the Act of Parliament which is to prevent a company from fixing its remuneration in that way; I can see nothing that amounts to a delegation of authority. Of course, if the *Midland Company* get any advantage by this, the *Hereford Company* will be bound to give exactly the same advantage to any

other persons. It seems to me the only mode in which it can be done conveniently for both companies is that there should be a division, one of the companies having the carriage of the through traffic; that one of them should fix the whole price from terminus to terminus, and then that the company over whose line the train is going should receive a certain proportion of the whole in accordance with the mileage.

It is said that it is not a toll. I do not know why it is not a toll. I do not know why a sum fixed with reference to the gross receipts is not as much a toll as if it were fixed in any other way. Take the case of market tolls. In one of the oldest cases the toll was a penny if the article sold for so much, and three-halfpence if it sold for so much more. That is to say, the sum which is to be received should vary in proportion to the sum which the seller was getting. There have been tolls taken also in proportion to quantity, such as a quart of corn out of a bushel sold, and so on. Anything which one man pays to another for the conveyance of a thing over a line where the rate is according to the quantity carried—whether that rate is with reference to what the man gets for the article or not—is a toll. It is a charge which one man takes from the other in proportion to the quantity of traffic carried.

Another clause upon which much stress was laid was the 9th clause, in which it is said that the *Hereford Railway Company* contemplate not having the local traffic. Possibly there might have been an objection to the clause if they had bound themselves not to put on any trains, but there is nothing here whatever to preclude them from putting on their own trains for the purpose of carrying their own traffic.

Then, again, it is said there is something in the clause with reference to the claims for compensation, which is in some way against the policy of the law. I am unable to see anything whatever objectionable in that. It provides that the claims for compensation shall be satisfied by the company deriving the profit from the traffic, that is, the *Midland Company*, with regard to the through traffic; and the claims for compensation arising from the local traffic, which belongs to the *Hereford*, are to be settled by arbitration between them, having regard to the respective profits

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they were getting from it. I cannot conceive how it can be in any way against any principle or policy of the law that there should be that mode of arrangement for the payment of persons who have claims for compensation as between two companies who are jointly interested, and who are in some way or other mixed up in the cause of the injury.

Then it is said we ought not to be blinded by the language of the agreement; that the agreement is drawn cunningly and craftily for the purpose of appearing to be legal, whereas there was a private understanding and knowledge on the part of both parties that practically it would give to the one company a monopoly of the other just as fully and as completely as if it had been a lease. I am unable to follow that line of argument. Were we considering an agreement between two companies who can only bind themselves, and only express their will by instruments under their common seal—I cannot conceive how their mind is to be ascertained by anything which has been said by the directors of the one company or of the other, or by anything that has passed between the agents or solicitors, or by any guess that we can make as to what the motives of those persons were—I cannot see how we can import into that which alone binds the companies, the agreement under their common seal, anything not to be found on the face of the agreements, or fairly to be implied from them. I do not think any of the cases that have been cited have really gone outside the document itself for the purpose of arriving at the conclusion that there is something against the policy of the law in what it contains. Being of opinion that this agreement is not *ultrà vires*, and that there is nothing illegal in it, or against public policy, so far as that is an intelligible phrase, and being of opinion that the *Midland Company* were entitled to use the communication for the purpose of getting on to the *Great Western* line, and that they were entitled to use under their working powers the *Great Western* line for the purpose of proceeding with their trains, I am of opinion that it was illegal and improper on the part of the *Great Western Company* to put any obstruction so as to interfere with the continuousness of the traffic; and that, therefore, the Plaintiffs are entitled to the injunction which they have asked; and the *Great Western Company* will, of course, bear the costs of the suit.

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SIR G. MELLISH, L.J :—

I am of the same opinion. The real question appears to me to be whether the *Midland Company*, under and by virtue of their working agreement with the *Hereford Company*, and under and by virtue of their working agreement with the *Great Western Company*, are entitled to use the lines in question. I think the fallacy of the argument of the counsel for the Defendants was that they argued it as two separate questions—first, whether the Plaintiffs were entitled to succeed by virtue of their agreement with the *Hereford Company;* and, secondly, whether they were entitled to succeed by virtue of their agreement with the *Great Western Company*. Whereas it appears to me, and has appeared to me all through the argument of this case, that the real question to be decided is, Are the Plaintiffs entitled to use the *Hereford* line by virtue of their agreement with the *Hereford Company*, and are they entitled to use the *Great Western* line under and by virtue of their agreement with the *Great Western Company?* If they are entitled to use the *Hereford* line under and by virtue of their agreement with the *Hereford Company*, and are entitled to use the *Great Western* line under and by virtue of their agreement with the *Great Western Company*, it would be, as it seems to me, a very extraordinary conclusion to hold that they are not entitled to go from the one to the other. And the real question on that part of the case appears to me to be this: If it should so happen after the agreement with the *Great Western* was made, and whilst it was in force, a new line was made by some other railway company which has communication with some portion of that part of the line of the *Great Western* which they are entitled to use, are the *Midland Company* thereupon entitled to go with the licence of that other company from the *Great Western Company* to the new line? It appears to me they are, because what is the effect of a working agreement of this kind? By virtue of the 92nd section of the *Railways Clauses Consolidation Act*, 1845, every company is entitled to use the line of every other company. It is perfectly true that that clause has been of very little practical use, because it is so imperfect and is made subject to such conditions that not having the use of the stations, nor of the watering places, and being subject to all bye-laws and regula-

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tions, practically one company cannot use the line of another railway company without a working agreement. But when they have made a working agreement, and that working agreement is confirmed by Act of Parliament, the result of that is that they have got a right to use the line of the other railway company which is given them by the 92nd section, and the obstacles which might be otherwise put in their way are altogether removed, and it appears to me that if there is any line of railway opened into that they are entitled to go from one to the other. It is quite absurd to say in this case that there was a little bit of railway which was neither the one line nor the other. By virtue of the Act of Parliament by which the *Hereford and Brecon* junction was made, there is a small portion of railway, which, although made on the land of the *Great Western*, is part of the undertaking of the *Hereford Company*. I am of opinion that that is to be considered for the purpose of this agreement as part of the *Hereford* line. Still it comes to the same thing; wherever that bit ends the *Great Western* begins, and in my opinion they are entitled to use the line of the *Great Western* by virtue of their agreement with the *Great Western*.

Then that brings it to the only remaining question, whether that agreement with the *Hereford Company* is a valid agreement, and I am of opinion that it is a valid agreement. I do not think it necessary to go through the clauses again. I entirely agree with the remarks which the Lord Justice has made upon them; but I wish to make a few remarks on what, no doubt, is a very important question, namely, assuming that the clauses in themselves are legal, nevertheless may it be shewn that there was some illegal intention, and that it was made with some illegal object, and that on that account the Court would not enforce it? First, is there any authority upon that? No doubt there are some cases in which the Judges have used this sort of expression, without saying in plain terms it is contrary to the Act itself, they have said it is contrary to the policy of the law, and "it is a virtual illegality," and expressions of that kind. But when the cases are looked at I think it is quite clear that in all the cases there was either an actual lease or an actual exclusive working agreement. The only case which raised any doubt in my mind as to that was the case of

London, Brighton, and South Coast Railway Company v. *London and South-Western Railway Company* respecting the station at *Portsmouth* (1). The third agreement in that case did at first sight look somewhat similar to the agreement in this case, but on the whole I am of opinion that the Judges did not really mean there to decide that though the agreement was on the face of it legal, yet the Court might go into the illegal intent, and on that ground hold it to be void. What they really meant was that there being a lump sum of £18,000 to be paid in lieu of all the tolls, that shewed quite plainly it was intended that the whole working of the traffic of the railway should be given up.

But then it is said here, though the agreement may not bind them to give it up, yet it is clear that the practical effect of it would be that the whole would be given up. But does that make it an illegal agreement? I will assume, and it is probable enough, though perhaps it is not strictly proved, that they went to Parliament to get power to lease the *Hereford* line to the *Midland Company*, and that having been refused they did what I think is very natural they should do in such a case—they laid instructions before some competent counsel, and said, Draw us an agreement which shall be legal, and shall as far as possible carry out our intentions. That is what I should suppose they did, and in my opinion, whoever was employed to do that has done it successfully. He has drawn what appears to me to be a perfectly legal agreement.

A great deal has been said about the "policy of the Act of Parliament" and about the "policy of the law," but you cannot find out the policy except by reading the Act and seeing what has been enacted in it.

What is it that the Act of Parliament has done? It has not made it compulsory on a railway company to act as carriers on their own line. Yet Parliament must be taken to have known, what is beyond all question the truth, that there may be comparatively short railways forming part of through lines of communication between important places, having no great and important traffic of their own, which cannot practically be worked by their own company at a profit. Looking at the map, it appears to me

(1) 4 De G. & J. 362.

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extremely probable that the *Hereford Company* is in that position —that a large portion of their traffic—almost all of it—depends on the through traffic. If they were simply to start with their carriages, taking up passengers at one end of their line and carrying them to another part where they have no terminus, but which is just near the *Barton* station at *Hereford*, and there to disembark them, it practically could not be worked at all. Then how are they to work it? They may open it to all persons if they can make regulations, or they may make regulations for working the traffic with any railways which are in communication with them; and if instead of making only one agreement with the *Midland Company* they had made three or four agreements—one with the *Great Western*, another with the *Mid-Wales*, another with the *Merthyr Company*, could it be said that there was anything in the least illegal in it? Then can it be said that it is illegal because it happens that there is only one railway company which desires to make such an agreement with them? I cannot see how that makes it illegal. It may be in that sense contrary to the policy of the law that a railway company shall give up its entire powers of working to another company, and shall prevent itself by contract from allowing other companies and persons to use its railway besides the particular railway company with whom it makes the contract. But, then, supposing a railway company is in such a position that it cannot practically work its own line with a profit, and can practically get no other company except one to enter into a working agreement with it, does that make it illegal? Is it the policy of the law that the railway shall remain unworked, or is it more consistent with the policy of the law that if there is only one company which is practically willing to work it, it shall make an agreement with that company? Well, then, of course if they are not bound to work themselves, and if there is only one company willing to make a working agreement with them, the practical consequence must be that the one company will have the working of the whole line. Surely that cannot make the agreement illegal. I cannot allow that it is the same thing, whether there is an agreement which practically amounts to a lease, and which, by contract, prevents them entering into an agreement with other companies, and an agreement like this, which has no such exclusive clauses in it;

although it may be that that company alone will work the line. The difference is this, that at any moment at which the *Hereford Company* think it for their advantage to work their own line, or think it for their advantage to enter into a contract with any other company, there is nothing in the agreement to prevent them from doing so. Upon the whole, I am not disposed to carry what is called the policy of the law beyond what I can find upon the face of the agreement. It appears to me that the agreement which has been entered into is an agreement which is authorized by the 87th section of the *Railways Clauses Consolidation Act*. I think that section is clearly reciprocal, and not, as Mr. *Fry* contended, a clause which only enables the company which is the owner of the line to enter into an agreement to enable another company to send its engines and carriages on the line, but it also enables the other company reciprocally to enter into the agreement. Therefore, being of opinion that the agreement itself is legal, and being of opinion that the *Midland Company* are entitled to use the *Great Western* line by virtue of the agreement with the *Great Western Company*, I must hold that the decree that has been made must be reversed.

Solicitors for the Plaintiffs: Messrs. *Beale, Marigold, & Beale.*

Solicitors for the *Hereford Company:* Messrs. *Tilleard, Godden, & Holme.*

Solicitors for the *Great Western Company:* Messrs. *Young, Maples, & Co.*

L. JJ.
1873
April 30.

HART *v.* HERWIG.

[1873 H. 84.]

Foreign Contract—Ship—Specific Performance—Injunction—Jurisdiction—Substituted Service.

A shipowner of *Hamburg* made, at *Hamburg*, an agreement with a domiciled Englishman for the sale to the Englishman of a *Hamburg* ship whenever she might return from the voyage on which she then was. The ship returned and was by the owner ordered to proceed to *Sunderland*. The master of the ship, who was authorized by the shipowner to act as his agent in the sale, refused to deliver the ship except on certain terms. The purchaser filed a bill against the owner and the master for specific performance. He obtained leave to substitute service on the master for the owner, and moved for an injunction to restrain the Defendants from removing the ship out of the jurisdiction:—

Held, that substituted service on the master was effectual and proper:

Held, that the Court had jurisdiction to restrain the Defendants from removing the ship, and injunction granted.

Order of *Malins*, V.C., affirmed.

By an agreement dated the 16th of January, 1873, and signed at *Hamburg* by *H. T. Hart*, of *Dalston*, in *Middlesex*, and *C. W. Herwig* (residing and domiciled at *Hamburg*), *Hart* agreed to buy from *Herwig* a *Hamburg* ship called the *Hertha*, with all her stores, provisions, and materials, at the price of £4700. The agreement stated that the ship was expected from *San Francisco* for orders to a port of discharge, but the purchaser was to take possession of the ship immediately after the delivery of the homeward cargo at any place whither she might be ordered, the seller paying all expenses or charges that might be incurred up to the date of delivery of the ship. In case of the ship arriving at her port of discharge in a damaged state over and above ordinary wear and tear, or under average, the seller to make corresponding allowances for the same.

The *Hertha* arrived at *Cork* from *San Francisco* on the 3rd of March, 1873, and by the owner's order proceeded to *Sunderland* as her port of discharge. *Herwig* had by a letter authorized the master to complete the sale as soon as the ship was discharged. *Hart* alleged that she arrived in a damaged state over and above

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the ordinary wear and tear, and that the purchase-money of £4750 was, therefore, under the agreement, subject to a deduction, which could be easily ascertained on a survey of the ship, but that *Herwig* and the master of the ship refused to allow a survey, and refused to deliver the ship on any other terms than on payment of the whole sum of £4750.

Hart thereupon filed the bill in this suit against *Herwig* and the master of the ship, alleging as above stated, and praying for specific performance, and that proper directions might be given for ascertaining the deduction for damage, and that in the meantime the Defendants might be restrained from removing the ship from *Sunderland* or otherwise dealing with her.

The Plaintiff on the 5th of April obtained an *ex parte* injunction to restrain the Defendants from removing the ship until the 16th of April, and also obtained an order that service of a copy of the bill and of notice of motion for the 16th of April on the master of the ship should be deemed good service thereof upon the Defendant *Herwig*, who was still at *Hamburg*, and who appeared under protest.

On the 16th of April the Plaintiff moved accordingly; and on the 17th of April the Vice-Chancellor *Malins* granted against both Defendants an injunction until further order.

The Defendants now moved by way of appeal before the Lords Justices that this order might be discharged.

Mr. *Glasse*, Q.C., and Mr. *Cozens-Hardy*, in support of the appeal:—

The contract for the sale of this ship was made with a foreigner in a foreign country, and the ship is foreign; this Court therefore ought not to interfere, and ought to leave the Plaintiff to proceed at *Hamburg*, where alone the contract can be construed. The cause of action is not within the jurisdiction: *Allhusen* v. *Malgarejo* (1). The ship is foreign, otherwise under the *Merchant Shipping Act* the Court could not interfere. A ship is a peculiar chattel, and the only right of *Hart* is to damages for breach of contract; but it is clear that he could not sue the Defendant at law, or obtain leave to proceed under 15 & 16 Vict. c. 76, s. 19, and the

(1) Law Rep. 3 Q. B. 340.

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accident of the vessel coming into an English port ought not to give this Court jurisdiction. It was no part of the contract that she should be delivered here. This Court acts *in personam*, and not *in rem*, and does not obtain jurisdiction merely because the subject matter of a dispute is in this country.

Moreover, we say that in such a case as this, service on the master could not be substituted under the rules of this Court: Cons. Ord. x. s. 7. The substituted service is therefore irregular and void. This is clear from *Davis* v. *Park* (1); *Cookney* v. *Anderson* (2).

Mr. *Cotton*, Q.C., and Mr. *Dauney*, for the Plaintiff:—

If this order is discharged, the ship may never go to *Hamburg*, where alone, according to the Defendants' contention, the rights of the Plaintiff can be enforced, and then he can never obtain the

(1) DAVIS *v.* PARK.

[1872. D. 55.]

1873. Jan. 22. L. C. & L. JJ.

THE bill in this suit was filed by a Plaintiff who was domiciled in *America*, against two Defendants, both of whom were domiciled in *America*, and the object of the suit was to enforce a contract made in *America* relating to a mine called the *Emma Mine*, situated in *America*.

Park, one of the Defendants came to this country, and the Plaintiff, who was also in this country, then filed the bill against both Defendants. On 31st May, 1872, the Plaintiff obtained in Chambers an order *ex parte* for leave to serve the Defendant *Baxter*, who had remained in *America*. He was served and appeared conditionally. He then moved before the Vice-Chancellor *Wickens* to discharge the order for service in *America*.

The Vice-Chancellor held that to make the order was within his jurisdiction; but that it would not be a proper exercise of discretion to uphold it. He said that the real question was, whether *Baxter* had, after entering into this contract (which must be taken as American, and made between citizens of the *United States*), done anything to waive his ordinary right to be sued in the Courts of that country of which he was a citizen, and where he still resided. His Honour could not satisfy himself that the Defendant had done so. The other Defendant, *Park*, came to this country, not as agent of *Baxter*, but of a company at *New York*, and the waiver of his right by coming here did not involve that of *Baxter*. *Baxter* refused to have the question tried in this country, and therefore the order must be discharged with costs.

The Plaintiff appealed.

Mr. *Dickinson*, Q.C., and Mr. *Cutler*, for the Plaintiff.

The *Solicitor-General* (Sir *G. Jessel*), and Mr. *Macnaghten*, for the Defendant *Baxter*.

THEIR LORDSHIPS thought that the Vice-Chancellor had exercised a proper discretion in discharging the order, and dismissed the appeal with costs.

Solicitors: Messrs. *Hargrove & Co.*; Messrs. *J. & R. Gole*.

(2) 1 D. J. & S. 365.

performance of the contract, and there will be an absolute denial of justice. In this case the master was the agent for the owner, and substituted service on the master was quite proper: *Hope* v. *Hope* (1); *Hobhouse* v. *Courtney* (2); *Larivière* v. *Morgan* (3).

There is nothing in the comity of nations to prevent this Court from exercising its jurisdiction in this case.

Mr. *Cozens-Hardy*, in reply:—

The contract must be enforced where the Defendant is. If the Plaintiff had failed to perform his part, he would have been sued here; and similarly the owner must be sued at *Hamburg*. Can it be said that one party to a contract relating to a chattel can follow that chattel and obtain a forum wherever the chattel is? The subject matter of the contract, the place where it was made, and one party to it, all are foreign, and the tribunal ought to be foreign.

Sir W. M. James, L.J.:—

This is an important matter, and deserves the full discussion which it has received.

I am of opinion that with one slight exception, there is really no objection whatever to any part of either of the orders which the Vice-Chancellor has made.

In the first place, I am of opinion that the order for substituted service is quite in accordance with the established principles and practice of this Court. It is an order for substituted service upon the man who in this country was the authorized agent of the Defendant abroad in respect of the very thing which is the subject matter of the suit; the service upon that agent is therefore as effectual to all intents and purposes as service upon the Defendant himself would be.

The substantial question, however, is, whether this Court has power to prevent a specific chattel from being removed out of the jurisdiction until a question relating to that chattel is decided. I am of opinion that, according to the established law of nations, if this suit were a suit for damages only, or one which could result

(1) 4 D. M. & G. 328. (2) 12 Sim. 140.
(3) Law Rep. 7 Ch. 550.

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in damages only, then the Plaintiff must in order to enforce his claim for damages go and seek the forum of the Defendant. But where the contract, as in this case, though made abroad, is to deliver a thing in specie to a person in this country, and the thing itself is brought here, then the Court here, in the exercise of its discretion, will see that the thing to be delivered in this country does not leave this country, so as to defeat the right of the Plaintiff to have it so delivered.

I am of opinion that if the converse case had arisen, and the ship had been in *Hamburg* under an English contract, and either party had sought, through the intervention of the tribunal there, to have the contract performed, no one here would suppose that there was any violation of international right, or any violation of the comity of nations as between this country and the country in which *Hamburg* is situated, by the tribunals of *Hamburg* taking cognizance of the matter.

Having regard, therefore, to the nature of the contract, the subject-matter of the contract, and the manner in which the contract was to be performed, I am of opinion that the Vice-Chancellor was quite right in ordering the ship to be kept here, so that it might be delivered in the performance of the contract, and in not allowing the ship to proceed to some other part of the world under such circumstances as actually to prevent the contract from ever being fulfilled. It would become utterly impossible for the Plaintiff to ascertain what he was to pay, or how he was to get the ship.

The right of the Plaintiff here was to have the ship delivered to him in exchange for the purchase-money. The purchase-money is *primâ facie* £4750, and that sum we think the Plaintiff ought to bring into Court. It is possible that that sum may have to be reduced, if it is shewn that the ship has arrived in a damaged state over and above ordinary wear and tear; but I do not think that because there is an uncertainty as to what the amount of the reduction is to be, we ought to make any difference as to the security to which the Defendant is entitled before the possession of the ship is interfered with. Therefore I think that the order ought to be varied to that extent, that is to say, the Plaintiff must undertake to pay into Court the sum of £4750, and there will be

an order upon him to that effect. The appeal, however, will be refused with costs, because that condition does not substantially affect the question which has been brought before our notice.

SIR G. MELLISH, L.J.:—

I am entirely of the same opinion.

Mr. *Glasse* relied very much on the analogy of the *Common Law Procedure Act*, 15 & 16 Vict. c. 76, s. 19, which he said would not give the Court of Common Law jurisdiction in this case, and said that if the Court of Common Law had not jurisdiction it could not be right for the Court of Equity to assume jurisdiction. But really the analogy of the *Common Law Procedure Act*, when we come to examine the case, is against that conclusion, and not in favour of it. It is quite true that if you simply look at this as an action brought upon a contract to recover damages, the contract having been made abroad, the Defendant could not, under the provisions of the *Common Law Procedure Act*, be served abroad, and if he did not choose voluntarily to appear in the action in this country, the Plaintiff must have gone to *Hamburg*, and could not have sued him here. But if, on the other hand, the contract had been of such a nature as that the property had passed, then the chattel having been sent to this country, and the agent of the owner, by the authority of the owner, having refused to deliver it in this country, then—if that had been the state of things—an action of trover or detinue could have been brought, because the whole cause of action would have arisen here.

The real truth is, that in the view of a Court of Equity the property has passed from the Defendant, and the Plaintiff, upon complying with the condition, is substantially to be considered as the owner. I think that this consideration shews very clearly that if the *Common Law Procedure Act* does not violate, as I am clearly of opinion that it does not violate, any rule of the comity of nations, we shall not violate any rules of the comity of nations by saying that we have jurisdiction to compel completion against the Defendant *Herwig*, who has agreed to sell his ship to an English subject, who has chosen to perform that contract in *England* by voluntarily sending the ship to *Sunderland*, and who has given directions to his agent, the master, to perform that contract.

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I am clearly of opinion that we are not in the least degree infringing any rule of the law of nations by saying that this Court, which is the only Court which can compel the actual specific performance of the contract, has jurisdiction in this case. It is peculiarly a case for the interference of this Court, inasmuch as if specific performance were denied to the Plaintiff he, practically, would get no justice at all, because it would be almost impossible for him to prove in *Hamburg* how much the ship was worth, and practically to make out that she was damaged at all. In fact he has entered into this contract for the purchase of the ship, and he is entitled to the ship. There may be a doubt as to what the purchase-money is to be, but that he is entitled to the ship there appears to be no doubt at all, yet he might actually, although he would be unable to prove it, suffer very considerable damage.

I am therefore clearly of opinion that the order of the Vice-Chancellor is substantially correct.

Solicitors for the Plaintiff: Messrs. *Parker & Clarke.*
Solicitor for the Defendants: Mr. *J. W. Hickin.*

L. JJ. 1873 *May* 28.

HARRISS *v.* FAWCETT.

[1872 H. 53.]

Guarantee—Death—Notice—Executor.

A guarantee was determinable by six months' notice. The guarantor died, leaving as his executor the debtor on whose behalf the guarantee was given. The creditors to whom the guarantee was given continued to make advances to the debtor, knowing that there was no personal estate to answer the guarantee:—

Held, that, under the circumstances, the creditors were not entitled to the benefit of the guarantee for their advances subsequent to the death.

Per Mellish, L.J.:—The death alone did not determine the guarantee.

Decision of Lord *Romilly*, M.R., affirmed.

5 Q.B.D. 46
16 C.L.D. 297
299, 300, 311
314,

JOSEPH FAWCETT on the 21st of October, 1840, gave to a bank a guarantee to make good to the said bank all sums not exceeding £3000 which the bank might advance to his son *James*,

Fawcett. The guarantee to continue until six months' notice should be given by *Joseph Fawcett.*

Joseph Fawcett died in September, 1867, leaving as his executor *James Fawcett.* At the time of the death *James Fawcett* owed £5415 to the bank. He continued to deal with the bank, and had paid to the bank sums exceeding £5415, but at his death in 1870 he owed £2485 to the bank. The bank now claimed to prove under the guarantee, against the estate of *Joseph Fawcett,* which was being administered by the Court. *Joseph Fawcett* left some real estate, but his personal estate was under £200. No notice to discontinue the guarantee had been given. There had been discussions between the bank and *James Fawcett,* and the bank had asked him for further security, as stated in the judgment of the Lord Justice *James.*

The Master of the Rolls dismissed the claim, as reported (1), where the facts are more fully stated.

The bank appealed.

Mr. *Fry,* Q.C, and Mr. *Freeling,* for the bank:—

It was formerly the notion that such a guarantee was revoked by the death of the guarantor, but that was put an end to by *Bradbury* v. *Morgan* (2). The bank clearly thought that the guarantee continued, or else they would never have made these further advances. At law it is clear that the guarantee continued, and our claim is legal. No doubt it was the duty of the executor to give the notice, but he did not, and his estate is liable in consequence; that, however, does not affect the bank. The bank had no notice of any breach of trust in not terminating the guarantee.

[They also cited *Offord* v. *Davies* (3).]

Mr. *Southgate,* Q.C., and Mr. *Bathurst,* for the Plaintiff, were not called upon.

Mr. *W. Pearson,* for the Defendants.

SIR W. M. JAMES, L.J.:—

I am of opinion that the order of the Master of the Rolls in this case is right.

(1) Law Rep. 15 Eq. 311. (2) 1 H. & C. 249.
(3) 12 C. B. (N.S.) 748.

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It is not necessary, in my view of the case, to consider how far the observations of the Master of the Rolls on the case of *Bradbury* v. *Morgan* (1) are well founded or not. It appears to me that this case ought to be determined upon equitable considerations, which very plainly arise upon the facts of the case as they are now disclosed to us. I assume for this purpose that the contract was a continuing contract, and one that required for its termination six months' notice to be given. It is argued on behalf of the claimants that the six months' notice was a six months' notice to be given by the executor after the death of the guarantor. But the executor was himself the man who was the guaranteed debtor, and the personal estate of the guarantor was sworn under £200, all of which was in the knowledge of the bankers. The case of the bank is, that knowing there was no personal estate, and that there was nothing therefore but the real estate, they for years after the death of the guarantor went on lending money to the executor upon the credit of the real estate, and that they have a charge upon the real estate, because the executor did not give them a written notice to determine the guarantee.

It appears to me that they must have known that it was the plain duty of the executor to have given that notice. They must have known it was either through a breach of trust or through inadvertence or neglect on the part of the executor that the liability of the real estate was continued, and they advanced the moneys to him with full knowledge that the real estate belonged to the beneficiaries under the will.

But I think that what really occurred between these parties proceeded upon the footing that in substance and in truth the guarantee was at an end. A new security was asked for, and I cannot help attaching great importance to the fact that the result of one of the applications was that a sum of £3200 was paid into the bank, reducing the debt at that moment to £1600.

It was considered that the guarantee was at an end except as to any debt recoverable at the time of the death of the father, and that the father's death determined the guarantee. The bankers proceeded upon that footing, and the executor acted upon that footing, and they knew or ought to have known that the father's

(1) 1 H. & C. 249.

guarantee was determined. It would be, I think, inequitable to allow the bank to recover against the real estate those advances which they continued to make to the executor of the guarantor after the death of the father.

Under the circumstances, it seems to me, therefore, that the order of the Master of the Rolls was right.

SIR G. MELLISH, L.J.:—

I am of the same opinion. As mere matter of law, although it is not necessary, perhaps, positively to decide it, I am of opinion that this guarantee was not determined by the death. If one were to suppose a case, which might very easily happen, where a bank holding such a guarantee was not aware of the death, I should think it very hard upon the bank to hold that a guarantee worded like this was terminated by the death of the guarantor.

I have great doubts whether even at law there would not have been a defence to an action upon this guarantee, on the ground that the subsequent advances were not really made upon the credit of the guarantee, but were made upon the assumption that the guarantee had been put an end to, though a formal notice had not been given. Whether that is so or not, I entirely agree with what the Lord Justice has said, that it would be most inequitable to hold that the bank was entitled to have this guarantee satisfied out of the real estate of the testator. The appeal will be dismissed with costs.

Solicitors: Messrs. *Torr, Janeway, & Co.*; Mr. *Stretton*; Messrs. *Sharp & Ullithorne.*

L. JJ.
1873
May 29.

TRUMPER *v.* TRUMPER.

[1869 T. 121.]

Renewable Leaseholds—Subsequent Purchase by Lessee of Reversion—Equitable Charge on Renewable Leaseholds.

W. W. T. was the equitable owner, subject to an estate for life, and to £1500, raiseable on the death of the tenant for life, of leaseholds for lives, which were perpetually renewable, and were vested in *B.* as trustee, with a direction to renew until the £1500 had been paid. The settlement under which *W. W. T.* acquired his interest contained a covenant by him to pay the £1500. In 1811 *W. W. T.* conveyed his interest to trustees upon trust for himself for life, and after his death, subject to raising the £1500, upon trust to raise £2000 for his younger children, and subject thereto for his eldest son *T. T.* absolutely. In 1815, after the death of the tenant for life, by a deed to which the owners of the £1500 were parties, and which recited, contrary to the fact, that the £1500 had been paid, *B.* conveyed the leaseholds to *W. W. T.* absolutely. In 1818, all the *cestuis que vie* being dead, *W. W. T.* obtained a renewed lease from the landlord to himself, and in 1819 purchased the reversion in fee, which was conveyed to a trustee for him. Subsequently *W. W. T.* paid off the £1500. In 1845 *W. W. T.* mortgaged the property in fee, the trustee of the fee joining, so that the leasehold interest was merged. By will made in 1856, reciting that he had paid off the £1500, and that it was a subsisting charge on the property for his benefit, he made a bequest of that charge, and appointed the £2000 among his younger children, and subject to those charges, and to a further charge of £500 created by his will, devised all his estate in this property to *T. T.*:—

Held (affirming the decision of *Bacon*, V.C.), that the three sums of £1500, £2000, and £500, were subsisting charges, and must be raised out of the estate, without distinguishing between those charged on the leaseholds and that charged on the fee.

THIS was an appeal by the Defendant *Thomas Trumper* from a decree of Vice-Chancellor *Bacon*.

By indenture dated the 29th of September, 1795, and perfected by livery of seisin, the Duke of *Beaufort*, for the consideration therein mentioned, granted certain lands to *T. Trumper* the elder, his heirs and assigns, for the lives of *T. Trumper* the elder, *Mary Hooper*, and *Charles Walwyn Trumper*, and the lives or life of the survivor, at the rent of £98 6*s*. The deed contained a covenant on the part of the Duke that if at any time within twelve months next after the first death of any or either of the lives for which

the property was or thereafter might be granted, *T. Trumper* the elder, his heirs or assigns, should be desirous to continue a perpetuity or right of renewal on the terms and conditions thereinafter mentioned, or to nominate and put in a new life or lives in the room of the life or lives then dead, that then and in such case or cases, and when and so often as it should so happen, the Duke, his heirs or assigns, would, on payment of £205 for each new life so to be nominated and put in within twelve months next after every the first death of one of the three lives in the then lease, or the surrender or expiration of that lease, as the case should be, grant a new lease of the property to *T. Trumper* the elder, his heirs or assigns, determinable on the death of such new life or lives, and of the other or others then in being, or on the death of three new lives so then to be nominated and put in, if the old ones should be all then dead, and so to continue such perpetuity or right of renewal on the said terms and conditions unto and in *T. Trumper* the elder, his heirs and assigns, for ever. There was a provision expressly declaring the right of renewal to be gone if on any occasion the nomination was not made and the fine paid or tendered within twelve months after the dropping of the first of the three lives for the time being.

By indenture dated the 12th of February, 1805, *T. Trumper* the elder conveyed his interest in the above property to *Theophilus Beavan*, his heirs and assigns, upon trust as to the *Lawns Farm*, part thereof, to permit *William Walwyn Trumper* the elder (son of *T. Trumper* the elder), his heirs and assigns, to hold and enjoy the same during the lives of the persons named in the original grant, with such benefit of renewal as therein contained, paying the said rent of £98 6*s*. And as to the rest of the property, in trust that *T. Beavan* should permit *T. Trumper* the elder and his assigns to hold and enjoy the same during his life, and after the death of *T. Trumper* the elder in trust that *Beavan*, his heirs or assigns, should by mortgage or sale of the whole of the premises, or a competent part thereof, or out of the yearly rents and profits thereof, raise a sufficient sum of money for putting in any new life or lives for the purpose of continuing the grant; and after raising the same and continuing the grant, upon trust by further mortgage or out of the rents and profits, to raise £1500, and pay it as therein

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mentioned, namely, £300 to *Winifred Hooper*, £300 to *Honor Trumper*, £300 to *Ursula D. Perry*, £500 to *John Trumper*, and £100 to *Francis Walwyn Trumper*, such sums to be paid with interest from the death of *T. Trumper* the elder. *W. W. Trumper* the elder entered into a covenant with *Beavan* to pay the £1500 within twelve months from the death of *T. Trumper* the elder to *Beavan*, his heirs or assigns, or to the parties beneficially entitled thereto. It was declared that on every renewal of the grant by the insertion of any life or lives, the renewed grant should be taken in the name of *Beavan*, his heirs or assigns, or some other person or persons to be appointed by the persons to whom the £1500 was payable, or the majority of them, upon the trusts aforesaid, and that after the death of *T. Trumper* the elder and payment of the £1500, it should be taken to *W. W. Trumper* the elder, his heirs and assigns, for his and their own benefit. *T. Trumper* the elder covenanted with *Beavan* to pay all fines for renewal that should become payable during his own life. This deed was not grounded on a lease for a year, nor inrolled as a bargain and sale, and to remedy this, *T. Trumper* the elder confirmed it by deeds of lease and release of the 3rd and 4th of July, 1811.

By an indenture of the 27th of July, 1811, grounded on a lease for a year, and made between *W. W. Trumper* and *Elizabeth* his wife of the one part, and *Thomas Hughes* and *John Trumper* of the other part, and reciting the above deeds, *W. W. Trumper* the elder, in pursuance of an agreement entered into before his marriage, which, however, did not appear to have been in writing, conveyed his equitable estate in the property to the use of *Hughes* and *John Trumper*, and their heirs, during the lives of the *cestuis que vie* named in the grant of 1795, and the life of the longest liver of them, subject to the rent and covenants, except so far as under the deed of 1805 the covenants were to be performed by *T. Trumper* the elder, and subject, as to all but the *Lawns Farm*, to the life estate of *T. Trumper* the elder under that deed, and to the sums by that deed provided to be raised for renewing the grant, and to the raising the £1500, but upon the trusts thereinafter declared. These trusts were to allow *W. W. Trumper* to enjoy the property for life, he paying the rent and keeping the covenants, and after his decease to pay the net rents, issues, and profits to *Elizabeth*

Trumper, until some one of their sons should attain twenty-four, or die under that age leaving issue entitled to the property under the trusts thereinafter declared, or until some daughter of *W. W. Trumper* and *Elizabeth Trumper* should become entitled to the property under the trusts, provided *Elizabeth Trumper* should continue a widow, and after the happening of either of those events, to pay to her during widowhood an annuity of £100; and subject as aforesaid, and to the trusts thereafter contained for raising £2000, the trustees were to stand possessed of the property in trust for the Appellant, *T. Trumper* the younger, his heirs and assigns, when he attained the age of twenty-four years, with various other dispositions to take effect if he died under that age, which did not happen. The trustees were directed after the death of *W. W. Trumper* the elder to raise by mortgage, sale, or other disposition of the property, £2000 in trust for all or such one or more exclusively of the other or others of the children of *W. W. Trumper* the elder, by *Elizabeth Trumper*, or of the issue born in the lifetime of *W. W. Trumper* the elder, of any such child or children (except such child or the issue of such child as should become entitled to the estate), as *W. W. Trumper* the elder and *Elizabeth* his wife, or the survivor, should in manner therein mentioned appoint, and in default of appointment upon the trusts therein mentioned for younger children and their issue. And it was declared that after the death of *T. Trumper* the elder, and the expiration or performance of the trusts for the purposes of which the lease was authorized and directed to be renewed in the name of *Beavan*, his heirs or assigns, by the indenture of the 12th of February, 1805, it should be lawful for the trustees or trustee for the time being of the present deed to renew the lease upon the dropping of any life or lives named in the then present, or to be named in any future lease of the property, and to obtain a new lease, to be granted to such trustees or trustee according to the terms of the covenant for renewal; and by mortgage or sale of the property, or a competent part thereof, to raise such sum or sums of money as should be sufficient from time to time to discharge the fines and expenses of renewal, and that every such new lease should be held upon the trusts of the present deed.

There were issue of the marriage five children—the Appellant

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Thomas Trumper, William Walwyn Trumper the younger, *Elizabeth Trumper, Mary*, afterwards the wife of *H. J. Mills*, and *James John Trumper*.

In 1814 *Thomas Trumper* the elder died, and *W. W. Trumper* the elder became entitled in possession.

By indenture of release dated the 20th of June, 1815, founded on a lease for a year, and made between *Beavan* of the first part, the persons entitled to the £1500 raiseable under the deed of the 12th of February, 1805, of the second part, and *W. W. Trumper* the elder of the third part, reciting that *W. W. Trumper* had paid or otherwise satisfied to the parties thereto of the second part the several sums of money to them respectively payable under the deed of 1805, which they thereby respectively acknowledged, and that in consideration thereof they had agreed to join and concur with and to direct *Beavan* to convey the premises to *W. W. Trumper* the elder in manner thereafter expressed, *Beavan*, by the direction of the parties of the second part conveyed, and the parties of the second part released the premises unto and to the use of *W. W. Trumper* the elder, his heirs and assigns, freed and discharged from the trusts of the indentures of the 12th of February, 1805, and the 4th of July, 1811, but subject to the rent and covenants in the lease.

On the 11th of May, 1818, a new lease, perfected by livery of seisin, was executed by the Duke of *Beaufort* to *W. W. Trumper* the elder. This deed recited that *Thomas Trumper* the elder died in August, 1814, *Charles Walwyn Trumper* in February, 1815, and *Mary Hooper* in January, 1818; and that *W. W. Trumper* having become entitled to the premises for the residue of the term therein to come and unexpired, "hath upon the dropping of the said several lives respectively requested the said Duke of *Beaufort* to grant him a renewal of the said lease according to the covenant contained in the lease, which the said Duke, being unwilling to admit his liability upon the said covenant, declined to do as a performance of the said covenant; but at the same time agreed to grant to the said *W. W. Trumper* a lease of the said premises for the three lives hereinafter named in consideration of the sum of £615 as a fine or consideration for such grant; and the said *W. W. Trumper* agreed to accept such lease so to be granted (it

being understood that the granting and acceptance thereof should not prejudice or conclude the rights of the said parties with respect to the said covenant, and that such proviso to that effect should be inserted as hereinafter expressed)." The Duke, then, in consideration of £615, granted the premises to *W. W. Trumper* the elder, his heirs and assigns, for the lives of *Thomas Trumper*, *W. W. Trumper* the younger, and *Elizabeth Trumper*, and the lives and life of the survivors and survivor of them, with a proviso that the rights and liabilities of the parties respectively in regard to the covenant for renewal should not be affected by the granting or acceptance of the present lease.

After this *W. W. Trumper* the elder purchased the Duke's reversion in the property, and by indentures of lease and release of the 20th and 21st of January, 1819, the Duke conveyed the property to *James Davies* in fee upon trust for *W. W. Trumper* the elder, his heirs and assigns, subject to the lease.

By a settlement dated the 12th of October, 1838, made on the marriage of *Mary*, a daughter of *W. W. Trumper* the elder, with *H. J. Mills*, and reciting to the effect that *W. W. Trumper* the elder had paid to *Honor Trumper* £300, to *Ursula Dorothy Perry* £300, to *John Trumper* £500, and to *Francis Walwyn Trumper* £100, making together £1200, being part of the £1500 made payable by the deed of 1805, and that the residue, £300, remained due to *Winifred Hooper;* and that *W. W. Trumper* the elder when he paid the sums amounting to £1200 did not intend them to be extinguished in the property, but intended that they should be kept alive for the benefit of his personal estate, *W. W. Trumper* the elder, and *Elizabeth* his wife, in exercise of the power given them by the deed of the 27th of July, 1811, appointed £500 (part of the £2000) to *Mary Trumper*, to be payable on the decease of *W. W. Trumper* the elder. By the same deed *Mary Trumper* assigned this sum to the Defendant *Thomas Trumper*, and *W. W. Trumper* the younger upon the trusts thereafter mentioned. By the same deed *W. W. Trumper* the elder assigned £600 (part of the £1500 raisable under the deed of 1805) to the same trustees, on the trusts thereafter mentioned. Trusts were declared of both funds for *Mary Trumper* and her then intended husband, and the children of the marriage.

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In 1845 *Winifred Hooper* died, leaving a will, which was proved on the 14th of May, 1845, by *W. W. Trumper* the elder, the executor. Her residuary personal estate was undisposed of, and *W. W. Trumper* the elder, as one of her next of kin, became entitled to a share of it.

On the 5th of November, 1845, *W. W. Trumper* the elder mortgaged the property in fee to secure £4500, *Davies* the trustee concurring, so that the leasehold interest was merged at law. This mortgage was expressed to be made subject to the sums of £600 and £500, assigned by the settlement of the 12th of October 1838, but not to any other incumbrances.

In May, 1853, *Elizabeth Trumper* died.

On the 9th of February, 1856, *W. W. Trumper* the elder made his will, reciting the deeds of the 12th of February, 1805, and the 26th and 27th of July, 1811, and that he had paid off out of his own moneys the £1500 raiseable under the trusts of the deed of February, 1805; and that the same was then subsisting as a charge on the property for his own absolute benefit, except the £600 assigned to the trustees of Mrs. *Mills's* settlement. The testator, under the power in the deed of July, 1811, appointed that the £1500, being the unappointed part of the £2000 raiseable under that deed, should after his death go to his children *W. W. Trumper*, *Elizabeth Trumper*, and *James John Trumper*, in equal shares. And as to the £900, the residue of the £1500 raiseable under the deed of February, 1805, he bequeathed one moiety thereof to his daughter *Elizabeth*, and the other moiety upon trusts for the benefit of his other younger children and their issue. The testator then charged the estate, the reversion of which he had purchased from the Duke of *Beaufort*, with the payment of £500, and subject thereto, and to all incumbrances subsisting on the estate at his decease (from the payment of which he declared that he wished his personal estate to be exonerated), he devised the estate to the Defendant, *Thomas Trumper*, in fee, and gave the last-mentioned £500 as to one moiety to his daughter *Elizabeth*, and as to the other moiety upon trusts for his other younger children and their issue. The testator appointed the Defendant *Thomas Trumper*, and *W. W. Trumper* the younger, one of the plaintiffs, his executors, and died in December, 1859.

The deed of February, 1805, when produced, was found to have three indorsements upon it, all long subsequent in date to the purchase of the reversion. First, a receipt dated the 7th of November, 1826, by *Ursula Dorothy Perry*, for £300. Secondly, a memorandum, dated the 27th of January, 1830, by which *Winifred Hooper*, the executrix of *Honor Trumper*, acknowledged the receipt on that day of the £300 payable to her, and *William Walwyn Trumper* the elder, declared that he did not intend that sum to merge, but to remain a charge for the benefit of his personal estate. Thirdly, a memorandum, dated the 2nd of January, 1838, by which *John Trumper* acknowledged payment of £500.

The bill was filed by *W. W. Trumper* the younger and *H. J. Mills* to have it declared that the £1500, £2000, and £500 were subsisting charges on the estate, and to have them raised. The existence of the indenture of the 20th of June, 1815, was unknown to the Plaintiffs, it being in the possession of *Thomas Trumper*, who by his answer set it up, and contended that it shewed that *W. W. Trumper* the elder had paid off the charges, and had therefore renewed the lease for his own sole benefit, and that no charges were subsisting thereon.

Vice-Chancellor *Bacon* decided (1) that the three sums were subsisting charges, and were charged not only on the leasehold interest, but on the fee, and that £600 and £500, part of the two first-mentioned sums, were so charged in priority to the mortgage for £4500. *Thomas Trumper* appealed.

Mr. *Kay*, Q.C., and Mr. *Cookson*, for the Appellant:—

W. W. Trumper, by the deed of 1805, covenanted to pay the £1500. It was, therefore, his personal debt, and must be treated as such, unless by the settlement of 1811 he made it primarily chargeable on the estate, which he did not purport to do. When he paid it off, therefore, it sunk for the benefit of the estate. If, however, the charge subsists at all, it is only a charge on the leasehold interest, not on the reversion in fee: *Randall* v. *Russell* (2); *Hardman* v. *Johnson* (3); for the tenant for life stands in no fiduciary position towards the remaindermen.

(1) Law Rep. 14 Eq. 295. (2) 3 Mer. 190. (3) 3 Mer. 347.

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[The LORD JUSTICE JAMES:—In 1815 *W. W. Trumper* took a conveyance from the trustee with notice of the trust.]

That will not make the charges a charge on the renewed lease, unless it was the duty of the trustee to renew: *Tudor's* Leading Cases (1). Here, in the settlement of the 27th of July, 1811, there was only a power to renew, which the trustees were at liberty to exercise or not.

[The LORD JUSTICE JAMES:—I am of opinion that they were bound to renew.]

By the release of 1815 *Beavan* ceased to be a trustee for anybody but *W. W. Trumper*, and the trusts for renewal in the settlement of 1805 came to an end. The testator did not intend to create by his will any charge which did not exist before. The trustees of the settlement of 1811 were other persons, and *W. W. Trumper* never took their estate.

The LORD JUSTICE JAMES:—It appears to me that *W. W. Trumper*, as between himself and other parties interested under the settlement, must be taken to have obtained a renewal in 1818 under the covenant to renew; and it is clear that the £1500 was not in fact paid off in 1815.

Mr. *Amphlett*, Q.C., and Mr. *Blackmore*, for the Plaintiffs, were not called upon.

Mr. *Villiers*, and Mr. *Vaughan Hawkins*, appeared for other Defendants.

SIR W. M. JAMES, L.J.:—

I am of opinion that the decision of the Vice-Chancellor is quite right. When the facts, which are complicated, are fully understood the case is simple. In 1805 *W. W. Trumper* became the equitable owner, subject to a prior life estate and to a charge of £1500, of a leasehold estate for lives, renewable for ever; the estate being in that year conveyed by *Thomas Trumper* the elder to *Beavan* in trust for the settlor for life, and after his death to raise by sale or mortgage the sums requisite for renewing the

(1) 2nd Ed. p. 76.

lease and the sum of £1500, and subject thereto in trust for *W. W. Trumper*. In 1811 *W. W. Trumper* was minded to cut down his interest to an estate for life, and to create a further charge of £2000 on the same property for his younger children, and, subject to that life estate and charge, to limit the property to the Defendant *Thomas Trumper*. After this, by certain instruments, the consideration of which it will be convenient to postpone for a time, the estate became vested in *W. W. Trumper*, the trustee having, by the direction of the persons entitled to the charge of £1500, conveyed it to him. Thereupon, being apparently absolute owner, he applied to the Duke of *Beaufort* for a renewal of the lease. The Duke seems to have disputed his right to a renewal, but did in fact renew under a sort of protest, not being minded to admit his liability to renew, and *W. W. Trumper* not being minded to admit that the renewal was a matter of favour. This renewal was upon the terms mentioned in the covenant for renewal. Soon after this *W. W. Trumper*, wishing no doubt to get rid of the chance of litigation, bought up from the Duke of *Beaufort* the reversion in fee, and had it conveyed to a trustee for himself. What, then, was the state of things as between him and the Defendant *Thomas Trumper?* Suppose *Thomas Trumper* to have been inclined to say "You have taken a lease absolutely without taking any notice of my interest, set the matter right." What would *Thomas Trumper's* rights have been in this Court? His right would have been to say, "You must be reduced to the state of a tenant for life, for the lease which you took from the Duke of *Beaufort* must be held to have been taken for my benefit." *W. W. Trumper* could not successfully have disputed that; but he would have had a right to say, "You have no claim to the fee. You have, indeed, a right to a leasehold interest, subject to my life estate, and with a right of renewal; but I have paid off £1500, which was a charge upon the whole leasehold interest, and as you reduce me to a life estate, I claim that £1500." He would have had a right to say this, as there is no ground for contending that he paid off the £1500 for the sake of making a present of it to *Thomas Trumper*. No doubt the object of the professed payment in 1815 was to facilitate the negotiations with the Duke of *Beaufort*. *W. W. Trumper* got the estate apparently discharged so as to satisfy

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Beavan, but it is clear that he never meant to discharge the estate as between himself and the other parties beneficially interested; he never meant to relieve the estate from the £1500. If he had not caused a merger by the subsequent mortgage, the rights, apart from the effect of his will, would have stood thus: *Thomas Trumper* would have been entitled to a leasehold for lives at the yearly rent of £98 6*s*., perpetually renewable on payment of a fine of £205, and charged with the £1500 for the benefit of the tenant for life, and with the £2000 for the younger children. Then comes the will, by which *W. W. Trumper* recites that the charges are subsisting, and subject to them and to a charge of £500 devises the estate to *Thomas Trumper* in fee, reciting the charges as if they were charges on the inheritance, and not on the leasehold interest; but that cannot take away his right to receive the sums out of what was really charged with them. Circumstances made it not desirable to deal with the leasehold interest separately, for that interest and the reversion were mixed up in such a way that the matter could not have been put strictly right without complicated conveyances. The two estates had got together, and the whole estate so consolidated is what *W. W. Trumper* deals with by his will, treating it all as charged. Justice will be done by requiring *Thomas Trumper* to pay the whole of the charges, and a severance cannot conveniently be made between what is a charge on the perpetually renewable leasehold and what is a charge on the fee. The appeal must be dismissed with costs.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

Solicitors: Mr. *Fortune;* Messrs. *Bridges, Sawtell, & Co.;* Mr. *Joseph Raw;* Mr. *H. A. Downes.*

MOXON *v.* PAYNE.

L. JJ.
1873
May 3, 5, 26, 27; *June* 11.

[1872 M. 37.]

Fraud—Collateral Agreement—Condonation—Independent Solicitor—Unproved Allegations.

Fraud cannot be condoned unless there be full knowledge of the facts and of the rights arising out of those facts, and the parties are at arm's length.

An agreement rendered inoperative by a collateral fraudulent agreement cannot be made valid by the abandonment of the collateral agreement.

Agreements, though prepared by an independent solicitor, may be set aside if that one of the parties for whom the solicitor is acting is under the undue influence of the other party.

Where material allegations of fraud are proved, the Plaintiff will obtain relief although other allegations of fraud may not be proved.

Decree of *Malins*, V.C., reversed.

THE bill in this suit was filed for the purpose of setting aside several deeds on the ground of fraud and undue influence.

Mr. *E. Moxon* was a publisher. He died in 1858, having by his will directed his business to be carried on by his widow until his sons should attain the age of twenty-four years, when either or both of them might become partners in the business.

The business was, for some time after the death of Mr. *Moxon*, managed for Mrs. *Moxon* by Messrs. *Bradbury & Evans;* but in 1864 Mrs. *Moxon*, by deed, appointed Mr. *J. B. Payne*, who had been a clerk in the establishment, the manager, at a salary of £400 a year. In 1864, 1865, 1868, and 1869, other deeds were made between *Payne* and Mrs. *Moxon* and one of her sons, who took a share in the business (the other son taking no part), under which deeds *Payne* became a partner in the business, and acquired a large interest therein, and in many of the copyrights. By an indenture dated the 29th of April, 1869, *Payne* surrendered all his interest in the business to Mrs. *Moxon* and her son *Arthur Moxon* for £11,000, which Mrs. *Moxon* and her son covenanted to pay; and they further assigned to *Payne* by way of security the copyrights and printed copies of a large number of books. This sum of £11,000 was afterwards reduced through subsequent drawings by *Payne*.

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During part of this time, between 1864 and 1869, the business appeared to have been very profitable, the profits being, however, over-estimated by all parties; and Mrs. *Moxon* and her children had the greatest confidence in, and considered themselves under great obligations to *Payne*. In 1871, however, the business was deeply indebted; some creditors had obtained judgment against the partners and threatened execution. Under these circumstances an agreement under seal, dated the 2nd of June, 1871, was executed by Mrs. *Moxon* and her son *Arthur Moxon*, *Payne* and his wife (who had an interest in some of the copyrights), and Messrs. *Ward, Lock, & Tyler*, the creditors, by which agreement all the stock-in-trade, copyrights, &c., were (subject to certain claims of Messrs. *Cowan*) assigned by Mrs. *Moxon*, *Arthur Moxon*, and *Payne*, to *Ward, Lock, & Tyler*, for the purpose of an arrangement for carrying on the business. By the 11th clause of the agreement *Payne* was to retain certain royalties on some of the copyrights; and by the 13th clause it was provided that, "As to the debt of £10,000, for which Messrs. *Moxon* became liable to Mr. *Payne*, and which Messrs. *Cowan* hold as security, it is only to rank for a dividend until Messrs. *Cowan's* debt is satisfied, and, as between Messrs. *Moxon & Co.* and Mr. *Payne*, it is agreed that such a sum has been ascertained upon an incorrect basis, and upon a mistake of facts, and the said *Moxon & Company* and Mr. *Payne* agree (subject to Messrs. *Cowan's* claims and rights) to readjust the above amount, but Mr. *Payne* is not to make any claim against Messrs. *Moxon* in respect of the said £10,000, until all the debts of the creditors set out in the first schedule are paid in full." The agreement also provided for referring to arbitration any matters in dispute between Mrs. *Moxon* and her son and *Payne*.

Previously to this time Mr. *Allen* had acted as solicitor for Mrs. *Moxon* and her sons, and also for *Payne*, but he declined to act for *Payne* in this matter, and *Payne* had no independent solicitor, the only solicitors concerned being Mr. *Allen* and the solicitors for the creditors. It appeared from the evidence that the 13th provision of the agreement was inserted by Mr. *Allen* against the wish of *Arthur Moxon*, and that *Arthur Moxon* executed two deeds, purporting to be made between Mrs. *Moxon* and *Arthur Moxon*, and *Payne* and his wife, bearing date the same 2nd day of June, 1871,

and prepared by other solicitors, by which deeds totally different arrangements were made as to the business and the copyrights, and the sum which Mrs. *Moxon* and *Arthur Moxon* owed to *Payne* was stated to be £7000.

The bill was filed by Mrs. *Moxon* and *Arthur Moxon* against *J. B. Payne* and his wife, the other children of Mrs. *Moxon*, and various incumbrancers, alleging, amongst other things (by par. 10), that "shortly after the death of the said *Edward Moxon* the said *James Bertrand Payne* formed the design of raising himself at the expense of the Plaintiff, *Emma Moxon*, and her children, and possessing himself of their property; and in pursuance of this design he contrived and perpetrated between the years 1863 and 1871 a series of frauds, the details whereof are hereinafter stated." The bill then alleged that *Payne* had obtained unbounded influence over Mrs. *Moxon*, and that she placed implicit confidence in him, and that he had induced her to give him the entire management of the business. The bill then stated the deeds and the circumstances under which it was alleged that they were executed; and the bill prayed that all the deeds might be set aside, and that *Payne* might be declared not entitled to any royalties on the copyrights, or to any interest in the business; and prayed accounts on that footing.

The Vice-Chancellor *Malins* was of opinion that all the transactions prior to the deed of the 2nd of June, 1871, were vitiated by undue influence and miscalculations as to the value of the property. It was evident that *Payne* had been actuated throughout by an eager desire to enrich himself speedily; but His Honour thought that there was no ground for the charges of fraud put forward in the bill, since every transaction had been carried out by the family solicitor of the *Moxons* with the assistance of the old accountant of the firm. All these transactions were, however, set right by the deed of the 2nd of June, 1871, which was prepared by the solicitor for the *Moxons* and by the creditors' solicitor, the Defendant himself being unrepresented by any solicitor. This deed His Honour considered to be a final settlement between the parties. The suit, therefore, was entirely unnecessary, and as the relief sought for was founded on fraud, for which there was no justification, he should dismiss the bill with costs. (1)

(1) See W.N. (1873) 54

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The Plaintiffs appealed.

Mr. *Pearson*, Q.C., and Mr. *D. Jones*, for the Plaintiffs.

Mr. *Locock Webb*, and Mr. *Byrne*, for *Payne*.

Mr. *Glasse*, Q.C., and Mr. *Speed*, Mr. *Cotton*, Q.C., and Mr. *Leeson*, Mr. *Higgins*, Q.C., and Mr. *Hadley*, for other Defendants.

June 11. SIR W. M. JAMES, L.J., now delivered the judgment of the Court, and after stating at length the contents of the deeds prior to those of June, 1871, and the circumstances under which they were executed, continued:—

There really can be no manner of doubt that these deeds (subsequent to the first deed), arrangements, bargains, gifts, and transactions so made and entered into were fraudulent and void. A Court of Equity would be abdicating its highest functions, and would be unworthy of its name, if it permitted such things to be done with impunity, and such profits and benefits to be quietly enjoyed. And up to this point we have the full concurrence of the Vice-Chancellor. But the Vice-Chancellor was of opinion that the Plaintiffs had lost all right to relief by what afterwards occurred. It is, therefore, necessary to consider what it was that so occurred.

The dream of prosperity indulged in at the outset was in a very few months rudely dispelled. The business, which was supposed to have had surplus assets to the extent of £30,000, found itself in inextricable difficulties (the management, be it noted, being still in the hands of *Payne*). Judgment was obtained in an action in which *Payne* also was a Defendant; an execution was actually put in, which, unless some arrangements were made, must have been followed in a few days by bankruptcy, in which case, no doubt, the judgment would have been enforced against the goods of the Defendant *Payne*.

In this emergency it became necessary to make arrangements with the creditors in order to avert the absolute ruin which would have ensued on a bankruptcy.

[His Lordship then stated the circumstances under which the

first deed of the 2nd of June, 1871, was executed, and the substance of that deed.]

The Vice-Chancellor was of opinion that this was an answer to the Plaintiff's case. He thought that the solicitor knew, or ought to have known, all the facts of the case, and that the agreement to refer to arbitration was a final settlement and compromise of all questions between them. It is difficult to conceive how this could, under any circumstances, have been sufficient. Frauds or impositions of the kind practised in this case cannot be condoned; the right to property acquired by such means cannot be confirmed in this Court unless there be full knowledge of all the facts, full knowledge of the equitable rights arising out of those facts, and an absolute release from the undue influence by means of which the frauds were practised. To make a confirmation or compromise of any value in this Court the parties must be at arm's length, on equal terms, with equal knowledge, and with sufficient advice and protection. In this case the solicitor was really acting almost officiously; he put in the protecting clause *ex proprio motu suo,* not only without any instructions from, but actually against, the will of his clients, who continued to maintain their infatuated confidence in the Defendant *Payne.* The agreement itself is of such a nature as to require the very strongest evidence of knowledge, and freedom of will, and deliberate purpose to sustain it in this Court. It is shortly this: A man fraudulently appropriates another man's property. He then sells it to him for a fraudulent price. He then agrees that there was a mistake as to the price, and that the real value shall be ascertained and the property taken at that ascertained value, and then says to a Court of Equity: "Now I can hold fast what I so got. Giving up the benefit of the second fraud in the sale, I have had my first fraud in the acquisition of the property condoned, and my right confirmed and established, so that you cannot deprive me of it."

But in truth it does not stand even there. The Plaintiffs, in fact, never got the benefit of the arrangement which the solicitor, Mr. *Allen,* had fondly thought he had acquired for them. For while the agreement was signed, apparently as the actual agreement between the parties, this transaction took place: *Arthur Moxon* was induced to think that this interference of the solicitor

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was very officious, and was very unfair and unjust towards the Defendant *Payne*, and, unknown to the solicitor, he signed two other documents, in fact nullifying the whole agreement as to referring the questions to arbitration, bearing date the same day, the 2nd of June, 1871. [His Lordship then stated the terms of these documents.]

No justification of these documents was attempted. They cannot, of course, stand of themselves, but the Defendant *Payne*, who obtained them, is absolutely precluded from setting up the agreement nullified by them as being of any validity.

The Vice-Chancellor was of opinion that the Defendant *Payne* had before suit given up all right under these documents, and had submitted to be bound by the agreement, and was therefore entitled to stand in this Court as if no such documents had been executed.

We are unable to concur with the Vice-Chancellor as to the fact that he had so given up such right. [His Lordship then stated the circumstances.]

But if the fact were so, it would be immaterial. The Defendant *Payne* could not by such an offer set up the agreement, nor purge himself of the additional fraud which these documents prove.

In *Bridgeman* v. *Green* (1), which is the great authority on this subject, Lord Chief Justice *Wilmot* says (2): "In cases of forgery, instructions under the hand of the person whose deed or will is supposed to be forged, to the same effect as the deed or will, are very material. But in cases of undue influence and imposition they prove nothing; for the same power which produces one produces the other; and therefore, instead of removing such an imputation, it is rather an additional evidence of it." The same principle applies to instruments obtained apparently ratifying and confirming the transaction.

In this case the influence was so continuous that it is impossible to say that *Arthur Moxon* had the advice and assistance which he ought to have had. He was not, in truth, relying on or being advised by Mr. *Allen* against the Defendant *Payne*, but was relying on and being advised by the Defendant *Payne* against Mr. *Allen*. The right of the Plaintiffs is not, therefore, affected by the arrangement of the 2nd of June, 1871.

(1) 2 Ves. Sen. 627; Wilm. Notes, 58. (2) Wilm. Notes, 70.

[His Lordship then referred to other parts of the case not material to this report.]

A great part of the argument which was addressed to us on behalf of the Defendant *Payne* was, that the case alleged against him by the bill was one of gross and premeditated fraud, and that unless the actual fraud as alleged was proved, the bill must fail. It was contended that the Plaintiffs were bound to make out, and had failed to make out, the case alleged in the 10th paragraph of the bill. [His Lordship then read that part of the 10th paragraph which has been stated above.]

It is true that when a case is based on fraud, the fraud must be proved, and no relief could be given in this suit on any different ground. But the obtaining of property, or of any benefit, through the undue and unconscientious abuse of influence by a person in whom trust and confidence are placed, has always been treated as a fraud of the gravest character; and if such frauds are alleged and proved, the allegation that they were parts of a scheme very early conceived and deliberately carried out is, whether it be made out or not, of no material consequence in such a suit. It is at most a rhetorical exaggeration, which a person who commits the frauds has no right to complain of. If a man robs his fellow traveller, and is indicted for so doing, the allegation that he became the companion of his victim with a pre-conceived design to rob him is wholly immaterial.

Much the same line of defence was taken in the case of *Huguenin* v. *Baseley* (1), and it may be worth while to quote what Lord *Eldon* said in that case: "I agree, further, that the relief must proceed upon what is alleged and proved by the persons complaining, that their complaints must be treated as effectual or ineffectual according to what they have, not what they could have, represented. . . . I have, therefore, looked through this bill with reference to the frame of it, and I have no doubt this case might have been more clearly reached if the situation of the parties had enabled them to go through all the difficulties as to amendment; also that many circumstances might have been brought forward on behalf of the Defendants, which I am bound not to look at. But, taking the case as it stands, though there is in this bill much foul

(1) 14 Ves. 273, 290.

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allegation, which, if not true, ought not to be there, and a great deal of which is denied and clearly disproved, there is enough upon the bill and in evidence to shew that this deed cannot stand, if the whole transaction taken together cannot stand."

The Plaintiffs have, in our judgment, substantially proved the material allegations of fraud in respect of the several transactions by which the Defendant *Payne* has appropriated their property, and they are entitled substantially to the relief they have prayed.

The bill must be dismissed so far as it seeks to recover the shares of the copyrights purchased for Mrs. *Payne*. But as to the rest of the case there must be a declaration that all the deeds, bargains, and gifts made with or obtained by the Defendant *Payne* since the deed of the 1st of June, 1864, are fraudulent and void; that he is entitled to the salary of £400 a year under that deed up to the time when *Arthur Moxon* attained the age of twenty-four.

His Lordship then directed accounts to be taken accordingly, *Payne* being entitled to all expenses and allowances; and *Payne* to pay the costs of the suit.

Solicitors for the Plaintiffs: Messrs. *Allen & Edwards.*
Solicitors for Mr. *Payne:* Messrs. *Benham & Tindell.*
Solicitors for the Mortgagees: Messrs. *West & King.*

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HILL *v.* WILSON.

[1871 H. 124.]

Gift—Acceptance—Gift or Loan—Promissory Note—Parol Agreement—Evidence by Claimant under alleged Bargain with a person since Deceased—Corroboration.

W., the uncle of the Plaintiff's wife, was applied to by a friend of the Plaintiff to advance £1000 to defray some expenses connected with the Plaintiff's election as Member of Parliament. *W.* declined to make the advance, but said he would give the Plaintiff £500 and deduct it from the legacy he intended to leave to his wife. Shortly afterwards *W.* sent the Plaintiff a cheque for £500. The Plaintiff wrote to thank *W.*, saying that he would gladly repay it at an early opportunity, and hoped shortly to be able to do so. A few weeks afterwards, as the Plaintiff deposed, a conversation took place between him and *W.*, and it was agreed at the Plaintiff's

instance that the Plaintiff should pay banker's interest on the sum during *W.'s* life; and the Plaintiff, for the purpose, as he deposed, of effectuating this agreement, signed and gave to *W.* a promissory note for £500, with interest at £1 per cent., on the understanding that payment of the principal was not to be enforced, but only payment of interest, during *W.'s* life. After *W.'s* death his executors sued the Plaintiff on the note for the £500:—

Held (reversing the decision of *Malins*, V.C.), that (although, if there had been a complete gift of the £500, it could not afterwards have formed a consideration for a promissory note) the executors were entitled to recover; for that, as the Plaintiff had not, before the giving of the promissory note, agreed to accept the £500 as a gift, it remained open whether it should be a gift or loan; and the giving the promissory note was conclusive evidence that the parties agreed upon its being a loan; and the Court could not allow the documentary evidence to be rebutted by the parol evidence given by the Plaintiff on his own behalf.

Per James, L.J. Evidence of a Plaintiff on his own behalf as to a bargain with a man since dead ought, in the absence of corroboration, to be disregarded.

THIS was an appeal from a decree of Vice-Chancellor *Malins*, by which he restrained the Defendants, the executors of Mr. *Edward Wilson*, by a perpetual injunction, from enforcing a judgment which they had obtained at law against the Plaintiff, Mr. *Staveley Hill*, on a promissory note for £500 which he had given to Mr. *Edward Wilson* during his lifetime.

The material circumstances were as follows:—In May, 1868, there remained unpaid certain electioneering expenses which had been incurred on behalf of Mr. *Staveley Hill* at *Coventry*. Mr. *Hill* considered himself not liable for these expenses, and was unwilling to pay them. Mr. *Gray*, a friend of his, who had been concerned in conducting the election for him, thought it was very desirable that they should be paid; and accordingly, without consulting Mr. *Hill*, he went, on the 4th of May, to Mr. *Edward Wilson*, who was the uncle of Mr. *Hill's* wife, and applied to him for £1000 for the purpose of paying these expenses. Mr. *Wilson*, according to the evidence of Mr. *Gray*, which the Court regarded as quite trustworthy, declined to advance £1000, but consented to advance £500 by way of gift, at the same time expressly and very clearly stating to Mr. *Gray* that the £500 would be deducted from the sum which he (Mr. *Wilson*) intended to leave his niece by his will. Mr. *Gray* advised him to write to Mr. *Hill*, and to send the

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cheque to him; and, according to Mr. *Hill's* evidence, a letter did arrive. The Vice-Chancellor came to the conclusion that the cheque was contained in that letter; but the further evidence which was produced on the appeal satisfied the Court that this was not the case.

On the 8th of May, 1868, Mr. *Wilson* wrote to his own solicitor as follows:—"The only alteration that I have to suggest respecting my will is that of Mrs. *S. Hill*, who, I am sorry to say, is rapidly sinking from consumption, and who cannot last long. I leave her £4500, to be settled on her son. This, as you were aware, stood before at £5000; but I have advanced her husband £500 this week to enable him to pay his electioneering expenses at *Coventry*. The drawings also left to Mrs. *Hill*, in the event of her death, to go to Mrs. *Brooke*." Then, "I enclose a draft on the *Lancaster Bank* for £18,000, the receipt of which be pleased to acknowledge along with the draft of the will."

Mrs. *Hill* died on the 14th of May. On the 21st of May a cheque was drawn by Mr. *Wilson* for £500, payable to Mr. *Staveley Hill* or order, and was enclosed that same evening in a letter to Mr. *Gray* in *London*, which appeared to have been received by him on the 22nd or the 23rd of May. Mr. *Gray* called on Mr. *Hill* at his house in town, handed the cheque to him, procured his indorsement to it, and then received the cheque back. On the 23rd the cheque was paid by Mr. *Gray* into his own account. at the *Bank of England*, and was paid on the 25th by Mr. *Wilson's* bankers, on whom it was drawn. There was some question whether Mr. *Gray* had made any actual advances which made him a holder for value, but the Court treated the case on the footing of his being such.

On the 24th of May Mr. *Hill*, who had left town on the 23rd, wrote from the country to Mr. *Wilson* as follows:—"Dear Mr. *Wilson*,—Before I left town yesterday evening *Gray* called upon me and handed to me a cheque for £500, which he had received from you. I indorsed it and handed it to him in liquidation of these *Coventry* expenses. I am very much obliged indeed to you for it. I have had so many expenses this year that I should have had difficulty in meeting their large claims. I will gladly repay it to you at an early opportunity, and I hope that it will not be very

long, as the death of my very dear old friend Mr. *Tarleton*, who died on the Sunday preceding the death of my darling wife, will, I rather think, place a few thousands at my disposal in the course of this year. The dear old man left all to me after the payment of legacies; and though the legacies are large in comparison with the small property over which he had power to dispose, there will be, I think, enough to enable me to return you what you have kindly sent me. I send you this sheet entirely on business." The letter then went on to other matters.

Mr. *Hill*, in his evidence in the cause, stated as follows:—"In August or September, 1868, being on a visit to the said *Edward Wilson*, I, in the course of conversation with him, alluded to the kind manner in which he had assisted me in respect of the said election, but said that I did not like being under such an obligation. He replied, 'It doesn't matter,' and alluded to what he had said to the said *Frederick Gray*—that if I had it now I must not expect it afterwards. I said, 'Yes, but you are out of the money now,' and he replied, 'Well, it would only have been lying at my banker's.' I said, 'Well, your banker would have allowed you interest upon it,' and he replied, 'Well, you can pay me what he would allow, one per cent.' Thereupon I of my own motion sent to my clerk in *London* for a stamped paper, and wrote upon the same a formal promissory note for £500 and interest at the rate of one per cent. per annum, expressing the same to be payable to the said *Edward Wilson* on demand; and one day, after dinner, having first signed the said document, I handed it to the said *Edward Wilson*. When the aforesaid conversation between me and the said *Edward Wilson* took place, and when I subsequently handed over the document as aforesaid, it was clearly understood between us, and it was taken by the said *Edward Wilson* on the express agreement, that it was never to be enforced, and that the only object with which it was prepared and signed was to express the voluntary undertaking on my part to pay to the said *Edward Wilson*, during his life, interest on the said £500 at the rate aforesaid. The said *Edward Wilson* never asked me for the said document, or any agreement or undertaking to repay the £500 given by the said *Edward Wilson* under the circumstances hereinbefore mentioned, and never had, I verily believe, the least intention

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that any proceedings should be taken against me on the said document, or otherwise to require from me any such repayment; and I verily believe that the said sum of £500 was intended by him solely as a gift, and that it was so accepted and treated by me, and so considered by us both down to the time of his death; and when he took the said document from me, he did so merely because I pressed it upon him, and without ever contemplating the exercise of any right which such document purported to give." Mr. *Hill* went on to state that on two occasions interest at £1 per cent. was paid upon the note. On one occasion half a year's interest was allowed in account between him and the testator, and on another occasion £5 was paid as a year's interest; and in respect of one of the payments an indorsement appeared upon the note itself, in the handwriting of Mr. *Wilson*, admitting the payment.

Mr. *James Christopher Wilson*, who was a brother of Mr. *Wilson* and one of his executors, deposed that he had conversations with the testator as to the management of his business after his death, and that on nearly all these occasions the manner in which Mr. *Wilson* alluded to the transactions with Mr. *Hill* was as follows:— "You will recollect that you will have to collect that £500 from *Staveley* after I am dead."

It appeared that shortly after Mrs. *Hill's* death Mr. *Wilson* altered his will, and reduced the £5000 legacy to £2500, which he left to Mrs. *Hill's* only child.

After Mr. *Wilson's* death, his executors commenced an action upon the promissory note. The Plaintiff then filed his bill to restrain the action. An interlocutory injunction was granted upon the terms of the Plaintiff's giving judgment at law to be dealt with as the Court should direct at the hearing of the cause. Vice-Chancellor *Malins*, at the hearing, came to the conclusion that there had been a complete gift of the money, and that the promissory note had only been given for the purpose of securing the interest. His Honour accordingly made the injunction perpetual, and ordered the Defendants to pay the costs of the suit and the costs at law.

Mr. *Glasse*, Q.C., and Mr. *Cookson*, for the Appellants:—

We admit that there was originally on the part of the testator

an intention to give, and that this intention continued down to the 14th of May; but in order to support the Plaintiff's case that there was a gift, it must be shewn that the intention continued down to the receipt of the money, and that the money was accepted as a gift. This, we contend, the Plaintiff fails to do. The promissory note—there being no distinct evidence the other way—shews that the parties had agreed to treat the transaction as a loan, and a document of this kind cannot be set aside upon parol evidence of a conversation between the testator and the Plaintiff, such parol evidence, moreover, coming only from the Plaintiff himself.

Mr. *Higgins*, Q.C., and Mr. *Bosanquet* (Mr. *Grosvenor Woods* with them), for the Plaintiff:—

We say there are two defences: First, that the transaction was originally a gift, and if so, it could not afterwards be turned into a loan without any valuable consideration. The time of receiving the cheque is the time to be looked to: *Bromley* v. *Brunton* (1); *Winter* v. *Winter* (2); *Veal* v. *Veal* (3). Moreover, Mr. *Gray* had become the holder of the cheque for value before the Plaintiff's letter was written. The gift was complete when the cheque was handed over.

[The LORD JUSTICE MELLISH:—I am not clear as to that. No one is obliged to accept a gift; and suppose the payee writes back saying that he cannot accept it as a gift, but it must be a loan, what is it then?]

We contend that he must either accept it on the donor's terms or send it back at once. If he draws the money and uses it, he accepts it on the footing on which it was sent. This gift could not, *ex post facto*, be turned into a loan: *Eastwood* v. *Kenyon* (4); and the promissory note is invalid for want of consideration. Then, secondly, if that be not so, we rely on the parol arrangement on the faith of which the note was given, that it should only be used for securing interest on the principal sum.

(1) Law Rep. 6 Eq. 275.
(2) 9 W. R. 747.
(3) 27 Beav. 303.
(4) 11 A. & E. 438.

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Mr. *Glasse*, in reply:—

There is no complete gift till payment of the money. The intention to give must continue till that time, for the drawer could stop payment of the cheque: *Tate* v. *Hilbert* (1); *Easton* v. *Pratchett* (2); *Hewitt* v. *Kaye* (3). If *A.* sends a cheque to *B.* as a gift, and *B.* writes back to say he can only accept it as a loan, I should contend, if necessary, that it is a loan; but, at all events, if *A.* replies, "Then let it be a loan," it certainly is one, for the only *aggregatio mentium* is on the footing of loan.

June 12. SIR G. MELLISH, L.J., after stating the facts to the same effect as above, continued:—

On this evidence the question is to be determined whether the executors are entitled to recover the amount of this promissory note, and it was agreed at the time the judgment was signed at law that Mr. *Staveley Hill* was to give judgment at law, and that all defences both at law and in equity which he was entitled to raise against the payment of the £500 should be open to him. In substance two defences are raised. The first is a purely legal defence—that there was no consideration for the promissory note—and is made out in this way: It is said that the £500 was advanced by the testator and received by Mr. *Hill* at the time it was advanced as a pure gift, and having been advanced and received as a pure gift the whole transaction was over, and that what was advanced and received as a gift could not form a consideration for a promissory note which was not signed for two or three months afterwards. I quite agree that such is the law, but at the same time this is a defence which, in my opinion, requires to be supported by very clear and strong evidence, for the giving of a promissory note relating to a sum of £500 which had been actually advanced is, beyond all question, very strong evidence in the way of admission that that £500 had not been advanced and received at the time by way of pure gift. Still I am of opinion that if it is made out by clear and satisfactory evidence that the

(1) 2 Ves. 111. (2) 1 C. M. & R. 798.
(3) Law Rep. 6 Eq. 198.

money was advanced and received at the time by way of pure gift, that is a defence in point of law.

The second ground which is raised by the bill and the evidence, although it was not very much relied upon in the argument, is a purely equitable defence, and is this—that admitting the £500 to form at law a good consideration for the promissory note, yet nevertheless at the time when the note was given there was a bargain between Mr. *Hill* and Mr. *Edward Wilson* that the promissory note should not be used for the purpose of enforcing payment of the principal, but only for the purpose of enforcing payment of the interest during the lifetime of Mr. *Edward Wilson*.

We have then to consider whether either of these defences is made out. I do not see the least reason to doubt the evidence of Mr. *Gray*, supported as it is by the letter of the testator written to his own solicitor; and I think, therefore, it is most clearly made out that the testator did offer, during the lifetime of Mrs. *Hill*, to make to Mr. *Hill* a present of £500 for the purpose of paying his election expenses. At the same time it is perfectly clear that he in the strongest way said that this £500 would be deducted from the legacy which he had intended to leave to Mrs. *Hill*, and that appears to have been understood by all parties not to mean necessarily a legacy to Mrs. *Hill*, but to include a legacy left to Mrs. *Hill* for her life, with remainder to any child or children she might have.

So far, therefore, the Plaintiff's case is made out. But then the first question which arises is, did the testator change his mind before the time when the cheque was actually sent? It was argued on behalf of the Appellants that on the evidence we ought to find that he had changed his mind; that it was very possible that the circumstance of his niece's death might induce him to change his mind; and unquestionably there is, unfortunately, this circumstance in the case, that the letter in which the cheque was inclosed and sent to Mr. *Gray* has never been produced, and Mr. *Gray* stated before us that he had no recollection whatever of its contents, and could give us no account of them. It is also argued that Mr. *Hill's* letter of the 24th of May is more consistent with the cheque having been sent as a loan than as a gift. On the other hand, it is argued that in the letter from Mr. *Wilson* to

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his own solicitor, he mentions the fact that Mrs. *Hill* was dying of consumption, and therefore there is no reason to suppose that her death would change his intention, which he clearly states in that letter, of making a present of the £500 to Mr. *Hill* on the terms that the amount should be deducted from any legacy which he might leave either to his niece or to his niece's child. It was also argued that if the letter to Mr. *Gray* had contained a statement of the testator that he had changed his mind as to whether the money was to be a gift or a loan, Mr. *Gray* must have remembered it, and that if he had told Mr. *Hill*, Mr. *Hill* must have remembered it. Although I cannot say that I have been free from doubt as to whether the evidence of a gift having been intended is so clear and satisfactory that we ought to act upon it, yet upon the whole I have come to the conclusion that there is no sufficient reason to suppose that the testator had changed his mind, and that we may take him to have sent the cheque by way of gift.

But then, in my opinion, in order to make out a gift, it must be shewn, not only that the cheque was sent as a gift, but that it was received as a gift. It requires the assent of both minds to make a gift as it does to make a contract. No doubt you may infer that a person has assented to that which is obviously for his benefit on slighter evidence than would be required to shew that he assented to a contract which may be to his prejudice; but still it is by no means uncommon, particularly in the case of money transactions between relatives, that the party intended to be benefited may prefer to receive as a loan what has been offered as a gift. Surely it is not an extraordinary thing that a man should offer to make a present to his friend and that the friend should say, in answer, "I am much obliged to you for the money, and it is of the greatest possible use to me; but I cannot take it as a gift, I can only take it as a loan." If the person who had advanced the money acquiesced in this, the ultimate agreement would be for a loan, and the transaction would be one of loan, and not of gift, although I quite agree that the person who sent the money might in his turn say: "I do not choose to have it taken as a loan; you must take it as a gift or not at all." In that case, if the person to whom the money was sent did not return it, but kept it, of course it would be a gift.

Those being the principles applicable to the case, the question is, whether Mr. *Staveley Hill's* letter of the 24th of May, 1868, amounts to an acceptance of the money as a gift, or amounts practically to saying, "I had rather not take it as a gift, I would rather take it as a loan." It was, indeed, argued very strongly that the letter was written too late, for that the cheque had been indorsed and handed to Mr. *Gray* as a holder for value on the 23rd, and that this amounted to an absolute acceptance of it as a gift, and nothing that could be written afterwards would alter it. I am not of that opinion. It appears to me that if within a reasonable time, within such a time as you might fairly expect an answer to come according to the ordinary course of business, or rather according to what you might ordinarily expect in dealing between friends in matters of this kind, the party who receives the money says, "I would rather receive it as a loan than as a gift," then, although he has used the money, still, if his answer is acquiesced in by the person who has sent the money, the transaction would be a loan and not a gift. The using the money does not appear to me to be inconsistent with that; for whether it be a loan or a gift, he is to have it and use it, and until the two minds come to an agreement that it shall be a gift, or to an agreement that it shall be a loan, the matter, as it appears to me, remains open, and you must look for further evidence as to what is the agreement to which they ultimately come.

To what, then, does this letter amount? We must look at Mr. *Hill's* position, and at the nature of the offer which was made to him. It appears to me his position was such that there is no reason to be surprised if he preferred to receive this sum as a loan rather than as a gift. The purpose for which the money was advanced was the payment of election expenses. He had been told in the plainest terms by the testator that if he took it as a gift it would be deducted from a legacy the testator intended to leave his child, the son of the testator's niece. Mr. *Edward Wilson*, as we have been told, was a very wealthy man, and left, it was said, upwards of £200,000. Surely it is not at all improbable that Mr. *Hill* should think it wrong to do anything which might prejudice his good intentions towards Mr. *Hill's* child; more particularly, if, as appears to be the case from this letter itself, Mr. *Hill*

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was in the expectation that in a very short time a legacy which had been left to himself would enable him to repay the debt to the testator. Under these circumstances it appears to me a very natural thing that he should say to the testator, "I am very much obliged to you for the money, but I do not wish to take it from what you intend to leave my son, and I would rather you would let me repay you."

Let us then see what the letter amounts to. The first two sentences, if the letter stopped there, would, I think, amount to an acceptance of the gift: "Before I left town yesterday evening *Gray* called upon me and handed to me a cheque for £500, which he had received from you. I indorsed it, and handed it to him in liquidation of these *Coventry* expenses. I am very much obliged, indeed, to you for it. I have had so many expenses this year that I should have had difficulty in meeting their large claims." This is, no doubt, quite consistent with accepting the money as a pure gift. But he goes on to say: "I will gladly repay it to you at an early opportunity, and I hope that it will not be very long;" and states his reason for the expectation. It appears to me that this was tantamount to saying—and I think the testator would understand him as saying—"Do not carry out your intention of deducting this sum from the legacy which you intend to leave to my child, for I would rather repay it myself, and I shall be able to repay it within a short time." At any rate, in my opinion this letter was not a final acceptance of the money as a gift; but was sufficient to keep the matter open, so to say, as between the testator and Mr. *Hill*, whether it should be finally accepted as a gift, or whether it should be finally accepted as a loan.

It appears to me, then, to follow, that at the time when the promissory note was given it was open to the parties either to make the transaction a gift or to make it a loan; and matters being in that position, I have no hesitation in saying that in a Court of Law the promissory note would be held absolutely conclusive evidence that the parties determined that it should be a loan, and that it should not be a gift. I apprehend that in a Court of Law the money not having been received absolutely as a present, and there being, therefore, a full consideration for the note, evidence is not admissible for the purpose of proving that the parties verbally

agreed that the note should not be paid, and should be no security for the principal. That being so the legal defence fails, and it appears to me it fails upon this ground, that at the time when the promissory note was given it had not finally been settled between Mr. *Hill* and Mr. *Wilson* whether the transaction should be one of gift or of loan, and that the promissory note conclusively made it a loan.

Then, ought there to be any difference in this Court? In my opinion there ought not. There is no doubt that in this Court relief may be had against written instruments in cases where no such relief could be had in a Court of Law. If an instrument has been drawn up by mistake, if it be proved by clear evidence that it was the intention of the parties to effect some different object, and by the mistake of the draftsman the instrument has been wrongly drawn up, no doubt it can be set aside. But in the present case it is impossible to say there was any mistake. It is impossible to suppose that either Mr. *Hill* or Mr. *Wilson* did not perfectly understand the meaning and the legal effect of such a common and ordinary instrument as a promissory note.

Then the evidence as to the alleged bargain depends exclusively on the evidence of Mr. *Hill* alone. I do not in the least mean to say that Mr. *Hill* does not perfectly believe and honestly make the statement which he has given in his evidence, but of course if we are to say that although a promissory note has been given promising to pay this money, yet the money is not to be paid, at the very least we ought to be perfectly certain that the testator received the note on these terms, and fully understood that, although he had received it, he was not to have the security of it. Upon that I think the evidence which is given by the executor cannot be disregarded, and according to his evidence the testator told him he would have to collect the £500 from Mr. *Staveley Hill*, shewing perfectly that he understood that he had got the security of the note. It appears to me that, in the face of this, it would be perfectly impossible for us to act on Mr. *Staveley Hill's* evidence alone, even if it were possible for us, which I doubt, on any evidence, to take away the right to sue on the note, there being no mistake. Then it is to be observed that the payment of interest is in itself another very strong circumstance.

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Why should interest be paid on money which was understood by the parties to have been given and received as a present and not to have constituted a debt?

On the whole, therefore, I cannot help coming to the conclusion that there was no sufficient ground for the judgment of the Vice-Chancellor by which he granted this perpetual injunction, and in my opinion the bill must be dismissed; and if the Defendants insist upon it, though I must confess I think it a hard case on Mr. *Staveley Hill*, it must be dismissed with costs.

SIR W. M. JAMES, L.J.:—

I am of the same opinion.

In considering this case, it appears to me that the whole of the conversation alleged to have taken place between Mr. *Hill* and Mr. *Wilson* on the occasion when the promissory note was given must be eliminated entirely. The conversation is not alleged for the purpose of shewing that there was any mistake in the preparation of the document, that there was any fraud in the concoction of the document or in the receipt of it, nor that it was given as a security for the balance due on some account, or anything of the kind; but the conversation is alleged solely for the purpose of shewing that the written document does not mean what the written document says; that a paper containing an express promise to pay £500 and interest at £1 per cent. was given on the one side and accepted on the other as a promise to pay interest at £1 per cent. during the lifetime of the person to whom the note was given. The evidence given is the parol evidence of the maker of a promissory note as to a conversation alleged to have taken place between himself and the person to whom the note was given, that person being dead. Even if such evidence be legally admissible for any purpose, the interests of mankind, in my opinion, imperatively require that, unless corroborated, it should be wholly disregarded. Nobody would be safe in respect of his pecuniary transactions if legal documents found in his possession at the time of his death, and endeavoured to be enforced by his executors, could be set aside, or varied, or altered by the parol evidence of the person who had bound himself. It would be very easy, of course, for any body who owed a testator a debt to say, "I met the

testator, and he promised he would not sue." "I met the testator, and I gave him the money." "I met the testator, and in consideration of something, he agreed to release me." The interests of justice and the interests of mankind require that such evidence should be wholly disregarded. In the present case such evidence is inadmissible, because it is the rule of law and the rule of this Court also that parol evidence cannot be tendered for the purpose of altering the terms of a written contract. I therefore entirely lay aside the whole of that conversation and proceed to the main question. A promissory note as between the original parties to it is no more than an express promise to pay a certain sum of money, and there is no doubt that an express promise for an executed gratuitous consideration is a *nudum pactum*, and that from a *nudum pactum* no action arises. But is there here such satisfactory evidence as is required that the promissory note was a mere voluntary promise to repay that which had been a voluntary gratuitous advance of money? In reference to that we have to consider this: We begin, no doubt, as it appears to me, with a clear intention on the part of Mr. *Wilson* to make a present of £500. The conversation deposed to by Mr. *Gray* does not seem to me to be at all unnatural. A man who is asked for a loan of £1000 gets rid of it by saying, "I would much rather give £500 than lend £1000" (that is by no means an unusual thing); "I will give £500, but I will give it with this distinct understanding, that it will make a difference to the legacy that I shall give to the family of the gentleman receiving it." That being so, the gentleman who receives it says: "No, I will not take it as a gift, because I do not want to prejudice my child, especially considering that circumstances have made me much better off than I thought I should have been some short time ago, and therefore I wish it to be treated as a loan." The letter saying this is retained by the testator, which letter contains an expression which is not without materiality in this case—it contains an expression that that part of the letter is written on business. It is sent to the testator as a business letter, it is retained by the testator in his repositories as a business letter, containing, as it appears to me, a distinct statement on the part of the gentleman to whom this money was sent, "I will not take it as a gift, I will take it as a loan, and I will repay you." That being so, there followed a meeting between the

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parties, in which the transaction is concluded by a promissory note as for money advanced—a promise to repay that money with interest upon it. That being the state of things upon the view of the evidence most favourable to the Plaintiff, I am of opinion it is impossible to get rid of the effect of the document, or to say that the transaction, as it was completed between the Plaintiff and the testator, was anything else than a loan to be repaid according to the terms of the promissory note.

I therefore concur with the Lord Justice in the opinion that the order of the Vice-Chancellor cannot be sustained, but I hope that the Defendants will not press for costs.

Solicitors: Messrs. *Guscotte, Wadham, & Daw;* Messrs. *Westall & Roberts.*

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DANCE *v.* GOLDINGHAM.

[1872 D. 199.]

Depreciatory Conditions of Sale—Trustee—Purchaser—Infant Plaintiff—Interest of Plaintiff—Injunction.

Ref'd Cas 310

By a deed of the year 1858, lands were conveyed to trustees on the usual trusts for sale. The trustees were unable to find a deed of 1819, through which the conveying parties to the deed of 1858 derived their title; and put up the lands for sale by auction under a condition that the title should commence with the deed of 1858, and that no earlier title should be called for except at the purchaser's expense. The lands were sold at the auction, the object of the condition being explained in the auction room. A suit to restrain completion was instituted by one of the *cestuis que trust* against the trustees and the purchaser. Some time after the institution of the suit, the deed of 1819 was found:—

Held (affirming the decision of *Malins*, V.C.), that this condition was calculated to depreciate the property at the auction, and was inserted without any reasonable ground:

Held, that the Court would, at the suit of a *cestui que trust*, restrain the purchaser from completing the sale:

Held (reversing the decision of *Malins*, V.C.), that the smallness of the interest of the Plaintiff, and the fact that she was an infant, and that the suit might have been instituted on other motives, were not reasons against granting an injunction to restrain completion.

BY an indenture of settlement bearing date the 11th of September, 1819, certain lands, amongst which was a farm called *Brockhill*,

in the county of *Worcester*, were conveyed to trustees for the term of 500 years, upon trusts for raising £3000 for the younger children of *John Thomas* and *Mary Thomas*, his wife, and subject thereto to the use of *John Thomas* and his wife for their lives, with remainder to their first and other sons in tail. They had ten children, of whom *John Prosser Thomas* was the eldest son. *John Prosser Thomas* mortgaged and otherwise dealt with his reversion, and certain proceedings in Chancery took place respecting his estate.

By an indenture dated the 12th of March, 1858, made with the consent of the Lords Justices of Appeal in Chancery as protector of the settlement (*Mary Thomas*, the then tenant for life, being a lunatic), the estate tail of *John Prosser Thomas* in the lands subject to the deed was barred.

By this indenture, after reciting at some length the indenture of the 11th of September, 1819, and reciting the state of the family, and reciting the mortgages and other dealings of *J. P. Thomas*, and reciting the orders in Chancery as to the consent on behalf of *Mary Thomas*, it was witnessed that the mortgagees of *J. P. Thomas*, and *J. P. Thomas*, with the consent of the Lords Justices, did grant and confirm unto *J. T. White* and *H. G. Goldingham*, and their heirs, the lands then subject to the uses of the indenture of 1819, To hold the same, freed from the mortgages of *J. P. Thomas*, to the use of *White* and *Goldingham* and their heirs, "Upon trust that they the said *John Thomas White* and *Herbert G. Goldingham*, or the survivor or the heirs of the survivor of them shall, as soon as conveniently may be after the death of the said *Mary Thomas*, sell the said messuages, lands, hereditaments, and premises expressed to be by these presents granted, released, and assured, either together or in parcels, and either by public auction or private contract, and under such special or other conditions or stipulations as to title or evidence of title or other matters as to them or him shall seem fit (with full power, in particular, to make any such conditions or stipulations as aforesaid in any particulars or conditions of sale of more than one lot, although such conditions or stipulations as aforesaid, or some or one of them, may not be required for some one or more of the lots); and also to buy in, and, either voluntarily or for a valuable con-

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sideration, to rescind any contract for sale of the same messuages, lands, hereditaments, and premises, or any part thereof, and to re-sell the same either by public auction or private contract with the like powers in all respects as upon an original sale, without being answerable for any loss upon a re-sale; and for the purposes aforesaid, or any of them, to execute and do all such assurances and things as they or he shall think fit." And the trustees were to stand possessed of the purchase-money, in trust, after payment of expenses, in the first place to pay the £3000 charged on the estate, and in the next place to pay the sum of £2500 and interest to the mortgagees of *J. P. Thomas*, and to stand possessed of the residue of the money, in trust for the children and grandchildren of *Mary Thomas* as therein mentioned.

Mary Thomas died in April, 1872, and the trusts for sale of the deed of 1858 then came into operation. *White* and *Goldingham*, the trustees, had possession of that deed and of the prior mortgages of *J. P. Thomas*, but were unable to find the deed of 1819; and after making many inquiries for it, and after some discussion between them, conceiving that to announce the loss of the deed of settlement would be injudicious, and that the expense of supplying evidence of the loss would be considerable, they determined to provide that the title should commence with the deed of 1858.

They accordingly prepared conditions of sale as to *Brockhill* and another piece of land, the 5th condition being that "The title to the several lots shall commence with an indenture dated the 12th day of March, 1858, under which the premises became vested in the vendors as trustees for sale; and no earlier or other title shall be called for or required, except at the purchaser's expense in all things."

Under these conditions, the lands were put up for sale by auction at *Worcester* on the 24th of September, 1872, and the farm called *Brockhill* was then sold to one Mr. *Hill*, a solicitor at *Worcester*, for £9000.

On the 17th of December, 1872, the original bill in this suit was filed by *Elizabeth Dance* (one of the grandchildren of *Mary Thomas*), an infant, by *John Dance*, her father and next friend, against *Goldingham* and *White*, the trustees, and *Hill*, the pur-

chaser, praying that the trusts of the deed of 1858 might be carried into execution under the Court, and that the sale of the *Brockhill* estate might be set aside, and the estate sold under the direction of the Court.

The bill charged that the sale was materially prejudiced by the conditions of sale, and made several other charges of misconduct against the trustees, which were abandoned upon the hearing before the Court of Appeal. The Plaintiff produced evidence that the *Brockhill* estate was worth more than £9000, and that the conditions had a depreciatory effect, the result of which evidence is stated in the judgments of the Vice-Chancellor *Malins* and of the Lords Justices. The Defendants *Goldingham* and *White* produced evidence that the property was sold for its full value, and deposed that several persons had called to make inquiries, but no one had objected to the shortness of the title. At the auction, a Mr. *Pugh*, supposed to be acting for the father of the Plaintiff, did object to the shortness of the title; the Defendant *Goldingham* then produced the deed of 1858, and shewed that it recited the deed of 1819, and explained why he could not at the vendor's expense extend the title. Evidence was also given that the sale was not affected by the condition.

The share of the infant Plaintiff in the residue of the moneys arising from the sale was one thirty-fifth, and it appeared that *John Dance*, the father of the Plaintiff, had been the tenant of *Brockhill* since the year 1839, and that there had been disputes between him and *Goldingham* respecting arrears of rent and other matters; and that *Goldingham* and *White* had given him notice to quit at Lady-day, 1873.

Some time after the suit had been instituted, the deed of 1819 was found to be in the possession of the *London* agents of a Mr. *Walcot*, of *Worcester*, who had been formerly engaged as solicitor of *J. P. Thomas* and also of a former committee of the estate of *Mary Thomas*.

The Plaintiff moved before the Vice-Chancellor *Malins* that the Defendant *Hill* might be restrained from accepting any conveyance of the *Brockhill* estate, and that *White* and *Goldingham* might be restrained from executing any conveyance to *Hill*.

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The Vice-Chancellor *Malins* refused the motion (1), and the Plaintiff appealed.

(1) 1873. April 24. WN(1873)85

SIR R. MALINS, V.C.:—

This is a litigation of a most extraordinary character, and of a magnitude far beyond what can be justified by the stake in question between the parties. [His Honour then stated the facts of the case.]

Now it is clearly the duty of this Court to maintain every sale which has been fairly made, whether it has taken place under its own direction or by virtue of an authority vested in trustees, or by virtue of the ownership of the vendor. It is the duty of this Court not to interfere unless some very plain necessity for doing so exists, and some mistake is shewn to have been made in the mode by which the sale has been carried into effect. This sale has been impugned on three grounds. [The Vice-Chancellor then referred to the charges of misconduct which on the appeal were abandoned.]

Then the third and remaining charge is one in which there is a considerable semblance of truth, and as to which, after all I have heard, I am bound to come to the conclusion that the trustees did not in a very satisfactory manner discharge their duty. The origin of their title to the land was a settlement of 1819. That settlement had been lost sight of, nobody knew exactly where to find it, and it had not been found; but it is clear that by the exercise of reasonable diligence it might have been discovered. Nevertheless, I am satisfied that there was no want of good faith on the part of Mr. *Goldingham* and Mr. *White* in their statement that they could not find the settlement.

But in the conditions of sale there is one of which the Court cannot approve. Even if the deed of 1819 was lost, they might have procured a copy, and might have stated in the conditions that though the deed was lost they could procure a copy. It was recited in the deed of 1858, and even that would have been conclusive. If the purchasers had been told that the property had been in the possession of the family for fifty years, but the deed of 1819 had been lost, the conditions of sale would not have been in the slightest degree calculated to prejudice the sale. But beyond this condition, I can find nothing of which the slightest complaint can be made.

Now, with regard to the duties of trustees, there is very considerable difficulty in the case, because although there may be a remedy against the trustees, it is very difficult to say that, if the conditions are unduly restrictive, the purchaser who attends the auction and knows nothing of the motive for introducing the condition, must necessarily lose the advantage of his purchase. I do not think the doctrines of this Court go to that extent. Upon this point the case of *Ord* v. *Noel* (5 Madd. 438) was cited. [His Honour then stated the facts of that case, and said that it proceeded on the ground that the purchaser, who was the Plaintiff, was cognizant of the irregularity which had been committed.]

Then comes the question, assuming that a sale may be vitiated by irregularity and want of due care, whether it can be intercepted upon the application of the *cestuis que trust*? That is a question about which I confess that upon principle, if there were no autho-

Mr. *Glasse*, Q.C., and Mr. *Locock Webb*, for the Plaintiff:—

The Vice-Chancellor considered that the Plaintiff's interest was so small as to disentitle her from filing this bill, but any *cestui que* rity whatever, I should feel no difficulty. The duty of the trustees is to protect the *cestuis que trust*, and to sell the property for the best price that can be reasonably obtained for it. They must not enter into undue speculations, but must conduct the sale in a business-like manner, and obtain the best price they can reasonably obtain for the property. If they so conduct the sale as that by reason of the introduction of improper conditions, by the want of due publication of the intended sale, or by a careless mode of conducting the sale, the interests of the *cestuis que trust* have been sacrificed, nothing is more clear than that the *cestuis que trust* are the persons upon whose application the completion of the sale can be stayed.

I have no doubt whatever that where it is made apparent to the Court that trustees have so conducted the sale as that a lower price has been obtained than ought to have been obtained, the sale will, upon the application of the *cestuis que trust*, be stayed against the purchaser if he was so mixed up with the irregularity as that he ought not to have the advantage of his purchase. That is not only correct upon principle, but it was so laid down by the Lord Justice *Turner* in *Rede* v. *Oakes* (4 D. J. & S. 513).

It was said in argument that this might be done after the sale had been completed, and not before. But in my opinion it is much more proper to come to the Court before the sale is completed, so as to stop the completion if the Court thinks it is a case calling for interference by injunction, and thus prevent the purchaser from being put to the inconvenience of parting with his money. If, therefore, it was established that Mr. *Hill* had been mixed up with this irregularity to such an extent as to call upon the Court to interfere, the *cestuis que trust* are the proper persons to file a bill for that purpose. There can be no doubt about that.

Then is Mr. *Hill* mixed up with this irregularity to such an extent as that he ought to be deprived of the advantage of the purchase of this property? He has purchased the property and he has a right to keep it unless he is so mixed up with the irregularity which was undoubtedly committed by the trustees as to disentitle him to retain his purchase; but it is an irregularity which does not necessarily affect Mr. *Hill*. Mr. *Hill* purchased under a condition which did not say that under no circumstances should more than fourteen years' title be shewn, but that no more than fourteen years' title should be shewn unless at the expense of the purchaser. This shews, therefore, that more could have been obtained if the purchaser chose to go to the expense of obtaining it. Is that such an irregularity as to affect the sale?

His Honour then said that it appeared that Mr. *Hill* had seen a copy of the deed of 1819 before he went to the sale, and others might have done the same. This, however, would induce him to give the utmost value for it, and not to stop short of its utmost value. The real vice of the thing was this, that it being stated that no earlier title would be shewn except at the expense of the purchaser, many men would be deterred from going to the

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trust has a right to prevent a breach of trust: *Turner* v. *Harvey* (1); *Rede* v *Oakes* (2).

It is clear that this was an improper condition, and was known to be so. Under those circumstances, it is not necessary for us to shew that the property could have been sold for more, which is usually impossible. There is, however, some evidence that it did affect the sale. We have proposed to have the property sold again, and we have guaranteed the estate against loss. *Ord* v. *Noel* (3)

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auction. Still most persons having an idea of bidding did attend the sale, and there was no evidence whatever that any material diminution of the price was caused by it, and there was no reason to believe that it would have fetched more; although His Honour's individual opinion was that it was worth more than £9000, and that if it was put up for sale again it would fetch more. But His Honour could not disregard the evidence to the contrary, and could not say that on the evidence it was shewn that any injury had been done. His Honour was bound to say that no case had occurred in this Court of interfering with the right of a purchaser who had attended an auction and become the purchaser of an estate unless he had been in some way mixed up in the impropriety of conduct on the part of the seller, as he was undoubtedly in the case of *Ord* v. *Noel*. His Honour was, however, at a loss to see that Mr. *Hill* had been so mixed up with this transaction as that he must lose the advantage of the purchase he has made. Then there came another question which the Court could not lose sight of, namely, who was the Plaintiff in this case, and what her interest? She was entitled to one-thirty-fifth part of the surplus of the purchase-money produced by the sale of this estate; and even if this estate were to fetch £1000 or £2000 more, if sold again her share would be very small. His Honour could not overlook the insignificance of the interest of the Plaintiff. He was satisfied that this suit was never instituted with that object alone. It was not the pecuniary value, but it was the desire of Mr. *Dance* to retain possession of the estate which he has held so long; but that was a desire that he should have expressed before September, and not have waited during the period that elapsed between September and December. His Honour's opinion on the whole case, therefore, was, that whatever might be the ultimate result as to the costs as between this Plaintiff and the trustees, he could not interfere as between the trustees and Mr. *Hill*. The trustees also were fully justified in defending themselves against the attacks made upon them for improper conduct, which attacks were utterly groundless. On the whole case, although to the extent pointed out the trustees had miscarried, they had not miscarried in such a manner as to mix up Mr. *Hill* with the result, and therefore this motion to restrain him from effecting the completion of his purchase must be refused.

(1) Jac. 169.
(2) 4 D. J. & S. 505.
(3) 5 Madd. 438.

and *Downes* v. *Grazebrook* (1) are authorities that trustees are bound to sell to the best advantage.

[They also cited *Jenkins* v. *Jones* (2) and *Mortlock* v. *Buller* (3).]

Mr. *Cotton*, Q.C., and Mr. *Stallard*, for the purchaser:—

There is no suggestion of any collusion, or if there was it has been given up. Even if the suit is a *bonâ fide* suit, the only question is, whether Mr. *Hill* had notice of any breach of trust; if not, the Plaintiff cannot set aside the sale, and her remedy is against the trustees. But it is clear that the suit is not *bonâ fide* or really the suit of the infant.

[SIR W. M. JAMES, L.J.:—Then you might have moved to stay the suit, and to have an inquiry whether it was for the benefit of the infant.]

The trustees have the legal estate, and have a right to sell, and are expressly authorized to make conditions of sale. There is no evidence that any person was deterred, and the purchaser has given a fair price.

Mr. *Higgins*, Q.C., and Mr. *Graham Hastings*, for the trustees:—

The trustees acted with perfectly good faith and every desire to do what was right. No one took any objection until this bill was filed containing charges of misconduct which have been abandoned. Any possible objection was cleared away by what took place in the auction room, where all the facts were stated. It would have been to the interest of the trustees, who were both solicitors, to carry back the title as far as possible; and it was entirely to save expense to their clients that this condition was inserted.

SIR W. M. JAMES, L.J.:—

This case raises some general questions affecting the conduct of sales by trustees which are much more important than this particular case seems to be.

I have always understood it to be the law, consistently with authority and principle, that, however large may be the power of trustees under their trust deed to introduce conditions limiting the

(1) 3 Mer. 200. (2) 2 Giff. 99. (3) 10 Ves. 292.

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title, and other special conditions which have, or are calculated to have, a depreciatory effect on the sale, they are bound to exercise them in a reasonable and proper manner—that they must not rashly or improvidently introduce a depreciatory condition for which there is no necessity. I am of opinion in this case that the conditions are of a depreciatory character, for which there really is no sufficient justification. The 5th condition, which states that the title commences with an indenture dated the 12th of March, 1858, under which the premises became vested in the vendors as trustees for sale, is a limitation of title such as I never saw before in conditions of sale, and is well calculated to deter persons from buying. The trustees say: "We are only trustees for sale; we produce you nothing except one deed" (which must have been a voluntary deed as far as they were concerned); "you must take whatever title we have at the time; we will give you merely a deed dated about fourteen years ago, vesting the property in us as trustees for sale." No doubt the condition goes on to say: "and no earlier or other title shall be called for or required except at the purchaser's expense in all things." What the meaning of those words is, I am not prepared to say. Whether they mean that the purchaser could compel the vendors to shew at his expense a marketable title for sixty years (which I do not think is the meaning they would bind themselves to), or mean that the title shall commence with an indenture of March, 1858, and if the purchaser wants other title-deeds in their possession or power they will at his expense give him everything he asks for and is entitled to upon reading the deed which they produce—which of those two is the legal construction of that condition, I am not prepared to say.

It appears to me that if the trustees had been asked to produce a marketable title for sixty years at the expense of the purchaser, they were not prepared to do so, by reason of the absence of the deed of 1819. If it had been stated that the title commenced with a deed of 1819 which had been acted upon in subsequent deeds, it would have made the thing satisfactory; but that was not done.

Then it is said that this condition has not, in effect, depreciated the sale, because it is shewn that the full value has been given for the property. Upon that point there is a large amount of contradictory evidence, some witnesses saying that more would have been

given, and others saying that more would not have been given, and that the full price was obtained. That is precisely the thing which the Court cannot inquire into. The *cestuis que trust* have a right to have this property sold without anything being done which is calculated to depreciate it; and whether the effect which this condition was calculated to produce was or was not produced, it is impossible for the Court satisfactorily to determine, because the Court cannot know how many people were deterred by such a clause as this from bidding or attending the sale. No doubt this clause would absolutely preclude one class of persons from attending the sale, namely, that class of purchasers who had trust moneys for investment in the purchase of land. It is quite clear that this is a condition which was calculated to depreciate the value of the property in the auction room, and that it was inserted without any reasonable ground for so doing.

That being so, I am of opinion that the *cestuis que trust* have a right to interfere to prevent a sale being made under that which was a breach of trust; and to that extent the Vice-Chancellor apparently seems to have expressed an opinion in accordance with what I have stated.

But then the Vice-Chancellor was of opinion that the purchaser was in a better situation than the trustees for sale. I am of opinion that the purchaser, under a mere contract for purchase, is not entitled to insist upon a transaction being completed which, as between the *cestuis que trust* and the trustees, is a breach of trust. He has a mere contract for purchase which could not be enforced against him under the circumstances, and which he could not have enforced against the trustees. He has, therefore, no right to call upon the trustees, or to ask the Court to allow the trustees, to execute a conveyance, having its origin in a breach of trust, when before the thing was completed he had notice of the irregularity which had been committed.

I am of opinion, therefore, that the Plaintiff filing the bill to intercept the sale is in time against the trustees and against the purchaser. What the purchaser's remedies may be against the trustees it is not for us now to inquire.

Then the Vice-Chancellor was also of opinion that even on

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evidence to shew that a larger price might possibly have been obtained, the Plaintiff's share would be very small, and that the Court ought not to interfere in such a case.

If all the rest of the *cestuis que trust* were anxious to settle it, they might have said to this *cestui que trust*, "You take your share, and we will make the loss good to you." But that case is not before us. The *cestui que trust* has a right in this Court to prevent the sale when a breach of trust has been committed; and it would be *pessimi exempli* for us to say, "A breach of trust has been committed, but the amount which any one *cestui que trust* suffers by reason of that breach of trust is not sufficient to justify a Chancery suit." That is not an effectual answer in this Court.

Then it is said that this is not the suit of the infant, but has some collateral object, and that the father wants the purchase to be made by somebody else, or does not wish to leave the farm. That is not a legitimate topic to be addressed to the Court. The Plaintiff is entitled to have her rights and equities enforced in this Court, and what may have been the motives inducing the Plaintiff to put the Court in motion we cannot inquire into. We have only to inquire, in the administration of justice in this Court, whether the Plaintiff has the right claimed, and whether the Defendants are under the liability which is alleged.

I am of opinion that the Plaintiff has a right to say, "This was not a proper mode of selling my property, and I want the Court to stop the sale," and that the purchaser has no right to insist upon an improper sale being completed. He can be put back in the same position as that in which he was before.

I cannot, however, part with the case without saying that I am shocked at the enormous amount of costs which seem to have been incurred, by reason of charges for which there was no necessity whatever, charges of improper conduct and deliberate dishonesty (as far as I can gather) endeavoured to be made out by affidavit and cross-examination, which occupied a good deal of time and will cost a good deal of money; and I regret that it is not in the power of the Court to make those costs fall where they ought to fall.

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SIR G. MELLISH, L.J.:—

I am of the same opinion. The Vice-Chancellor appears clearly to have considered that the 5th condition was one which the trustees ought not to have inserted, and which was calculated to have a depreciatory effect upon the persons present at the auction. I am also clearly of that opinion.

Then the Vice-Chancellor also came to the conclusion that the purchaser had no notice that there was any defect in the conditions, or that the conditions were not in performance of the duty of the trustees; and he appears to have thought that on that ground the Court ought not to prevent the sale being effected.

I am of opinion that the rule in this Court is, if there is a breach of trust, if the sale is conducted in such a manner that, as between the trustees, who have the power of sale, and the *cestuis que trust*, it constitutes a breach of trust, the *cestuis que trust* are entitled to prevent the sale being completed, leaving the purchaser to his remedy against the trustees. That is laid down most clearly in *Sugden's* Vendors and Purchasers (1), and also by Lord Justice *Turner* in *Rede* v. *Oakes* (2), where he says: "The true queston on which the validity of such a sale must depend seems to me to be this: Was or was not the sale made under such circumstances and in such a manner as that the *cestuis que trustent* ought to be held bound by it? If it was, the title of the purchaser could not, I conceive, be impeached. If it was not, his title would, I apprehend, be liable to impeachment at the suit of the *cestuis que trustent*." What Lord Justice *Turner* lays down is, that if the sale is conducted by the trustees in such a way as to constitute a breach of trust as between them and the *cestuis que trust*, and the purchaser has notice of this before his purchase is completed, he will be liable to a suit at the instance of the *cestuis que trust*. It necessarily follows that if the *cestuis que trust*, instead of waiting till the purchase is completed, file the bill at once (which is a more proper thing to do), they can prevent the purchase being completed.

I also agree that the small interest of the infant can make no difference. The interest of each of them may be so small that no one of them might think it worth while to file a bill at his own

(1) Page 61, 14th Ed.

(2) 4 D. J. & S. 513. 10 Jur. N.S. 1248

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risk; but the bill being filed on behalf of one infant, we must look at the whole substantial interest which is in question, and not merely at the individual interest of the infant.

Solicitors for the Plaintiff: Messrs. *Miller & Miller.*
Solicitors for the Trustees: Messrs. *T. White & Sons.*
Solicitors for the Purchaser: Messrs. *Prior, Bigg, & Co.*

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Ex parte STONE. *In re* WELCH.

Bankruptcy—Double Proof—Member of a Firm and sole Contractor—Bankruptcy Act, 1869 *s.* 31—*Debt payable at Request of a Stranger—Debt in which the Debtor has a beneficial Interest.*

2 Ap Cas 594 11 C.L.D. 319 5 Ap Cas 164 14 C.L.D. 124

Where a joint and several covenant is entered into by partners for payment of a debt, and there is nothing in the instrument to shew that they were jointly contracting as partners, parol evidence may be admitted to shew that the money was used for partnership purposes, and if that is established proof may be made in bankruptcy against their joint as well as their separate estates.

A covenant to pay a sum of money when requested by *A.*, or after his death by the covenantee, with interest in the meantime, creates a present debt which may be proved for in bankruptcy.

A debtor, before his bankruptcy, covenanted to pay a sum of money which was due to his father to a trustee to whom the father assigned it; and trusts were declared of the money, under which the debtor took a reversionary interest:—

Held, that the trustee of the settlement could prove for the whole amount without deducting the debtor's interest.

THIS was an appeal from a decision of the Chief Judge in Bankruptcy.

In the early part of the year 1863 *John* and *Thomas Welch* entered into business in co-partnership as shipowners under the firm of *J. & T. Welch & Co.* They borrowed a large sum of money from their father, *Henry Welch.* The loan was made by means of transfers of several sums of railway stock by *Henry Welch* to *John* and *Thomas*, on which occasion they signed an agreement, dated the 16th of March, 1863, by which they agreed to pay interest for the loan at the rate of £5 per cent. as therein

mentioned. This document contained another clause, signed by the father and the sons, by which it was mutually agreed that any amounts of the loan might be repaid at any time by the sons, but that the father should have no right to withdraw it for five years from the date of the agreement, and that after the five years he should only be entitled to withdraw the loan on giving a year's notice in writing. There was nothing in this document to shew that the loan was made for partnership purposes. The sons afterwards sold the railway stock and applied the proceeds for the purposes of their business. They met with heavy losses, and ultimately *John* went to *America* without dissolving the partnership. Some time afterwards he sent to his brother *Thomas* a power of attorney, authorizing him to act for him in all matters. *Thomas* continued to carry on the business alone under the name of the firm, until he was adjudged a bankrupt on the 3rd of October, 1870. In the proceedings he was described as carrying on business under the firm of *J. & T. Welch & Co.* He filed in the Court a statement of the partnership affairs and also a statement of his separate affairs.

On the 15th of May, 1863, an indenture was executed between *Henry Welch* of the first part, and *John Welch*, *Thomas Welch*, and *William Drew Parsons*, of the second part (thereinafter called the trustees). By this deed after reciting among other things the transfers of the railway stock by *Henry Welch* to *John Welch* and *Thomas Welch*, and the document of the 16th of March, 1863, and that the then market value of the stock was £4755, *Henry Welch* assigned to the trustees, their executors, administrators, and assigns, the said sum of £4755, and all securities therefor, and all interest to become due thereon, upon trust during the joint lives of *Henry Welch* and *Ann* his wife to pay the annual income to *Ann Welch* for life, and after her death to pay the income to *Henry Welch* for life, and after his decease to pay out of the capital certain sums to persons therein mentioned, and as to the residue of the capital and the income thereof upon trust for *John Welch* and *Thomas Welch* as tenants in common. And by the same deed *John Welch* and *Thomas Welch* for themselves, and each of them for himself, his heirs, executors, and administrators, severally covenanted with *W. D. Parsons*, his executors and

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administrators, that they would pay the said sum of £4755 on being required so to do by *Henry Welch*, and after his death by *W. D. Parsons*, so and in such manner that the same might be duly invested in the names of the trustees; and also that they would while the same was unpaid duly pay the income or interest thereof at the rate prescribed by the said agreement, so and in such manner that the same might be had and assessed in manner thereinbefore expressed concerning the same.

The deed did not in any way shew that the sum was due from *John Welch* and *Thomas Welch* as partners.

Parsons claimed to prove for the £4755 and interest against the separate estate of *Thomas Welch*, and also against the joint estate of the firm. The trustee under the bankruptcy refused to admit the claim upon several grounds, one of which was, that the proof could not be made against both the joint and separate estates, but that the claimant was bound to elect against which estate he would prove. The County Court Judge admitted the proof against both estates, and the Chief Judge affirmed this decision, considering that the case was governed by *Ex parte Honey* (1). The trustee appealed from the order of the Chief Judge.

The bankrupt, *Thomas Welch*, was examined in Court before the Lords Justices, and stated that he and his brother were in partnership when the money was advanced to them, and that it was advanced and applied for partnership purposes.

Mr. *De Gex*, Q.C., and Mr. *W. Potter*, for the Appellant:—

The 37th section of the *Bankruptcy Act*, 1869 (2), applies only where the joint contractors appear on the face of the contract to be contracting as partners. That was so in *Ex parte Honey*. In the present case the creditor is not proving for the original advance, but on the covenant in the deed, and nothing appears in

(1) Law Rep. 7 Ch. 178.

(2) Sect. 37 provides: "If any bankrupt is at the date of the order of adjudication liable in respect of distinct contracts as member of two or more distinct firms, or as a sole contractor, and also as member of a firm, the circumstance that such firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof in respect of such contracts against the properties respectively liable upon such contracts."

Cases W.N. [1873] 82.

the deed about the partnership. The covenantors did not pledge the credit of the firm.

In the second place there is no debt proveable because the covenant was not to be enforced except at the request of the father. If any proof is allowed the interest of the debtor under the trust ought to be deducted.

Mr. *Herschell*, Q.C., and Mr. *Wheeler*, for the creditor, were not called on.

SIR G. MELLISH, L.J.:—

I am of opinion that the case is governed by *Ex parte Honey* (1). If the money advanced had not been lent to *John* and *Thomas Welch* as partners, but for purposes wholly unconnected with the business, it might have been a point of difficulty in consequence of the use of the word "firm" in the section. But after the bankrupt's examination before us it is quite clear that the original loan by the father was for the purposes of the firm, and that he afterwards settled the sum and took a joint covenant from the two partners. The only difference between this case and *Ex parte Honey* is that in that case the partners signed in the name of the firm and also in their separate names. It was there decided that the separate contractor need not be carrying on business separately. Here the question is whether it is necessary that the joint contract should be formally entered into in the name of the firm. From the very nature of a covenant the covenantors must covenant in their own names; a firm as such cannot enter into a covenant. I think it is quite unnecessary that the firm should be specially mentioned, if the contract is made for partnership purposes.

It is also objected that there was no proveable debt because the covenant was only to pay at the request of the father; but on the death of the father the money was to be payable at the request of the trustee, and in the meantime interest was to be paid on the debt. I can see no distinction with respect to proof between a sum payable immediately, and a sum payable at a future time

(1) Law Rep. 7 Ch. 178.

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with interest in the meantime. I am, therefore, of opinion that it is right to treat it as a covenant to pay at the time.

The only other question is whether there should be any set-off or deduction on account of the reversionary interest of the debtor. I think there should be none, for that would diminish what the tenants for life would have to receive. The trustee in the bankruptcy will be able to realize the interest of the debtor when it falls into possession.

SIR W. M. JAMES, L.J., concurred.

Solicitors for the Trustee: Messrs. *Chester, Urquhart, & Co.*, agents for Mr. *Gill, Liverpool.*

Solicitor for the Creditor: Mr. *J. P. Harris, Liverpool.*

L. J. J. 1873 *June* 24.

BELANEY *v.* FFRENCH.

[1868 B. 330.]

Solicitor—Lien—Administration Suit.

Solicitors for the trustees of an estate which is under the administration of the Court have not, after their discharge, such a lien for costs and money advanced in the suit as will enable them to refuse production of documents which are required by the receiver for the management of the estate.

Order of *Bacon*, V.C., affirmed.

23 L.D. 770
24 L.D. 488
411-2-6-9

MESSRS. *HINES & SON* were, in 1868, employed by Lord *Ffrench* and Lady *Ffrench*, and also by *Belaney* and *Clarke*, who were then trustees of the will of one *R. Thompson*, as their solicitors in the suit of *Belaney* v. *Ffrench*, which was a suit for administering the estate of *R. Thompson*, in which Lady *Ffrench* had an interest.

Messrs. *Hines & Son* were in June, 1869, discharged by Lord *Ffrench* and Lady *Ffrench*, the Defendants, and in January, 1871, by *Belaney* and *Clarke*, the Plaintiffs.

Lord and Lady *Ffrench* moved before the Vice-Chancellor *Bacon* that certain plans belonging to the estate of the testator might

be delivered by Messrs. *Hines & Son* to *J. O'Byrne*, the receiver in the cause, who alleged that the plans were required for the management of the estate.

Messrs. *Hines & Son* opposed the motion, on the grounds, first, that they had as solicitors a lien on all the papers and documents, for their costs incurred and for money advanced to pay the debts of the testator, and to pay expenses connected with his estate; and, secondly, that they had an express charge from *Belaney* and *Clarke*, and from Lady *Ffrench*, and were equitable mortgagees in respect of these advances.

The Vice-Chancellor *Bacon* made an order that the plans should be delivered to the receiver without prejudice to any lien which Messrs. *Hines & Son* might have upon them (1).

(1) 1873. May 23. WN(1873)115

Sir James Bacon, V.C., said that no one could dispute the authority of *Lord* v. *Wormleighton* (Jac. 580), in which Lord *Eldon* said, that a solicitor who had been discharged might make use of the non-production of the papers in order to get what was due to him. But that had nothing to do with this case, in which the Respondents upon the motion had been solicitors for the trustees in the administration and management of an estate, and had knowledge of the limited power of the trustees, and of the limited interest of Lady *Ffrench*. Admitting, for the present purpose, to the fullest extent, that the trustees did give them possession of the deeds as security that they should be repaid their advances, and that if the trustees themselves had advanced the money they would have had a lien, and that by soliciting the trustees to advance it, the solicitors had acquired that lien, still that lien would not be disturbed by the order proposed to be made, and the solicitors would have all they could claim in respect of that transaction.

It was stated, that in this suit for the administration of this estate, which the Court had taken in hand, the receiver whom the Court had appointed (which appointment was for the interest just as much of Messrs. *Hines & Son*, if they had any lien, as of any other person) could not proceed in the discharge of his duties for want of these plans. The solicitors, in answer, contended that they had a right to sit upon the papers, and to embarrass the prosecution of the suit. That had been not only the substance and pith of the argument, but that was the form in which the opposition had been conducted. The solicitors said that, until their bill of costs was made out and taxed, and their demand paid, they could embarrass the progress of the suit; and that then, and not till then, should the parties interested in the administration of the estate be at liberty to take a single step in this matter.

His Honour thought that the terms of the notice of motion must be complied with, of course preserving to Messrs. *Hines & Son* all the liens which they possessed as well against the estate as against Lady *Ffrench*, if they had any lien against her. There was a distinction between advances made for an estate at the instance of

L. J. J. 1873 BELANEY v. FFRENCH.

Messrs. *Hines & Son* moved by way of appeal to discharge this order.

Mr. *Eddis*, Q.C., and Mr. *Ince*, in support of the motion :—

A discharged solicitor has a lien on all the papers and documents until he has been paid. The money is either costs or money advanced for the payment of debts, funeral expenses, and other charges on the testator's estate, and at the request of the trustees and of Lord and Lady *Ffrench*.

[They cited *Farhall* v. *Farhall* (1).]

Mr. *Hemming*, in support of the order.

SIR W. M. JAMES, L.J. :—

23 Ch D 171

The appeal in this case must fail. It is based on two grounds: first, on the lien of a solicitor for costs incurred on behalf of trustees, and for money advanced; and, secondly, on an alleged express charge, which, however, is denied on the other side. But a

24 Ch D 411

solicitor cannot embarrass a suit by keeping papers which belong to an estate which is being administered by the Court, and cannot use that means of obtaining payment. There is no foundation for such a claim to lien, and it cannot be allowed.

His Lordship then expressed his opinion that there was no sufficient evidence of any express charge, and that the allegation that there had been such a charge was rash. The Appellants had failed to make out their case, and the appeal must be dismissed with costs.

Solicitor for Messrs. *Hines & Son* : Mr. *Philipe*.

Solicitors for Lady *Ffrench* : Messrs. *Hensman & Nicholson*.

(a

trustees and any dealings there might have been between Lady *Ffrench* and the solicitors; and *Bozon* v. *Bolland* (4My. & Cr. 354) shewed that no deposit of title-deeds with a person who might have a lien could give him a right to tack to that lien any debt which the person depositing them might owe, independent of the trust estate. In the case of *Turner* v. *Letts* (20 Beav. 185), which was more near this case than any other, the Court had no hesitation in doing what was right. In fact, Lord *Eldon's* words were greatly misunderstood if they were understood to say that a solicitor might by detaining papers embarrass the proper and rational progress of an administration suit.

(1) Law Rep. 7 Eq. 286.

(a 41 Jur Pt. 3. 456

LACEY *v.* HILL.

[1870 L. 94.]

SCRIMGEOUR'S CLAIM.

L. JJ.
1873
July 2.

Principal and Agent—Stockbroker—Insolvency of Principal—Sale by Agent to recoup himself—Custom of Stock Exchange.

184 187

Stockbrokers who have with their own money purchased stock for a principal are, in the event of the death, bankruptcy, or insolvency of the principal, justified in immediately selling the stock. Under such circumstances the stockbrokers have a claim against the estate of the principal for the balance due to them on the account, which balance is subject to deduction for any loss which may have been incurred by selling before the next settling day.

Decision of Lord *Romilly*, M.R., affirmed.

MESSRS. *SCRIMGEOUR* were brokers on the *London Stock Exchange*, and had been employed as such by Sir *R. Harvey*, a banker at *Norwich*. In the year 1870 they had bought for him £204,000 Spanish Stock, and £150,000 Italian Stock. The brokers paid the purchase-money, having borrowed money for that purpose from their bankers on the security of the stock. In their accounts they treated it as a loan to Sir *R. Harvey*. They were in the habit of sending Sir *R. Harvey* fortnightly accounts after each settling day. On the first settling day in June, 1870, the stock had risen in price, and his account shewed a balance in his favour of £8794. The brokers paid £6700 to him, and, under verbal instructions from him, carried over or continued the stocks to the next settling day. On the next settling day, the 28th of June, these stocks had fallen, and there was on this account a balance of £292 against Sir *R. Harvey*. The stocks were again carried over or continued for the next settling day, the 4th of July, on which day the stocks had fallen heavily, and the balance against Sir *R. Harvey* was £15,988. He had on that day directed them to sell half the stock, which they did, and credited him with the price. The account was sent to him on the 14th of July. On the following day he shot himself, and he died on the 19th of July.

On the 16th of July Sir *R. Harvey's* bank at *Norwich* stopped payment.

L. JJ.
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LACEY
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SCRIMGEOUR'S CLAIM.

Messrs. *Scrimgeour* being, as they stated, apprehensive of a further fall in the market, sold on the 16th, 18th, and 19th of July the remainder of the stock. The result of these transactions was that the balance against Sir *R. Harvey* in the books of Messrs. *Scrimgeour* was (after deducting their commission on the sales) £26,346.

A suit of *Lacey* v. *Hill* was instituted by creditors for the administration of the estate of Sir *R. Harvey*, and Messrs. *Scrimgeour* carried in a claim in the suit against the estate for this sum of £26,346.

Messrs. *Scrimgeour*, in support of their claim, produced evidence from members of the *Stock Exchange*—That, with very few exceptions, all bargains and transactions on the *Stock Exchange* are made for certain periodical days called "settling days." That when a broker, on the instructions of his principal, agrees to buy or actually buys a certain amount of stock or shares, the stock or shares so bought are in nowise identified as the stock or shares so ordered to be purchased, but remain, by the practice of the *Stock Exchange*, the property of the broker, and at their disposition, not at that of their principal. When the transaction as between the brokers and the principal is completed by payment by the principal and by delivery of the stock, the particular stock becomes the principal's property, and is treated and considered as the subject of the bargain; and the brokers, according to the practice, are thereupon bound to hold the particular stock or shares at the disposal of the principal. That when it becomes notorious that a principal is, by reason of bankruptcy or death, unable to receive and pay for or to deliver the stocks or shares which he has ordered to be purchased or sold, and that no one is authorized to deal with the account, or able and willing to take the responsibility thereof, then and in such case it is usual for the broker, who is responsible to the members of the *Stock Exchange* for the transactions entered into for his principal, to proceed at the earliest practicable period to close the account of such principal by selling, on the best terms, amounts of all stocks or shares equivalent to those he may have contracted to take, and by purchasing amounts of all stocks or shares equivalent to those he may have contracted to deliver.

The Master of the Rolls allowed the claim, and the Plaintiffs in the suit appealed.

It was stated that there were similar claims by other stockbrokers, amounting, in the whole, to £190,000.

Sir *R. Baggallay*, Q.C., and Mr. *C. Hall*, jun., for the Appellants:—

The arrangement between Sir *R. Harvey* and the brokers was that the stock should be held until the next settling day, the 28th of July, and they cannot recover for a loss incurred by them in acting against their duty. It is probable that by throwing so large a sum on the market they lowered the price, and had they not done so it is possible that the difference on the 28th of July might not have been against Sir *R. Harvey*. At all events they have precluded themselves from saying that it would be against him. *Duncan* v. *Hill* (1) shews that the contract between a stockbroker and his principal is one of indemnity, and then, if the broker puts an end to the contract, he cannot claim the indemnity. Neither the death nor the bankruptcy of the principal can affect the contract. We must not be misled by the result in this particular case. There is nothing to shew that the personal representatives of Sir *R. Harvey* might not have chosen to perform the contract, and have taken the stock: *Lacey* v. *Hill* (2).

Mr. *Fry*, Q.C., and Mr. *Cozens-Hardy*, for the executors of Sir *R. Harvey*.

Mr. *Southgate*, Q.C., Mr. *B. B. Rogers*, and Mr. *D. Gardiner*, for Messrs. *Scrimgeour*, were not called upon.

SIR W. M. JAMES, L.J.:—

I think that in this case we have nothing to do with the rules of the *Stock Exchange*, or with any supposed variation of the general rule of law introduced by those rules.

It is, to my mind, a simple case of principal and agent. Sir *Robert Harvey* employed Messrs. *Scrimgeour* to buy for him certain Italian Stock and Spanish Stock, which were things capable of being delivered. They bought, accordingly, £150,000 Italian Stock and £204,000 Spanish Stock, for which they paid their own

(1) Law Rep. 6 Ex. 255; Ibid. 8 Ex. 242. (2) *Ante*, p. 441.

L. JJ. 1873 LACEY v. HILL. SCRIMGEOUR'S CLAIM.

money. The transaction was continued from time to time, and it not being convenient to him to pay the money, and it not being convenient to them to be out of so much money, they borrowed money from their bankers, depositing the certificates of the Italian and Spanish Stock with their bankers. Although there were no express new contracts, these matters were kept open, and accounts were from time to time rendered to Sir *Robert Harvey*, based upon the principle of the *Stock Exchange;* that is to say, the prices at the time were given so as to shew what he would have lost or gained when the thing came to be realized. But these accounts were nothing more than papers between him and them, shewing what the state of his speculations would be at any particular time.

The result is, that he did remain debtor to them for all the money they had paid for him. They would in the ordinary course of things, as agents, have kept the transaction still open until the 28th of July. Circumstances, however, affecting Sir *Robert Harvey* induced them not to keep the thing open, but at once to close the account, and to see what the profit or loss was upon the 16th, 18th, and 19th of July.

If that had resulted in any loss to him, possibly it would have been a very good set-off. The executors would have said, "We owed you money, but you closed the account earlier than you ought to have done, and the result is you have exposed us to loss." There is, however, no such case made here, and no loss arose to them through the closing of the transaction on the 16th, 18th, and 19th, instead of on the 28th of July.

In my opinion Sir *Robert Harvey's* estate is answerable to Messrs. *Scrimgeour* for the amount which he owed them, *minus* the amount they realized from selling the property; and I think that the order of the Master of the Rolls is quite right.

SIR G. MELLISH, L.J.:—

I am of the same opinion. I think, whether we look at this claim strictly according to the rules of the *Stock Exchange*, or look at it according to the rules of law, in either view the claim is good. If we strictly apply the rules of the *Stock Exchange*, as explained

in the judgment of Mr. Justice *Blackburn* in *Duncan* v. *Hill* (1), and for a moment leave out of sight the fact that the stock had been actually paid for and delivered, and assume that the state of things was exactly the same as if the whole remained in contract, yet, even then, in my opinion, the rules of the *Stock Exchange* are very reasonable and would apply. Those rules are, that when a broker making a contract in his own name has made for his principal a contract by way of speculation whether certain stocks will, during the next fortnight, rise or fall, and the principal dies, or becomes bankrupt, or falls into such a state of insolvency that it is manifest the brokers cannot depend on him to protect them against any loss that may occur, then the brokers may at once terminate the transaction, so as to make the profit or loss, whichever it is, depend upon the state of things on that day, and not to run the risk of any further fall in the market. That appears to me a most reasonable rule; and as no broker or jobber has been called on the other side to say that such a rule does not exist on the *Stock Exchange*, I must presume that it does exist.

If, therefore, the question depended strictly on the rules of the *Stock Exchange*, and this case were looked at as one in which the property had not been actually purchased, but all still remained in contract, I should think that that was a perfectly reasonable rule, and that there was a good claim on this ground alone.

But I also entirely agree with what has been stated by the Lord Justice on the ground that this is a case where the property has been actually purchased and delivered.

I am not aware that there is any difference between the purchase of stock or shares and the purchase of wheat or cotton. If a broker has purchased a quantity of cotton, or other goods, and has paid for it out of his own money, and has got an order from his principal that he may sell for the purpose of recouping himself the amount which he has actually paid, but the principal has told him, "I think you had better not sell till the 1st of August," and he, being afraid the market will fall, sells a fortnight too soon, that, upon the ordinary principles of law, would not entirely deprive him of his right to recover. He would still be entitled to recover the money he had laid out on behalf of the

(1) Law Rep. 8 Ex. 242, 246.

L. JJ. 1873 LACEY v. HILL. SCRIMGEOUR'S CLAIM.

principal; but the principal would have a counter claim against him for damage, if any, which might have resulted from the fact of selling a fortnight earlier than he ought to have done. But if it turned out that the market kept continually falling during the fortnight, so that the sale was in fact a gain to the principal's estate, in that case there would be nothing to recover.

That is the case before us. The evidence seems to shew perfectly plainly that when Sir *R. Harvey* died, he was in a state of insolvency. If these stocks had not been sold at the time when they were sold, they would have been sold on the account day, when it is admitted that the brokers would have been entitled to sell. There is not the least reason to suppose that they would then have been sold at a higher price than on the day when they were sold. Therefore I am of opinion, on both grounds, that this appeal must be dismissed.

Solicitors for the Appellant: Messrs. *Linklater & Co.*
Solicitors for Messrs. *Scrimgeour:* Messrs. *Lyne & Holman.*
Solicitors for the Executors: Messrs. *Sharpe, Parkers, & Co.*

L. JJ. 1873 *July* 9.

CHADWICK *v.* CHADWICK.

[1859 C. 33.]

Practice—Appeal—Revivor.

Where a sole Plaintiff dies after his petition for rehearing is before the Court of Appeal in Chancery, the suit can be revived on an original motion before the Court of Appeal.

JAMES CHADWICK, the Plaintiff in this suit, by his bill claimed certain real estates as heir-at-law to Sir *A. Chadwick.*

On the 14th of July, 1868, the Vice-Chancellor *Stuart* made a decree dismissing the bill. The Plaintiff presented a petition of rehearing, which was, on the 7th of July, 1871, answered, and the appeal was set down for hearing. On the 18th of July, 1871, the Plaintiff *James Chadwick* died, having by his will appointed *J. H. Williams* and *T. Marzetti* executors and devisees of his real

estate in trust for *J. H. Williams* and others. Probate of the will was granted to *J. H. Williams*, but it was alleged that there was a later will in existence.

J. H. Williams had obtained an *ex parte* order of revivor, which was discharged by the Vice-Chancellor *Wickens* on the ground that the suit was by the petition of rehearing brought before the Court of Appeal. His Honour was stated also to have thought that certain other devisees of the Plaintiff could only be brought before the Court by a supplemental bill.

A motion was now made by leave that the suit might be revived at the suit of *J. H. Williams*.

Mr. *Greene*, Q.C., and Mr. *A. Bailey*, in support of the motion:—

We have not been able to find any rule as to the practice in such a case. We considered that the suit might be revived in the usual manner, but the Vice-Chancellor *Wickens* discharged our order, and we therefore make this application.

Mr. *Dickinson*, Q.C., and Mr. *L. Bird*, for the Defendant.

THEIR LORDSHIPS made an order that on an affidavit of one of the attesting witnesses to the will of the Plaintiff, the suit, and also the petition of appeal, might be revived at the suit of *J. H. Williams* against the Defendant to the original suit; and that *J. H. Williams* might be at liberty to carry on and prosecute the suit against the Defendant *Chadwick* and the other devisees of the will of the Plaintiff. Leave to amend the petition of appeal. This order to be without prejudice to the right of the Defendant to the original suit to apply to discharge the order on the ground that the will alleged was not the last will of the original Plaintiff.

Solicitor for *J. H. Williams:* Mr. *J. Andrews*.

Solicitors for the Defendant: Messrs. *Clarke, Woodcock, & Ryland*.

L. JJ.
1873
July 12.

SHERRATT *v.* MOUNTFORD.

[1868 S. 129.]

Will—Parol Evidence—Ambiguity—"My Nephews and Nieces"—Nephews and Nieces of Testator's Wife.

Residuary gift in trust for "my nephews and nieces living, and the issue, if any, of my nephews and nieces dead before me." The testator never had any nephew or niece of his own, nor had he any brother or sister living when he made his will:—

Held (affirming the decision of the Master of the Rolls), that the nephews and nieces of the testator's wife took under the gift, and that evidence of circumstances making it improbable that the testator intended to benefit them, but not tending to shew that any other class was intended, was inadmissible.

THIS was an appeal from a decision of the Master of the Rolls.

James Billings, by his will, after a devise and bequest to his cousins, *John Mountford* and *Hugh Mountford*, gave the residue of his estate as follows: "All the rest of my property, real and personal, I give to my said cousins in trust for them and my nephews and nieces living and the issue of any of my nephews and nieces dead before me, such issue taking only the parent's share." He appointed his cousins his executors.

The testator had not at the date of his will any brother or sister, nor any nephew or niece of his own. There were, however, nephews and nieces of his deceased wife, some of whom survived him, and some died in his lifetime leaving issue living at his death.

The bill was filed by a nephew of the wife to establish an interest in the residuary gift. The Master of the Rolls held that nephews and nieces of the wife were the persons intended by the description "my nephews and nieces" (1). The two cousins appealed.

Sir *R. Baggallay*, Q.C., and Mr. *Vaughan Hawkins*, for the Ap-

(1) Law Rep. 15 Eq. 305.

pellants, proposed to read fresh evidence, and urged that though evidence of intention was not admissible, evidence of any surrounding circumstances from which intention could be inferred was admissible. They referred to *Doe* v. *Hiscocks* (1).

[THE COURT allowed the evidence to be read *de bene esse*. Its general effect was that the testator was on very unfriendly terms with his wife's nephews and nieces, but it did not suggest that there were any other persons who in any degree answered the description of nephews and nieces.]

Mr. *Roxburgh*, Q.C., and Mr. *Batten*, for the Plaintiff, were not called upon.

Mr. *Bevir* appeared for the heir-at-law, and

Mr. *Southgate*, Q.C., and Mr. *Humphreys*, for the next of kin.

SIR W. M. JAMES, L.J.:—

I am clearly of opinion that this evidence is not admissible. Evidence of the acts, feelings, and intentions of the testator is not admissible for the purpose of construing the will. You must always, of course, have evidence who are the persons mentioned, and you must also have evidence of what are the things bequeathed. It is like evidence of parcel or no parcel in a deed. You must admit evidence to shew who constitute the class of takers, and what constitutes the property which is dealt with. When you find a trust for the testator's nephews and nieces, you must ascertain by evidence who are the persons to take under that trust. It appears that the testator at the time of making his will had no nephew or niece the child of any brother or sister of his own, and that there was no brother or sister of his living. He had not, and he could not thereafter have, nephews and nieces by blood, but it turned out that he had nephews and nieces by affinity. Then when it has been ascertained that there were nephews and nieces by affinity, they are entitled exactly in the same way as his own nephews and

(1) 5 M. & W. 363.

L. JJ. 1873

SHERRATT v. MOUNTFORD.

nieces would have been entitled if he had had any. It has been ascertained that there are persons who answer the description of "nephews and nieces" in the ordinary and popular use of the words. A man commonly calls his wife's nephews and nieces his nephews and nieces, especially while they are children. It is a popular and not an improper use of the words, and accordingly the Court of Exchequer Chamber, in *Grant* v. *Grant* (1), confirming the Court of Common Pleas, held that parol evidence was admissible to shew that a wife's nephew was intended by a gift to "my nephew *John*," though the testator had a nephew of his own of that name. When it has been shewn that there were no nephews or nieces of the testator, and that there were nephews and nieces of his wife, I can conceive it possible that if there were another class to whom the description of nephews and nieces might, though with less propriety, be applied, parol evidence might be admissible to shew which of those two classes was intended. For instance, a man might have persons living with him whom he was in the habit of calling his nephews and nieces, and who had so far acquired that designation as to render parol evidence admissible in order to remove the latent ambiguity which would be introduced by shewing that there were two persons or two classes of persons, who might fairly and reasonably answer the description. But when you go further, and say, "What we want is to shew by evidence, not that there were other persons who might properly answer the description, but to shew that the testator was on very unfriendly terms with these persons, and cannot have intended to benefit them"—that is evidence of facts raising an improbability of intention which, in my opinion, is no more admissible than evidence of an express intention, which is confessedly inadmissible. If the testator had said, "I do not mean my wife's nephews and nieces to take a farthing," that would not be admissible; and evidence that he treated them in such a way that he never could have intended them to take is of exactly the same kind. The only safe rule is that when persons have been found sufficiently answering the description in the will, there we stop, and are not to go any further unless it is shewn that there is another class of persons also sufficiently answering the description,

(1) Law Rep. 5 C. P. 380, 727.

in which case extrinsic evidence is admissible to remove the latent ambiguity, and shew which of the two classes was intended.

SIR G. MELLISH, L.J.:—

I am of the same opinion. No doubt a man's own nephews and nieces are primarily his nephews and nieces, but I am of opinion that his wife's nephews and nieces are his nephews and nieces according to the ordinary meaning of the words in a secondary sense; so that if he has no nephews or nieces according to the strict primary sense, then his wife's nephews and nieces will take under the description of his nephews and nieces, unless there is some other class of persons who come into competition with them, and who are proved by extrinsic evidence first to be persons who may take under the description of nephews and nieces, and if that is proved, then that they are the persons who really were intended to take. But I am of opinion that if there is no such class, if no one claims under the description of his nephews and nieces except his wife's nephews and nieces, that then his wife's nephews and nieces will take rather than that the gift should fail; and I think that evidence is not admissible to prove that he did not intend them to take, unless you first make a ground for that evidence by proving that there is some other class which possibly might take under that description.

The appeal must be dismissed with costs.

Solicitors: Messrs. *Wedlake & Letts;* Messrs. *Tibbitts & Co.;* Mr. *J. Burton.*

L. JJ.
1873
July 12, 14.

BURTON *v.* GRAY.

[1871 B. 162.]

Condition precedent—Guarantee—Equitable Mortgage.

The Plaintiff handed title deeds to his brother to enable the brother to borrow £600 from *H.* The brother deposited them at his bankers, with a memorandum of deposit purporting to be executed by the Plaintiff, and addressed to them, "In consideration of your lending *F. B.*" (the brother) "£1000 for seven days from this date I deposit," &c. The bankers did not place £1000 to the credit of the brother, but during the next seven days they allowed him, by cheques drawn in the ordinary way, to overdraw his account to an amount somewhat less than £1000. The Plaintiff filed his bill for delivery up of the deeds, alleging the memorandum of deposit to be a forgery, and also alleging that the bank had not lent the brother £1000 for seven days:—

Held (affirming the decision of the Master of the Rolls), that, assuming the memorandum to be genuine, the bankers had no lien on the deeds, for that they had not fulfilled the condition.

THIS was an appeal by the *London and County Banking Company* from a decree of the Master of the Rolls ordering them to deliver up to the Plaintiff certain deeds of his which had been deposited with them, and on which they claimed a security for the balance of an account due to them from the Plaintiff's brother, *Frederick Burton.*

The deeds were deposited with the banking company by the Plaintiff's brother, *Frederick Burton*, a customer of the bank, on the 25th of September, 1869, along with a memorandum of that date purporting to be signed and sealed by the Plaintiff, the material part of which was as follows:—

"*London*, 25 Sept., 1869.

"To *William John Norfolk*, Esq.
James Gray, Esq.
} Public Officers of the *London and County Banking Company*, 21, *Lombard Street, London.*

"Gentlemen,—In consideration of your banking company lending to Mr. *Frederick Burton*, of, &c., the sum of £1000 sterling for seven days from this date, and of 5*s.* sterling now paid by you to me, the receipt of which I hereby acknowledge, I deposit with

you the several documents mentioned in the schedule hereunder written, which I agree shall remain with you, or other the public officers for the time being of the said company, as a security for the payment to you, or other such public officers as aforesaid, of all money due or to become due from the said *Frederick Burton* to the said company, of whatsoever members or proprietors it shall from time to time consist, on any account whatsoever, including charges for interest, commission, and all costs, charges, and expenses which you may incur in enforcing or obtaining payment of such money, or in realizing this or any further security. And I agree to pay you, or such public officers as aforesaid, upon demand, all such money; and I hereby charge the hereditaments and premises comprised in such documents respectively, and all fixtures now or hereafter thereon, with the payment thereof."

The document contained some further provisions, which need not be specified.

The Plaintiff had been asked by *Frederick Burton* for assistance, and had handed the deeds to him that he might borrow on them, for seven days, £600 from a Mr. *Hawkins*, whom the Plaintiff knew. At the end of the time the Plaintiff asked for the deeds back, but *Frederick Burton* put him off with various excuses, and in May, 1870, the Plaintiff learned that they had been deposited with the bank. The Plaintiff did not, however, apply to the bank about them, being afraid of injuring his brother. In April, 1871, *Frederick Burton* was arrested for forgery, and was shortly after convicted. The Plaintiff, upon his brother's arrest, applied to the bank, and then, as he stated, first learned that there was a memorandum of deposit purporting to be signed by himself, and that under it the bank claimed to hold the deeds as a security for a balance of more than £2000; and they threatened to proceed to a sale of the property.

The Plaintiff filed his bill, alleging that the memorandum was a forgery, and stating that, moreover, the bank never advanced to *Frederick Burton* the sum of £1000, or any other sum, for seven days from the 25th of September, 1869.

The public officer and the manager of the bank, by their answer, insisted that the document was genuine, that the bank had lent *Frederick Burton* £1000 by placing it to his credit, and that he

L. JJ. 1873 BURTON v. GRAY.

had drawn cheques upon it to the extent of £900 and upwards, and that the bank did thereby in fact lend him £1000 for seven days from the 25th of September, 1869; and, further, that if the document was not genuine, still the bank was entitled to the benefit of the deposit, inasmuch as the Plaintiff had lent the deeds to his brother for the purpose of enabling him to raise money upon them.

The account of *Frederick Burton* with the bank, from the 25th of September to the 6th of October, was as follows:—

THE LONDON AND COUNTY BANKING COMPANY IN ACCOUNT WITH FREDERICK BURTON.

DR. CR.

1869			£	s.	d.	1869			£	s.	d.
Sept.	25	By Balance	58	4	3	Sept.	25	Self	300	0	0
								Crippin	20	0	0
								Bland	20	0	0
„	27	Cash	34	0	0	„	27	Crippin	500	0	0
								Fowler	10	0	0
								Curling	20	0	0
						„	28	Pettit	7	6	2
„	30	Ditto	42	10	0	„	30	Charges on Account	8	3	3
								Brand	25	0	0
								Ditto	15	0	0
								Gas	20	0	0
									945	9	5
									134	14	3
1869											
Oct.	1	Cash	510	0	0	Sept.	30	Balance	810	15	2
						Oct.	1	Curling	25	0	0
„	2	Ditto	5	0	0	„	2	Self	200	0	0
„	4	Ditto	330	10	4	„	4	Humphries	8	0	0
		P. N.	1000	0	0			Palmer	6	4	7
								Bonnick	3	10	6
								Pundman	3	3	0
								Bill Stamp	0	10	0
								Interest on Burton's Account	1	0	6
								Burton	500	0	0
								Discount	4	13	2
„	5	Bill	500	0	0	„	5	Craight	5	0	0
								Bland	20	0	0
								Burton	100	0	0
								Ditto	200	0	0
								Discount	1	1	11
„	6	Cash	35	0	0	„	6	Self	200	0	0
		Hitchin	25	0	0						
		Ditto	12	10	0						

The Master of the Rolls declined to try the question of forgery, as to which there was a conflict of evidence, and said that if it had been necessary to decide that question he would have had it tried by a jury; but being of opinion that, assuming the memorandum to be genuine, the bank had not complied with its terms, made a decree as prayed (1).

(1) 1873. Feb. 21.

LORD ROMILLY, M.R.:—

I think the condition has not been performed on which the Plaintiff was to be guarantee for the due payment to the bank. The £1000 in seven days was never attempted to be given. To fulfil the condition the bankers should have transferred £1000 to the credit of the brother, or should have given to him notice that they would honour his cheques to that amount at any time before the 7th of October, 1869. But they do nothing of the sort. They treat the matter just as if it were his ordinary banking account, and treat him exactly as if the Plaintiff was security for any advance which they might think fit to make the brother without their performing the condition in any respect. It is obvious that fixing the seven days was a very important part of the direction. It might well be that the brother was within seven days of the advance to pay to the Plaintiff £1000. The Plaintiff is not a customer of the bankers. They have not fulfilled the condition contained in the said guarantee entered into solely upon the faith of its performance.

The Defendants contend that the deposit of the Plaintiff's deeds is sufficient, and would entitle the bank, in the absence of any memorandum, to advance the money upon the security of those deeds. But I am of opinion that this is entirely erroneous, and that they could only treat them as a security upon the conditions contained in the memorandum of deposit. The Plaintiff gave his title deeds to his brother to deposit with a friend named *Hawkins* for a particular purpose. The purpose for which they were intended to be deposited is immaterial. The brother deposits them with his own bankers, and as security for his balance. I am now treating the case wholly independently of the effect of the memorandum of deposit. The bank receives them as the Plaintiff's title deeds, never sends any notice to him, or makes any inquiry of him as to his knowledge or consent as to the possession of the title deeds. Does the fact of the brother's possession of these title deeds justify them, in the absence of any authority from the Plaintiff, to treat the brother's deposit as binding the Plaintiff for any advance the bank may think fit to make upon them? If so, everybody is at the mercy of any servant or messenger who may be disposed to rob him, or who is bribed to cheat him. Does it, again, accompanied by the memorandum signed by the Plaintiff, which is the only authority given to the bank, entitle them to claim a security without performing the condition imposed upon them by the memorandum which is their sole authority for keeping the deeds as security, and entitle them to advance this money and make the Plaintiff repay it? I think not. I have considered the case in both ways: supposing the deeds to have been deposited by the brother without any memorandum at all, in which case the bank are not entitled to move in the matter without

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Mr. *Fry*, Q.C., and Mr. *W. W. Cooper*, for the Appellants.

Mr. *Southgate*, Q.C., and Mr. *Waller*, for the Respondent, were not called upon.

SIR G. MELLISH, L.J.:—

This is an appeal of the *London and County Banking Company* from a decree of the Master of the Rolls, by which he ordered them to deliver up to the Plaintiff certain deeds of his which had been deposited with them, and on which they claimed a security for the balance of an account due to them from the Plaintiff's brother, *Frederick Burton*.

The bill proceeds on two grounds: first of all it alleges that the memorandum of deposit under seal, dated the 25th of September, 1869, under which the Defendants claim, is a forgery, and no doubt that is the main ground on which the bill rests; but there is also this statement at the end of the 14th paragraph of the bill: "Since the said negotiation the Plaintiff has discovered that the said bank did not in fact lend to the said *Frederick Burton* the sum of £1000, or any other sum, for the period of seven days from the 25th of September, 1869, as stated in the alleged memorandum set out in the 12th paragraph hereof." Therefore the bill plainly relies upon two different grounds—first, that the memorandum of deposit was a forgery, and secondly, that if it was not a forgery, nevertheless the bank had not complied with the consideration stated in it, so as to make it binding on the Plaintiff. The answer denied that it was a forgery, and also set up a variety of other defences. The Master of the Rolls held that if it were necessary to try the question of forgery, it ought to be tried by a jury. And we entirely agree with him in that opinion. But His Lordship decided the case on the second ground, that, even admitting the memorandum not to be a forgery, the Plaintiff was entitled to recover possession of his deeds,

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communicating to the Plaintiff; and in the next place, with the memorandum of deposit, which imposes upon the bank the performance of the condition on which they alone were to take them.

I am of opinion, therefore, that, wholly irrespective of the genuineness of the memorandum of deposit, the Plaintiff is entitled to a decree for the delivery up of the title deeds, and for the costs of the suit.

because the bank had not complied with the consideration stated in the memorandum. [His Lordship here read the material part of the memorandum.]

I am clearly of opinion, on the construction of this document, that unless £1000 sterling was advanced for seven days in accordance with the consideration as stated in the commencement, this guarantee and mortgage never came into operation. The bank ought to have known when they saw the words in the memorandum that the nature of the transaction was this: that the Plaintiff had been informed, truly or falsely, that his brother had some very pressing necessity for £1000 instantly for seven days, and that the Plaintiff entered into this security for the purpose of enabling his brother to obtain the £1000, which he supposed was to be returned in seven days. The bank then must have known that if the brother did not want the £1000, if he did not come for and did not get the £1000 for seven days, the ground for the Plaintiff becoming security never existed, and that therefore he was not bound. It seems to me quite impossible to put any other meaning on the words than this: "If you will advance him £1000 instantly for seven days, then, and not otherwise, I agree to give the deposit of title deeds, and to become security."

Then if we look at the account it is quite clear that no such advance was made. There were certain sums, no doubt, advanced in the ordinary way by cheque, which make, on the 30th of September, a balance of £810 15*s.* 2*d.* against *Frederick Burton*, but £510 of that is paid back on the 1st of October. So that in no way whatever is there anything like £1000 advanced; no sum of £1000 was advanced until the 4th of October, and that advance was made on a promissory note. The note is not produced, but it appears to have been a note at three or four months' date. That advance of £1000 on the 4th of October on a note at three or four months' date could not by possibility be a compliance with the memorandum. If an action were brought on the guarantee for the amount advanced in the note, and an action of detinue were brought to recover the deeds, the action on the guarantee must fail, and the action of detinue must succeed, on the ground that the consideration which was the condition precedent to the mortgage and the guarantee attaching never was complied with.

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That being so, a case is attempted to be made in equity, on the ground that the Plaintiff, having had notice that the bank had got his deeds, did not come and demand them. It appears to me that there is one complete answer to this, viz., that it is impossible that the Plaintiff could waive the non-compliance with the condition precedent, inasmuch as he did not know that the £1000 had not been advanced.

Then this curious case is set up, that if the deed is genuine, it may be that the Plaintiff has got a case, but that if the deed was a forgery, he has no case, because he has waived his rights by not claiming his deeds from the bank, and must be taken to have acquiesced in his brother's raising money on them. The Plaintiff is entitled to put his case as he does by his bill both ways. "The memorandum is not genuine, but if it is genuine, you have not complied with its terms." But the bank cannot set up that this memorandum, on the footing of which they received the deeds, is not a genuine instrument. If, therefore, they are not entitled to use the Plaintiff's deeds and to sell his lands in accordance with the memorandum which they have received—which, in my opinion, they are not, because they have not complied with the consideration—then they are not entitled to use the Plaintiff's deeds at all. I think, therefore, that the decision of the Master of the Rolls in this case was quite correct, and the appeal must be dismissed with costs.

SIR W. M. JAMES. L.J :—

I agree.

Solicitors: Messrs. *Heath & Parker;* Mr. *A. E. Francis.*

BROWN *v.* BLACK.

L. JJ.
1873
July 14.

[1870 B. 176.]

Company—Transfer to Infant—Vendor Trustee for Real Purchaser—Release and Indemnity.

The Plaintiff sold on the *Stock Exchange* fifteen shares in a limited company. They were bought by a broker as agent for a firm of Scotch brokers, whose names appeared as purchasers in the bought and sold notes. The broker furnished the name of *W. K.* as transferee, a transfer was executed to *W. K.*, and he was registered as owner. About two years afterwards an order was made to wind up the company, and it being found that *W. K.* was an infant, the Plaintiff's name was restored to the register. The Plaintiff thereupon filed this bill against the Scotch brokers for indemnity. The brokers shewed by their answer that the shares had been purchased along with seventy-five others, in consequence of separate instructions from *D.*, *J.*, and *S.* respectively, to purchase for them respectively thirty shares, and that all the ninety shares had been transferred to *W. K.*, and had not been appropriated between the purchasers. The bill having been amended by making the purchasers parties, *Bacon*, V.C., made a decree against *D.*, *J.*, and *S.* for them to indemnify the Plaintiff from all liability upon the fifteen shares which he had sold, thus making them jointly and severally liable to the Plaintiff's whole demand:—

Held, on appeal by *D.*, that the Plaintiff was entitled to indemnity, but that the decree ought to be varied so as to make *D.*, *J.*, and *S.* only liable severally, each for one third of the liability on the Plaintiff's shares.

THIS was an appeal by the Defendant *Dixon* from a decree of Vice-Chancellor *Bacon*.

In June, 1864, the Plaintiff instructed his broker to sell on the *London Stock Exchange* fifteen shares in the *Contract Corporation, Limited*, for delivery on the 15th of June. The broker sold that number of shares.

In the same month the Defendants *Black & Stephen*, brokers, of *Aberdeen*, bought through *Kitchin*, their *London* broker, 130 shares in the same company. The Plaintiff's fifteen shares were treated as included among these, and bought and sold notes were made out, naming *Black & Stephen* as purchasers.

Kitchin gave the name of *William Keith* as transferee. The Plaintiff's fifteen shares were transferred to *Keith* accordingly, and the transfer was registered.

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In April, 1866, the company was ordered to be wound up, and the name of *Keith* was placed on the list of contributories; but on inquiry it was found that he was a clerk in the employ of *Black & Stephen*, and of the age of about seventeen. His name was therefore removed from the list, and that of the Plaintiff restored. The Plaintiff was compelled to pay a heavy call in the winding-up, and as *Black & Stephen* denied all responsibility, he filed a bill against them for indemnity.

Black & Stephen put in their answer, from which it appeared that the 130 shares were bought for the following three persons: thirty for *Dixon*, forty for *Easson*, thirty for *Jopp*, and thirty for *Stephen*, and that all were transferred into *Keith's* name. *Easson's* forty shares had been sold by *Keith*, and transfers executed in which the Plaintiff's shares were not included; but the remaining ninety had been left standing in *Keith's* name, and had not been appropriated as between *Dixon*, *Jopp*, and *Stephen*. The bill was then amended by making *Dixon* and *Jopp* parties.

Vice-Chancellor *Bacon* made a decree obliging *Dixon*, *Jopp*, and *Stephen* to indemnify the Plaintiff against the call already made, and all future calls, and against all future costs, damages, and expenses. The case is reported (1), where a more full statement of the facts will be found. *Dixon* appealed.

Mr. *Davey*, and Mr. *Cobbold*, for the Appellant:—

We contend that *Dixon* is under no liability to the Plaintiff directly, there being no privity between them, so that the Plaintiff never became a trustee for him. But if the Court is against us on that, we say that at all events the decree goes too far. *Dixon* did not join in a speculation with the other purchasers, and he cannot be liable to anything more than the calls on thirty shares, the number which he authorized his broker to buy; but the principle of this decree includes him in a joint and several liability for the whole ninety, for each vendor is in the same position as the Plaintiff, and can file a similar bill. If, therefore, the decree is sustained at all, it should be varied by making *Dixon*, *Jopp*, and *Stephen* severally liable to the extent of one third each.

(1) Law Rep. 15 Eq. 363.

Mr. *J. W. Chitty*, for the Plaintiff:—

There must have been a joint and several request by these three Defendants to *Keith* to hold the shares in trust for them. If, therefore, he had been an adult, they would have been liable jointly and severally to indemnify him, and the Plaintiff standing in his place as to part of the shares, has to the extent of those shares the same right to indemnity as *Keith* would have had.

[The LORD JUSTICE JAMES:—There is no evidence of any joint request. It must be taken that these were only separate requests, for the purchasers knew nothing of each other; they only happened to employ the same brokers.]

SIR W. M. JAMES, L.J.:—

This is an appeal from a decision of Vice-Chancellor *Bacon*, holding the Defendants liable to indemnify the Plaintiff in respect of shares remaining in the Plaintiff's hands. With respect to the main principle of the case, it appears to me that the Vice-Chancellor was quite right in following out the rule that where there is a contrivance like this which puts shares into the name of an infant, and so the vendor is fixed with the shares, he is entitled to be indemnified by the real owner against the liability which he incurs by remaining the legal owner of the shares which he has parted with. The difficulty in this case arises from the fact that there are no particular shares which can be identified as shares sold by one particular person to another particular person, a number of shares sold by several persons and purchased by several persons being mixed up in one mass. Ninety shares, representing purchases by various persons, and purchases from various persons, were transferred into the name of the infant. I quite agree with the Vice-Chancellor that this is not to deprive the Plaintiff of his remedy, but, on the other hand, it is not to make the Defendant liable for more than the shares which he really bought, and of which he became the beneficial owner. He became the beneficial owner of thirty shares out of the ninety, and two other persons became equally entitled to the others. The Plaintiff was one of several persons who stand in exactly the same position, he having sold fifteen, and the others the remainder of

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the ninety shares. Which shares belonged to which of the purchasers, it is impossible now to say, and the only way in which justice can be done is, I think, to distribute the shares of each vendor rateably between the purchasers; and at the suit of Mr. *Brown* to decide that Mr. *Dixon* and the other two purchasers are respectively liable to the extent each of five of his fifteen shares. That appears to me to be the proper measure of their liability to him, and they will be liable in exactly the same manner, *i.e.*, each for one third to each of the other vendors who have placed themselves in the same predicament as Mr. *Dixon*. The decree will be varied in that respect by declaring that they are liable each of them in respect of five shares of the Plaintiff's fifteen. The costs will remain as they are.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

Solicitors: Messrs. *Linklater, Hackwood, & Co.*; Messrs. *Patteson & Cobbold.*

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LLANELLY RAILWAY AND DOCK COMPANY *v.* LONDON AND NORTH-WESTERN RAILWAY COMPANY.

[1872 L. 97.]

Railway Companies—Traffic Arrangement—Running Powers—Indefinite Agreement, whether perpetual—Consideration not expressed in Deed—Construction.

The *L. Railway Company*, being in want of money to complete an extension line, applied to the *N. W. Railway Company* for a loan of £40,000, and it was agreed that the *N. W. Company* should lend the money and have running powers over the lines of the *L. Company*. An agreement under seal was entered into, not referring to the loan, by which it was agreed, (1) that, subject to such bye-laws and regulations of the *L. Company* as should from time to time be in force, the *N. W. Company* might run over and use the railways of the *L. Company*, and their stations, sidings, and conveniences; (2) that the receipts from through traffic should be apportioned between the two companies according to mileage proportion, with a certain allowance per cent. to the *N. W. Company* out of the *L. Company's* share; (3) that the *N. W. Company* might have their own staff at the sta-

tions on the *L. Company's* lines; (4) that, whether the running powers were exercised or not, there should be a complete system of through booking and through fares from the stations of each company by the lines of the other; (5) that, if the running powers were exercised, the fares should be fixed by the *N. W. Company*, and if the *L. Company* objected to any of them, then by arbitration; (6) that the *N. W. Company* should not carry the local traffic on the *L.* lines, but should, if required by the *L. Company*, carry local passengers for 15 per cent. of the local fares; (7) that the companies should send by each other all traffic not otherwise consigned to and from stations on the lines of each other whenever such lines formed the shortest route; (8) that any difference under the agreement should be settled by arbitration under the *Railway Companies Arbitration Act*, 1859. The *N. W. Company* advanced the £40,000, and the agreement as to running powers was acted upon for some time, but afterwards the *L. Company* gave three months' notice to determine it:—

Held, by *Malins*, V.C., that the jurisdiction of the Court of Chancery was excluded by the 8th clause of the agreement; but this objection was waived on appeal:

Held, by the Court of Appeal, that evidence of the advance of the £40,000 having been the consideration for the agreement was admissible:

Held, by *James*, L.J., that, apart from this evidence, the agreement was not determinable:

Held, by *Mellish*, L.J., that, having regard to this evidence, which did not contradict anything in the agreement itself, it was clear that the agreement was not determinable; but whether, apart from the proof of consideration, this agreement, the principal terms of which were one-sided, would not have been revocable, *quære*.

Per James, L.J.:—*Semble*, the jurisdiction of the Court was not excluded by the 8th clause; for that, if the agreement was revocable, the revocation would determine the 8th clause as well as the other terms of the agreement.

Affirmed L.R. 7 H.L. 550.

THIS case originally came before the Court of Appeal, on the 26th of July, 1872, on a motion by way of appeal from an order of Vice-Chancellor *Malins* refusing an injunction. It was then ordered that the motion should stand over and the cause come on before their Lordships on motion for decree.

In 1867 the Plaintiffs were proprietors of the *Llanelly Railway*, which was complete, and were about to make lines to *Carmarthen* and *Swansea*, each line being a separate undertaking with separate capital. In August, 1867, being in want of capital to make the *Swansea* line, they applied to the *London and North-Western Railway Company* for a loan of £40,000. That company, being desirous of obtaining access from their own lines to *Swansea*, *Carmarthen*, and *Llanelly*, entertained the proposal, and an arrange-

(1) See W.N. 1872, 172.

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ment was verbally come to that the *London and North-Western Railway Company* should lend the £40,000, and have running powers over the lines of the *Llanelly Railway Company*. The following letters passed between the chairmen of the two companies:—

Aug. 17, 1867. *Llanelly Company* to *London and North-Western Railway Company.*

"It strikes me that you can so far expedite matters that your solicitor can say what security is required for the advance of £40,000. We can give debentures or second preference stocks or original stock of the *Swansea Line Extension*, guaranteed by the original undertaking, now earning 4% on its original stock; or we can give the lands we have to pay for, or we can give rolling stock, or some of all, if any of these or all will do. I do not imagine there will be any difficulty as to details; but we want this money to complete the *Swansea* lines."

Nov. 14, 1867. *London and North-Western Company* to *Llanelly Company.*

"I inclose agreement to carry out the arrangement made between us, which had better be completed at once. The loan is not mentioned in the agreement, as it had better not appear in the formal document; but the money will be lent on the terms mentioned in your letter."

Nov. 20, 1867. *Llanelly Company* to *London and North-Western Company.*

"I have sent the agreement to Messrs. *M. & Co.*, and requested them to see Mr. *B.* on the same. There are some slight alterations required, I think, to make it clear, and I am sorry that the consideration (the loan of the money) cannot be put forward in the agreement. However, if this cannot be, I propose to hand you £10,000 of debentures with the agreement for £10,000 cash, so as to nail the proceeding. I trust Mr. *B.* will make the alterations at once, so as to allow the whole matter to be finally concluded at our board meeting on the 28th instant. We want the cash to complete agreements for land which are now causing us trouble, and may be very seriously injurious to our (and your) interests if not at once concluded."

The *London and North-Western Company* accordingly advanced the £10,000 at once, and on the 29th of November, 1867, the agreement referred to in the above letters was executed by the companies. Shortly afterwards the *London and North-Western Railway Company* advanced to the Plaintiffs further sums, making up in all £44,660. The security given for these sums consisted of £18,000 £5 per cent. preference stock of the original undertaking of the *Llanelly Company*, and debentures of the *Swansea* undertaking for sums amounting to £26,660.

The agreement was in the following terms:—

"An agreement made this 29th day of November, 1867, between the *Llanelly Railway and Dock Company* of the one part, and the *London and North-Western Railway Company* of the other part.

"It is hereby agreed between the parties hereto that—

"(1.) Subject to such bye-laws and regulations of the *Llanelly Railway Company* as may be in force from time to time, the *London and North-Western Railway Company* shall have power to run over and use, with their engines, carriages, vehicles, and servants, the railways of the *Llanelly Company*, and the stations, sidings, and conveniences connected therewith. (2.) The receipts from the through traffic shall be apportioned between the two companies (after deducting clearing-house terminals and Government duty), according to their mileage proportions, with an allowance to the *London and North-Western Company*, out of the *Llanelly Company's* share, of 20 per cent. on passengers and 25 per cent. on goods for working expenses. (3.) The *London and North-Western Company* to be at liberty to have their own staff at the stations on the *Llanelly Company's* lines, and to be allowed (out of the terminals) a reasonable sum for the cost of cartage, clerkage, and other work done by them at such stations, the same, in case of difference, to be settled by arbitration as hereinafter mentioned. (4.) Whether the said running powers be exercised or not, there shall be a complete system of through booking, and through rates and fares for all traffic to and from the stations of each company by the lines of each other, the receipts to be divided (after deducting the usual clearing-house terminals and Government duty) by mileage, such rates and fares, if not agreed upon, to be settled by arbitration. (5.) In the event of the *North-Western Company* exercising their

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running powers, the rates and fares to be fixed by the *London and North-Western Company;* but if the *Llanelly Company* object to any such rates and fares, then, after one week's notice, the same shall be referred to arbitration as hereinafter provided. (6.) The local traffic on the *Llanelly* lines shall not, without the consent of the *Llanelly Company*, be carried by the *London and North-Western Company*, but the last-named company shall, when required by the *Llanelly Company*, carry local passengers by their trains between any stations at which they stop, receiving 15 per cent. of the local fares for so doing. (7.) The two companies shall send by each other all traffic not otherwise consigned to and from stations on the lines of each other whenever such lines form the shortest route. (8.) Any difference under this agreement to be settled by arbitration, as provided by the *Railway Companies Arbitration Act*, 1859."

On the 19th of March, 1872, the Plaintiffs served the Defendant company with a written notice that the Plaintiffs determined the agreement from the 30th of June then next. The Defendant company denied the right of the Plaintiffs to determine the agreement, and claimed a continuing right to run over the Plaintiffs' lines. The Plaintiffs accordingly, on the 1st of July, filed their bill, praying that it might be declared that the agreement had been put an end to, and that it might be ordered to be delivered up to be cancelled, and that the Defendant company might be restrained from running over and using all or any of the railways of the Plaintiffs, or the stations, sidings, or conveniences connected therewith, and for an account and payment of what was due under the agreement, and for damages for running over the Plaintiffs' lines since the determination of the agreement.

Vice-Chancellor *Malins* refused an injunction, on the ground that the case was one for arbitration under the *Railway Companies Arbitration Act*, 1859. The Plaintiffs appealed, and, as stated above, the appeal motion was turned into a motion for decree. The Defendants did not insist on the ground taken by Vice-Chancellor *Malins*, but wished for a decision on the merits.

Mr. *Cotton*, Q.C., Mr. *H. Lloyd*, Q.C., and Mr. *Ferrers*, for the Plaintiffs:—

We contend that this was a license revocable on reasonable

(1) See 14 W.R. (1872) 172

notice. It is doubtful whether such an agreement in perpetuity would not be bad as against public policy: *Winch* v. *Birkenhead, &c., Railway Company* (1); *Hare* v. *London and North-Western Railway Company* (2); and it certainly would be unreasonable, there being no adequate consideration.

[The LORD JUSTICE MELLISH referred to the *Railways Clauses Act*, 1845, s. 87.]

These points are important in construing doubtful words. The case of *Great Northern Railway Company* v. *Manchester, Sheffield, and Lincolnshire Railway Company* (3) is different, for in that case mutual privileges were granted, some of which were clearly perpetual. Indefinite agreements, like contracts for service, partnership, &c., are generally terminable.

The *Solicitor-General* (Sir *G. Jessel*), Mr. *Glasse*, Q.C., and Mr. *Speed*, for the Defendants:—

The question is, whether this agreement is perpetual or not. There is no ground for the suggestion that its being so makes it illegal. It involves no delegation of powers. The 92nd section of the *Railways Clauses Consolidation Act* gives power to run over other lines. It is found not to work in practice when resorted to adversely, because it simply gives a right of passage without obliging the servient railway to give any facilities. This agreement merely gives facilities, and there cannot be any objection, on the score of public policy, to giving perpetual facilities for doing what Parliament has given a perpetual right to do. The cases where indefinite contracts are held terminable are usually cases involving personal confidence. It is shewn that the Defendants gave an important consideration for this agreement, by advancing a large sum of money at a rate at which it could not have been obtained from a capitalist on such security, and it is not a reasonable construction to hold that an easement granted for such a consideration is terminable at will. We are at liberty to prove any consideration which is not inconsistent with the terms of the agreement: *Villers* v. *Beamont* (4).

(1) 5 De G. & Sm. 562.
(2) 2 J. & H. 80.
(3) 5 De G. & Sm. 138.
(4) 2 Dyer, 146 a.; 2 Phill. Ev. 9th Ed. p. 353; 10th Ed. p. 347.

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Mr. *Cotton*, in reply :—

You cannot travel out of the deed to import a further consideration for the sake of varying the construction. Such evidence has only been admitted where the question is as to the validity of the instrument. A perpetual one-sided agreement of this nature would be most unreasonable, for it does not bind the *London and North-Western Railway Company* to anything. This is a mere revocable license: *Wood* v. *Leadbitter* (1).

July 14. SIR W. M. JAMES, L.J. :—

In this case the *Llanelly Railway and Dock Company* have filed their bill against the *London and North-Western Railway Company*, praying, in effect, that it may be declared that a certain agreement entered into between the two companies was determinable, and has been sufficiently and well determined by the Plaintiff company, and for an injunction to prevent the Defendant company from availing themselves of that agreement. The bill is in one respect a novelty, for in order to obtain a decision on the question whether the agreement was determinable and has been determined, it asks for an injunction to restrain the Defendant company from committing a trespass; but the Defendant company has not desired to raise any objection on this score, and it is no doubt very convenient that the question should be determined, for if, from any technical objection, the present suit became abortive, this would necessarily lead to some proceeding being taken by the *Llanelly Company* which would compel the *London and North-Western* to become plaintiffs in their turn.

When the case was before the Vice-Chancellor, His Honour disposed of it upon the ground that the proper tribunal was arbitration, as provided by the *Railway Companies Arbitration Act*, 1859, there being a clause in the agreement to the effect that any differences arising under this agreement were to be settled by arbitration, as provided by that Act. Neither party has desired to support that view of the case, and both concur in desiring that the matter should be determined by this tribunal, and possibly it would be

(1) 13 M. & W. 838.

difficult to say that the real question between the parties could be determined by the arbitrator under that clause; because, if the Plaintiffs are right in their contention, they have determined that part of the agreement as well as everything else. Of course, if they are right, there is no agreement to refer to arbitration, any more than to do anything else.

The agreement has some collateral agreements included in it, but in substance and in the main it is an agreement for giving to the *London and North-Western Railway Company* what are called running powers over the line of the Plaintiff company—that is to say, a power to use the railway, and a power of access to and use of all the conveniences and appliances of that railway, subject to such bye-laws and regulations of the *Llanelly Railway Company* as may be in force from time to time; and the agreement provides for the remuneration which the *Llanelly Company* is to have for giving that power. The contention on the part of the *Llanelly Company* is, that this is an agreement determinable at will, or by reasonable notice. The contention of the *London and North-Western Railway Company* is, that it is, as it is expressed to be, an agreement without any limit whatever in point of time. The case is in many respects similar to the case of the *Great Northern Railway Company* v. *Manchester, Sheffield, and Lincolnshire Railway Company* (1), in which there were running powers given interchangeably between the railway companies, and the Vice-Chancellor held that they were given in perpetuity. In my opinion this case is not distinguishable on any sufficient ground from that case, which was decided as far back as the year 1851, and has been considered to be law from that day to this. As that, however, was only the decision of a Vice-Chancellor, and as it has been contended before us that a great part of the *ratio decidendi* in that case does not apply to this case, it is incumbent upon us to express our own opinions upon the matter as if no such authority existed; and upon general principles I have formed a very decided opinion that I should have arrived at the same conclusion as the Vice-Chancellor did in that case; and I should, if the thing were *res integra*, arrive at a similar conclusion in this case. I start with this proposition, that *primâ facie* every contract is permanent and irrevocable, and

(1) 5 De G. & Sm. 138.

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that it lies upon a person who says that it is revocable or determinable to shew either some expression in the contract itself, or something in the nature of the contract, from which it is reasonably to be implied that it was not intended to be permanent and perpetual, but was to be in some way or other subject to determination. No doubt there are a great many contracts of that kind: a contract of partnership, a contract of master and servant, a contract of principal and agent, a contract of employer and employed in various modes—all these are instances of contracts in which, from the nature of the case, we are obliged to consider that they were intended to be determinable. All the contracts, however, in which this has been held are, as far as I know, contracts which involve more or less of trust and confidence, more or less of delegation of authority, more or less of the necessity of being mutually satisfied with each other's conduct, more or less of personal relations between the parties.

But I am of opinion that no such consideration applies to a case in which there is a grant, or an agreement in the nature of a grant, of a wayleave, or of running powers, which is only another mode, according to my view of it, of expressing a wayleave. In my view the implication is quite the reverse. A wayleave or running powers, determinable at will or short notice, would in my opinion be a delusion. Take the most ordinary case of a wayleave. A colliery proprietor desires to have the power of working an adjoining coal field through his lessor's pit, or he desires to have a right of carrying his coals over a piece of land which intervenes between him and a seaport. With that view he enters into a negotiation with his neighbour or his landlord. I take it that both sides will, in so negotiating, know that what the man wants to have is a wayleave as permanent as the colliery, and both sides must be understood to be negotiating for that kind of wayleave which is the only thing that will suit the mine-owner's purpose.

Then with regard to railways. The way in which running powers come to be negotiated for between railway companies is generally this: A railway company wants to establish through communication from point A to point B; it finds that there is an existing railway over part of the distance between those two points; it says to the other railway company, "We do not wish to

incur the expense of making so many miles of additional railroad, and we do not wish to come into competition with you, if you will let us utilise your line; what are the terms upon which you will let us use it?" Upon this the terms are negotiated. Both parties, in my opinion, must be understood to be negotiating for running powers which will be an effectual substitute for that communication, for that independent line, which the parties seeking running powers would otherwise be minded to make or attempt to make; that is to say, they are negotiating for running powers which are to be part of that permanent communication they desire to have between A and B; that is, for permanent running powers. That would seem to me to be the principle with which we must start in considering whether this agreement, which is in indefinite terms, means that the *London and North-Western Railway Company* shall have power from time to time, and at all times, to run over and use with their engines, carriages, vehicles, and servants the lines of the *Llanelly Company* and their conveniences, or that they shall have such power only during the pleasure of the *Llanelly Company*. Then, when we come to look into the agreement, it appears to me that almost every line of it is full of permanence and adverse to the notion of its being revocable. Why should it be said, "Subject to such bye-laws and regulations of the *Llanelly Railway Company* as may be in force from time to time, the *London and North-Western Railway* shall have power." If they were only to have the power during the pleasure of the *Llanelly Company*, the exercise of that power would, of course, be subject to any terms the *Llanelly Company* thought fit to impose, and it would be useless to express it. Then, again, it would be absurd to say that the *London and North-Western Railway Company* were to be at liberty to have their own staff at the stations if the *Llanelly Company* were to be at liberty to determine the agreement on the day following that on which, at very great expense, their staff had been placed there. Again, there is an arbitration clause to fix the rates which the *London and North-Western* are to take for their own through traffic from any point on their line to any point on the Plaintiffs' line; and if the agreement is determinable, then, if an arbitration, conducted, perhaps, at great expense and occupying great length of time, resulted in a determination adverse to the

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Llanelly Company, they might say, "We give you a notice to determine the agreement, as we are not satisfied with the rates which are given." It appears to me, therefore, that it is most improbable that the agreement was intended to be revocable at the mere will and pleasure of the *Llanelly Railway Company*. The force of that argument was so much felt that it was said, "We do not say it is to be at their will and pleasure, but determinable by reasonable notice." I am at a loss to understand upon what principle it can be determined what is reasonable notice in a case of this kind. If there was a local or general usage, or anything of that sort, by which it could be ascertained what was reasonable notice, one could understand it; but nothing of the kind is suggested. Is it to be determined in each case by a jury what is reasonable notice, one jury taking one view and another taking another view, without any possibility of a direction from the judge? If those very words had been introduced into the agreement, that it should be determinable by reasonable notice, what very different views might be taken of their meaning. In this case the Plaintiffs have given three months' notice, as being the reasonable notice which they ought to give. Now, if I were the arbitrator appointed under clause 8, and had to determine what would be reasonable notice for determining such an arrangement as that, I should put five years as the minimum notice which ought to be given, so as to enable the *London and North-Western Railway* to make their plans for an independent line, to enable them to make their surveys, to enable them to make their deposits, to give the proper notice to the landowners, to go to Parliament to get parliamentary authority, and then to make a new line. Upon these grounds, I am of opinion that the true meaning of this agreement is what it says, that the *London and North-Western Company* shall have power, unlimited, to run over and use with their engines, carriages, vehicles, and servants, the railways of the *Llanelly Company*, and the stations, sidings, and conveniences connected therewith, subject only to such bye-laws and regulations of the *Llanelly Railway Company* as may be in force from time to time; that is to say, from time to time, subject to the bye-laws which may be in force from time to time, they have power to use the line.

There was one fact which the Solicitor-General pressed on us as

an additional reason for arriving at a conclusion in favour of the *London and North-Western Railway Company*, that there was a valuable consideration given by the one company to the other, in the shape of an undertaking to advance, and the advance of a very large sum of money in debenture capital, to enable them to construct the line. It was contended that that evidence was not admissible. In my opinion the evidence is not material, because, independently of that, it appears to me that there is sufficient consideration expressed in the agreement itself, and that the agreement, on the face of it, without any reference to that evidence, is conclusive upon the parties. But I desire to express my opinion that the evidence is admissible—that is to say, it is not evidence of a consideration for the purpose of construing anything in the document, or of altering the construction of it, but it is evidence that there was an entire arrangement which resulted in two contracts, both of them part of the same one transaction—that is to say, on the one side the *Llanelly Railway Company* were to bind themselves to give the privileges; on the other side, the *London and North-Western Railway Company* were to bind themselves to find a sum of money to enable the company to construct the line. If the fact that the *London and North-Western Company* bound themselves to do this would, if recited in the agreement, have had any effect, it appears to me that the Defendant company ought to be allowed to give evidence of it, and that the fact proved will have exactly the same operation as the fact recited. It may, indeed, be treated as evidence of a collateral bargain that the running powers should not be revoked, just as in *Erskine* v. *Adeane* (1) we let in evidence of a collateral bargain by the landlord to keep down the game, just as in the case of mutual wills, you cannot read the one will for the purpose of construing the other, but you can give evidence that there were the two wills made, for the purpose of shewing there was a mutual agreement between the testators that the wills should not be revoked. You can give evidence of anything to rebut an implication of a resulting trust, or to rebut an implication of an advancement for a child or a person to whom the donor or the purchaser is in *loco parentis*; and so, in my opinion, it is quite open to give evidence of the contemporaneous contract as to the advance of the money, not

(1) Ante, p. 756.

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for the purpose of contradicting the written agreement (for if it had contained anything making it determinable, evidence could not have been admitted to shew that it was not to be determinable; or if it had expressed that the running powers were to last for a certain time, evidence could not have been admitted to shew that they were intended to last longer) but for the purpose of rebutting any presumption which might arise from the nature of the transaction and the connection between the parties that a power of revocation was intended to be given to the *Llanelly Company*, and so preventing such power from being implied. Upon all these grounds, I am of opinion that the *London and North-Western Railway Company* are right, that the *Llanelly Railway Company* are wrong, and that the bill ought to be dismissed with costs.

SIR G. MELLISH, L.J.:—

I have come to the same conclusion, though I confess I have had more difficulty than the Lord Justice has respecting the case. The difficulty I have had has arisen exclusively from this, that the first three clauses, which are the material clauses in the agreement, are not reciprocal, that is to say, that the effect of them is that the *London and North-Western Company* has power to run its trains over the *Llanelly Railway Company* whenever it pleases, but the *Llanelly Company* gets no power to run its trains over the *London and North-Western;* neither does the *London and North-Western* bind itself to work the through traffic for the *Llanelly Company*, and certain terms are fixed which are never to be altered, as to the share which the *London and North-Western Company* is to receive. So that the effect of the agreement is, that for all time, whenever the agreement is advantageous to the *London and North-Western*, the *London and North-Western* can rely on it and work it; whenever it becomes disadvantageous to them, they can abandon it, and oblige the *Llanelly Railway* to work the through traffic itself; and, moreover, they can do that without giving any notice whatever. They may bring their trains on the *Llanelly* line, and so oblige them to give up working all the through traffic, and then may, without notice, suddenly abandon it, so as to leave the *Llanelly Company* with no power to work the through traffic at all; and I confess, if there had been nothing more in the agreement than that, I should have considerable doubt whether a

contract which did nothing more than fix the terms on which one company might carry its trains over the line of another company, fixing no time and having no reciprocal clauses, ought not to be construed to be determinable on account of the injustice that must manifestly be done to the company over whose line the power is given, if it has no clause (which, in my judgment, such an agreement ought to have) compelling the other company to work the through traffic. But I have come to the same conclusion as the Lord Justice, on the ground that evidence of the consideration is admissible, and that a very large consideration was given for the grant of those powers. I think that evidence admissible, because, in the first place, it does not contradict the agreement. I do not say the agreement is altogether without consideration, because the 4th, 5th, and 6th clauses are reciprocal, but there is no consideration expressed for the running powers which are given, and in my opinion, no consideration being expressed in the agreement, it is competent to prove what the real consideration was. If it is competent to prove that, then the letters do beyond all question shew that £40,000 was advanced for the completion of the *Llanelly Railway*. That, I think, is a very considerable consideration, because it is obvious that the *Llanelly Company* could not have borrowed that £40,000 in the market at that time, or they would not have had recourse to the *London and North-Western Company*. The result was, that they got their railway made by means of that bargain, and it seems to me perfectly clear that the *London and North-Western Company* never would have agreed to advance on the faith of this agreement £40,000 for the finishing the railway if they had understood that the agreement could be terminated at any moment. On this ground, therefore, that the evidence of the consideration can be admitted, and that being admitted it proves that the real bargain between the parties was that the agreement was not to be terminable, I have come to the conclusion that the notice to terminate it was bad and ineffectual.

Sir W. M. James, L.J.:—

The decree will be—The Court being of opinion that the agreement is not determinable by notice, dismiss the Plaintiffs' bill with costs.

Solicitors: Messrs. *Markby, Tarry, & Stewart;* Mr. *R. F. Roberts.*

L. JJ.
1873
July 16.

In re TAVARONE MINING COMPANY.

PRITCHARD'S CASE.

Contributory—Fully Paid-up Shares—Companies Act, 1867 (30 & 31 *Vict.* c. 131), s. 25.

By the articles of association of a mining company it was provided that the company should, immediately after incorporation, enter into an agreement with the vendor of the mine for the purchase of the mine; the price to be £2000 in cash, and 3200 fully paid-up shares to be allotted to the vendor or his nominees. The articles were signed by the vendor and six other persons, and were duly registered. The directors allotted the 3200 shares to the vendor or his nominees, and for a short time worked the mine, but no further agreement was made with the vendor. The company was then ordered to be wound up. A firm to whom ten of the vendor's shares were allotted had requested that they might be registered in the name of one of the members of the firm, which was done; and he was afterwards placed on the list as a contributory in respect of ten shares not fully paid up:—

Held (affirming the decision of *Wickens*, V.C.), that the articles of association did not constitute a contract in writing between the vendor and the company within the 27th section of the *Companies Act*, 1867, and that the ten shares could not be considered as fully paid up.

THIS was a motion on appeal from an order of Vice-Chancellor *Wickens*, refusing to review the list of contributories of the *Tavarone Mining Company, Limited*, and to vary the Chief Clerk's certificate by striking out the name of Mr. *Pritchard* as a contributory in respect of ten £5 shares.

The company was incorporated on the 2nd of March, 1870, and the object of its formation, as specified in the memorandum of association, was to purchase and acquire the estate and interest of *R. L. de Thierry*, in a concession from the King of *Italy* for a tract of land in *Italy*, called the *Tavarone Mine*, to mine for ore and minerals within the limits of the said mine, and to erect the necessary machinery.

The capital was to be £50,000 in 10,000 £5 shares.

The 2nd of the articles of association was that "The company shall immediately after their incorporation enter into an agreement with *Robert L. de Thierry*, mentioned in the memorandum of association of the company, for the purchase of the *Tavarone*

Mine mentioned in the same memorandum, and all the powers and privileges connected therewith, for the sum of £2000, to be paid in cash, and an interest in the company to be represented by the issue of 3200 fully paid-up shares in the company. Such agreement shall be made conditional on the sum of £5000 cash, or such less sum as the directors (other than *De Thierry*) and the said *De Thierry* shall agree upon, being actually paid up within three calendar months from the date of these articles in respect of shares allotted and issued, irrespective of the said 3200 fully paid-up shares to be issued to the said *De Thierry*," and was to contain certain other provisions.

The 3rd article provided that 6000 shares should be issued at once and the remaining 4000 should form a reserve.

The 4th article provided that of the first issue of 6000 shares 3200 should be allotted and issued to the said *De Thierry* or his nominees, free of expense, as his interest in the company, under the provisions of the said agreement so to be entered into as aforesaid, and for the purchase of his estate, rights, interests, powers, and authorities in the said mine, and the same shares should be deemed to be fully paid-up shares in cash, and no further sum should be payable in respect thereof, and the residue of the said first issue should be allotted and issued on payment of the full amount of each share in cash.

The 6th article provided, "that the company shall not commence business until the sum of £5000, or such less sum as the directors (other than *De Thierry*) and the said *De Thierry* shall agree upon as aforesaid, shall have been paid up in respect of shares allotted and issued irrespective of the 3200 shares to be allotted and issued to *De Thierry* as aforesaid.

The 8th article provided that none of the 6000 shares, except the 3200 fully paid-up shares to be issued to *De Thierry* as his interest in the company under the agreement so to be entered into between him and the company, should be issued, but upon payment in cash at the time of such issue of the full amount payable thereon, and no person should be entered on the register in respect of any such shares, except *De Thierry* or his nominees, until he should have paid up in cash the full amount payable in respect of each share.

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The memorandum of association was signed by *De Thierry* and six other subscribers, and registered on the 9th of March, 1870.

Immediately after the incorporation the directors proceeded to issue and allot shares, and duly allotted to *De Thierry* and his nominees the 3200 shares purporting to be fully paid up, according to the agreement, but the £5000 stipulated for by the 6th article was never paid up.

In May, 1870, mining operations were commenced, but made little progress, and were discontinued in October. The mine was never conveyed to the company, and it was admitted that the only agreement ever entered into between the company and *De Thierry* was that contained in the articles of association.

In June, 1870, Messrs. *Pritchard & Sons,* who had acted as solicitors for the company and for *De Thierry*, received a note from the secretary of the company inquiring in what name they wished ten shares conveyed by *De Thierry* to them to be registered; in answer to which they requested the secretary to register the shares in the name of Mr. *A. Pritchard,* which was done. The company was subsequently ordered to be wound up, and Mr. *A. Pritchard's* name was placed on the list as a contributory in respect of ten ordinary £5 shares in the company. No return of shareholders had been made to the Registrar.

The Vice-Chancellor *Wickens* refused to remove Mr. *A. Pritchard's* name (1).

(1) 1873. May 23. W.N. (1873) 118

SIR JOHN WICKENS, V.C.:—

The authorities compel me to hold that Mr. *Pritchard* is a contributory to this company. No doubt he supposed he was getting from *De Thierry* fully paid-up shares, to which no liability could attach; but the pure and sole question is, whether Mr. *Pritchard* has brought himself strictly within the terms of the 25th section of the *Companies Act*, 1867. That section requires that there shall be a contract duly made in writing, and filed with the Registrar of Joint Stock Companies, at or before the issue of such shares. Here it is perfectly clear that the articles are sufficient to disclose to every one the intention of the company to issue fully paid-up shares for a consideration other than cash, and no doubt they are binding on all the parties who signed them. But I think it is equally clear upon the Act generally that the notice so given by the articles, and the assent to them by the subscribers, are not sufficient to satisfy the exigencies of the Act. There must be a contract in writing filed with the Registrar of Joint Stock Companies, and therefore, though what is contained in the articles is quite enough to give everybody dealing with the company notice of what

Mr. *A. Pritchard* appealed.

Mr. *J. W. Chitty*, for the Appellant:—

The question depends entirely upon the 25th section of the *Companies Act*, 1867 (30 & 31 Vict. c. 131). That section requires any agreement as to paid-up shares to be registered; and we say that the articles of association did constitute an agreement, and were registered. Mr. *Pritchard* never applied for shares, and there is no contract by him to take shares. He only said, in answer to the application, that the shares were to be registered in his name, but as paid-up shares. There has been no return to the Registrar, and no shareholder can have been deceived. Though the conveyance was never made, the agreement was acted upon, and the company were actually working the mines. This case comes within *Simpson's Case* (1); *Currie's Case* (2). There was a registered contract, and the shares were allotted to Mr. *Pritchard*, as a nominee of *De Thierry*, in pursuance of that contract.

Mr. *Davey*, for the official liquidator, was not called upon.

SIR G. MELLISH, L.J.:—

This is an appeal from an order of the Vice-Chancellor *Wickens*, in which he refused to remove the name of Mr. *Pritchard* from the list of contributories to the *Tavarone Mining Company* in respect of ten £5 shares.

The decision entirely depends upon the question whether the terms of the 25th section of the *Companies Act*, 1867, were duly complied with, so as to make Mr. *Pritchard* the holder of paid-up shares, and not the holder of shares payable in cash.

I agree with the decision to which the Vice-Chancellor came, and with the grounds on which he came to it. The 25th section states that, "Every share in any company shall be deemed and

was to be done, it is not, in my opinion, a sufficient compliance with the Act, and the shares issued must be paid for in cash. This view may appear to interfere with the rights of those who deal with companies, but it must be assumed that the Legislature intended such interference. There is here "no contract duly made in writing" such as is required by the statute, and the motion must be refused with costs.

(1) Law Rep. 4 Ch. 184.

(2) 3 D. J. & S. 367.

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taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing, and filed with the Registrar of Joint Stock Companies at or before the issue of such shares." Now, the contract under which Mr. *Pritchard* claims to have ten fully paid-up shares was not a contract in writing, unless the articles of association themselves can be deemed to be a contract in writing within the meaning of the section.

But I am of opinion that the articles of association cannot be considered as a contract in writing between *De Thierry* and the company for the sale of the mine to them. It may, no doubt, be the case, if no other contract was entered into, and if *De Thierry* signed these articles and they were acted upon, that a Court of Equity would hold that as between him and the company—from their acting upon it—there was a binding contract; but in themselves the articles of association are simply a contract as between the shareholders *inter se* in respect of their rights as shareholders. They are the deed of partnership by which the shareholders agree *inter se;* and the effect of the articles as respects the purchase of this mine was, in my opinion, simply to give to the directors authority to make a contract with *De Thierry* for the purchase of the mine on certain terms specified in the articles.

Therefore, on that simple ground I agree with the Vice-Chancellor; although I quite agree with him, also, that it is a hard case. I think almost all these cases under the 25th section of the Act of 1867 are in a certain sense hard cases, because the result of them is, that in many instances persons who never intended to become shareholders in the company, except as holding paid-up shares, and very often holding them merely as nominees for other persons, find themselves fixed as shareholders, and are obliged to pay the calls. That is the necessary effect of the section, which was passed, no doubt, because of the abuses which were supposed to have taken place from other persons being deceived by shares turning out to be paid up which were supposed not to be paid up. Therefore I agree with the ground which the Vice-Chancellor gave for his decision.

But besides that, in this case I am of opinion that even if this could be considered a contract, there would still be many reasons why Mr. *Pritchard* could not avail himself of it. In the first place, the shares appear to me to have been issued before, according to the terms of the articles, they ought to have been issued; and any person who looked at the articles, knowing that the proper amount had not been subscribed for and paid up, so as to make the purchase binding, might very well assume that these were some other shares, and not the paid-up shares to be allotted to *De Thierry*. On that ground also I should say that Mr. *Pritchard* could not avail himself of the articles of association.

Though it is not necessary, perhaps, to decide the question, I have also very great doubt whether, in order to avail himself of the articles of association, supposing there had been a contract in writing between *De Thierry* and the company, the proper and necessary course would not have been, that the shares should have been allotted to *De Thierry* himself as paid-up shares in pursuance of the contract, and then transferred by deed to the persons to whom he might have assigned them; so that people looking at the list might be able to connect the particular shares which might be found in Mr. *Pritchard's* name with the shares that are mentioned in the contract.

Therefore on all these grounds I am of opinion that the decision is right; but I affirm it especially on the ground on which the Vice-Chancellor rested his decision.

SIR W. M. JAMES, L.J.:—

I am of the same opinion, and I only desire to add that in my opinion it is quite clear that the shares were never issued under the contract, and that the directors had no authority whatever to issue any of these paid-up shares except upon the completion of the purchase.

Solicitors for the Appellant: Messrs. *Pritchard & Sons.*
Solicitor for the Official Liquidator: Mr. *Clements.*

L. J. J.
1873
July 18.

Ex parte ROBERTSON. *In re* MAGNUS.

Liquidation by Arrangement—Discharge—Business carried on by Debtor with old Stock-in-Trade—Lien of Creditors for Debts incurred subsequent to Discharge.

The creditors of a liquidating debtor resolved that, on the debtor's entering into a bond to pay the trustee £5000, by half-yearly instalments, the trustee should allow him to carry on his business, he accounting to the trustee for the stock-in-trade as it was disposed of; and that, on the execution of the bond and the registration of the resolution, the debtor should have his discharge. The debtor executed the bond and obtained his discharge, and carried on the business for two years, and then the creditors resolved that the business should be sold to a purchaser for £3000, which was done, and the purchase-money received by the trustee:—

Held, that a creditor who had advanced money to the debtor after he had resumed business had no lien upon any part of the £3000.

THIS was an appeal from an order of Mr. Registrar *Spring Rice*, sitting as Chief Judge in Bankruptcy.

On the 7th of July, 1870, *G. E. Magnus*, who was a slate merchant at *Pimlico*, filed a petition for liquidation by arrangement. The creditors resolved on a liquidation, and appointed a trustee of the estate. They also passed a resolution that on *Magnus* entering into a covenant or a bond to pay the trustee £5000, by ten equal half-yearly instalments, the trustee should assign to *Magnus* his household furniture and stock-in-trade, and allow him to carry on his business, he accounting to the trustee for the stock in hand, as and when disposed of. Within a month of the execution of the deed of covenant or bond and registration of the resolution, the debtor was to have his discharge granted to him. It was also resolved that as soon as a dividend of 20*s.* in the pound and the costs of the liquidation should have been paid the trustee should make over to *Magnus* the portion of the estate not sold, and should release him from any further payment under the covenant or bond.

On the 19th of August, 1870, *Magnus* executed a bond in the required form, and on the 29th of September, 1870, his discharge was granted to him.

Magnus continued to carry on the business till the 19th of

December, 1872, when a meeting of the creditors was held, at which a resolution was passed, that in the opinion of the meeting the business and stock should be immediately realized for the benefit of the estate, and a committee of creditors was appointed to consider how this could best be done.

On the 7th of January, 1873, to which day the meeting had been adjourned, it was resolved that the debtor should be called on to give up possession of the property, and that the business should be advertised for sale.

On the 21st of January another meeting was held, at which it was resolved that the trustee should accept an offer made by a Mr. *Taylor* to purchase the business and stock for £3000. This resolution was afterwards confirmed by the Registrar, who ordered that Mr. *Taylor* should pay the purchase-money to the trustee, he undertaking not to part with it without the direction of the Court. The business and stock were accordingly assigned by *Magnus* and the trustee to *Taylor*, who paid the purchase-money to the trustee.

On the 18th of April, 1873, *Magnus* died.

Major *Thomas Bell* was a creditor of *Magnus* for £175, for various sums of money lent to him in July and September, 1872, after he had obtained his discharge, and he claimed a lien on such part of the sum of £3000 as represented stock-in-trade purchased by *Magnus* after he had been let into possession of the business and stock by the trustee.

The Registrar, being of opinion that the stock acquired by *Magnus* subsequently to the 19th of August, 1870, was liable for the debts contracted by him in his business, ordered that an account should be taken of his business transactions since the 19th of August, and from this decision Mr. *Robertson*, the trustee, appealed.

Mr. *De Gex*, Q.C., and Mr. *Doria*, for the Appellant:—

The creditor has no lien for the debt on the property. He could not have prevented *Magnus* from parting with it without levying an execution in the ordinary way. He has, therefore, no lien on the proceeds of the sale. The order is also irregular, as having been made in the absence of a representative of *Magnus*.

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Mr. *Finlay Knight*, for Major *Bell*:—

The trustee assisted *Magnus* to get fresh credit by permitting him to retain possession of the stock-in-trade, and that encouraged the creditor to advance money by which part of the property has been obtained. The creditor has, therefore, an equity to prevent the property which has been obtained with his money being applied to pay the debts under the liquidation. Such a right was recognised in *Troughton* v. *Gitley* (1), *Tucker* v. *Hernaman* (2), and *Morley* v. *White* (3).

SIR W. M. JAMES, L.J.:—

I am of opinion that this order cannot be sustained. The application was made by the creditor under the notion that he had a specific lien on the goods. *Magnus* was no doubt liable to the creditor, and if the creditor had but taken proper steps he might have obtained possession of his debtor's property. But he could not have filed a bill to restrain *Magnus* from dealing with his property; he could only have enforced his legal rights under an execution. *Magnus* was the absolute *dominus* of the property, except so far as he could not give a fraudulent preference to any creditor, the liquidation being at an end; and the trustee was only a creditor for a large amount under the bond. Then *Magnus* and the trustee join in selling the property for £3000, and the money is paid to the trustee, and mixed up with the other assets in his hands. I am of opinion that the creditor cannot interfere with the money, and that it must be distributed by the trustee among the creditors.

Solicitors: Messrs. *Dixon, Ward, & Letchworth*; Mr. *Leefe*.

(1) Amb. 630. (2) 4 D. M. & G. 395. 17 Jur 725.
(3) *Ante*, p. 214.

Ex parte DEWHURST. *In re* LEGGATT. *In re* GLEDSTANES.

L. J. J. 1873 July 18.

Bankruptcy—Securities for Bills of Exchange—Doctrine of Ex parte Waring—Firms engaged in a Joint Adventure.

Two distinct firms, *L. & Co.* of *Bombay*, and *G. & Co.* of *London*, were engaged in a joint adventure for buying and selling goods in *England* and *India*. The course of business as to the homeward shipments was that *L. & Co.* drew bills on *G. & Co.* which they discounted in *India*, and with the proceeds purchased cotton which they consigned to *G. & Co.* specially to meet the acceptances. Both firms stopped payment, and went into liquidation. The holders of unpaid acceptances of *G. & Co.*, which had been drawn in this way, claimed to have the proceeds of certain shipments of cotton specially appropriated to meet the acceptances:—

Held, that the bill holders were entitled to have the cotton specially appropriated, upon the principle of *Ex parte Waring* (1), but subject to the rights of the creditors, if any, of the aggregate firms to have the cotton applied as part of the aggregate assets.

THIS was an appeal from a decision of Mr. Registrar *Brougham* sitting as Chief Judge in Bankruptcy.

Messrs. *Wallace*, *Buxton*, and *W. E. Gledstanes* carried on business in *London* as merchants under the firm of *Gledstanes & Co.* Messrs. *C. D. Leggatt* and *J. R. P. Leggatt* carried on business as merchants in *London* and *Bombay* under the firm of *Leggatt & Co.*

Gledstanes & Co. filed a petition for liquidation by arrangement on the 27th of August, 1872, and *Leggatt & Co.* filed a similar petition on the 3rd of September in the same year.

The two firms had been engaged in joint transactions, consisting partly in the shipment of goods from *England* for sale in *India*, and partly in the purchase of goods in *India* for shipment to *England*.

The accounts of the two sets of transactions were kept separately.

Messrs. *Dewhurst* were commission agents at *Manchester*, and sold goods to *Leggatt & Co.* on the joint account, as they alleged, of the two firms of *Leggatt & Co.* and *Gledstanes & Co.*, for which

(1) 19 Ves. 345.

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they took acceptances of *Gledstanes & Co.*, with a stipulation that the proceeds of the sale of the goods in *India* should be remitted to *Gledstanes & Co.* to meet the acceptances. At the time of the failure of the two firms, Messrs. *Dewhurst* held acceptances for a large amount, for which they proved against the estate of *Gledstanes & Co.*, and also against the aggregate estate of the two firms.

Gledstanes & Co. kept three separate accounts in respect of these transactions:

1. The joint shipment account: relating to shipment of goods to *India*.

2. The joint cotton account: relating to cotton sent from *India* for sale in *England*.

3. The *India* account: being the account of profit on the joint transactions.

The course of dealing as to the joint cotton account was as follows: *Gledstanes & Co.* issued letters of credit to *Leggatt & Co.* at *Bombay*, by which they engaged to honour *Leggatt & Co.'s* bills to a certain amount. *Leggatt & Co.* then drew bills in *Bombay* on *Gledstanes & Co.*, and sold the bills to bankers there; and with the proceeds of the bills they purchased cotton, which was shipped to *England*, and consigned to *Gledstanes & Co.* for sale by them on the joint account of the two firms.

According to the evidence of Mr. *C. D. Leggatt* the agreement and course of dealing between the two firms, which had existed for several years, was that the shipments of cotton should be specifically appropriated to meet these bills.

In the liquidation of the two firms the *Chartered Mercantile Bank of London* and other holders of bills drawn in this way by *Leggatt & Co.*, and accepted by *Gledstanes & Co.*, claimed to have the proceeds of certain shipments of cotton specally appropriated to the payment of these bills. This was opposed by Messrs. *Dewhurst*, who had proved for their debt against the aggregate estate of the two firms, and who insisted that the cotton belonged to the aggregate estate. The Registrar allowed the claim of the bill holders, and Messrs. *Dewhurst* appealed from that decision.

The bill holders also appealed from the allowance of Messrs. *Dewhurst's* proof against the aggregate estate.

Mr. *J. Brown*, Q.C., Mr. *De Gex*, Q.C., and Mr. *Winslow*, for Messrs. *Dewhurst*:—

The Registrar considered that the case was governed by *Ex parte Waring* (1), and *Inman* v. *Clare* (2); but those cases are not applicable. *Gledstanes & Co.*, and *Leggatt & Co.*, are not, as regarded this transaction, separate firms; but were engaged in a joint adventure. *Ex parte Waring* has never been held to apply to firms engaged in a joint adventure, except in *Ex parte Prescott* (3), and *Ex parte Copeland* (4). But in those cases there was a special agreement. Here the bill owners only rely on the ordinary course of business. The doctrine of *Ex parte Waring* did not arise out of any implied contract, but out of the necessity of the case. Here no such necessity exists. If the trustees of the two estates of *Gledstanes & Co.* and *Leggatt & Co.* had taken upon themselves to divide the proceeds of the consignments between the two estates, the bill owners had no equity to prevent them. We are creditors of the united firms and claim to be paid out of the aggregate assets.

[They also referred to *City Bank* v. *Luckie* (5), and *Banner* v. *Johnston* (6).]

Mr. *Roxburgh*, Q.C., and Mr. *Everitt*, for the bill holders:—

The doctrine of *Ex parte Waring* and *Inman* v. *Clare* is applicable to this case. The consignments were sent as cover to the bills, and were specially appropriated to meet them. It makes no difference that the two firms were engaged in a joint adventure. So far as this transaction was concerned, they are to be treated as separate firms, and whatever rights *Gledstanes & Co.* had with respect to the consignments they would transfer to the bill holders.

[They also referred to *Ex parte Imbert* (7), and *Ex parte Tempest* (8).]

Mr. *Jackson*, Q.C., for the trustees of *Leggatt & Co.*

(1) 19 Ves. 345.
(2) Joh. 769.
(3) 1 Mont. & A. 316.
(4) 2 Ibid. 177.
(5) Law Rep. 5 Ch. 773.
(6) Ibid. 5 H. L. 157.
(7) 1 De G. & J. 152.
(8) Law Rep. 6 Ch. 70.

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Mr. *Linklater*, for the trustees of *Gledstanes & Co.*

SIR W. M. JAMES, L.J.:—

I am of opinion that this particular point is governed by the decisions in *Ex parte Copeland* (1) and *Ex parte Prescott* (2), that is, that the principle of *Ex parte Waring* (3) and *Inman* v. *Clare* (4) applies as between the two firms; but not so as to deprive the joint creditors of the aggregate of the two firms of their rights to be paid their debts out of the aggregate estate. Whether there are any such rights will have to be determined in the next appeal.

The Registrar's order must be varied by declaring that the right of the bill holders is subject to the rights of the joint creditors (if there are any) of the aggregate of the two firms to have the proceeds of the consignments of cotton applied as part of the aggregate estate.

The appeal of the bill holders against the proof of Messrs. *Dewhurst* against the aggregate estate of the united firms was then opened; but before the conclusion of the argument the matter was compromised.

Solicitors: Messrs. *Murray & Hutchins;* Messrs. *Clarke, Son, & Rawlins;* Messrs. *Linklater, Hackwood, & Co.*

(1) 2 Mont. & A. 177.
(2) 1 Ibid. 316.
(3) 19 Ves. 345.
(4) Joh. 769.

PEARCE *v.* CARRINGTON.

L. JJ.
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[1870 P. 113.]

Will—Child in ventre sa mère.

A testator gave a fund to his wife for life, then to his daughter (a married woman) for life, and after her death to her children who being sons should attain the age of twenty-one, or being daughters attain that age or marry, and if none, then to certain persons by name. By a codicil he directed that if his daughter should be living at the expiration of five years from the death of his wife, and should not then have had any child or children, the fund should be at once divided between the ulterior takers, as if his daughter were dead without children. The daughter's first child was born five years and six months after the death of the testator's widow:—

Held (affirming the decision of *Wickens*, V.C.), that as the daughter had a child *in ventre sa mère* within five years after the death of the widow the gift over had not taken effect.

THIS was an appeal from a decision of Vice-Chancellor *Wickens*, on the construction of a will.

J. O. Harrison, by will, dated the 20th of October, 1865, directed his trustees to pay an annuity of £2500 to his wife during widowhood, and to set apart a portion of his estate the income of which would be sufficient to answer the annuity, and after her decease or second marriage he directed his trustees to stand possessed of the annuity fund upon trust in case his daughter *Mary Knight* should have any child or children who being a son or sons should attain the age of twenty-one years, or being a daughter or daughters should attain that age or marry, to pay and divide the same unto and between such child or children, and if there should be no such child or children, upon trust as to one moiety for his cousin *Richard Ovington;* and as to the other moiety, for his two brothers-in-law and two sisters-in-law as tenants in common. The testator then gave a legacy of £60,000 to his trustees upon trust for his daughter *Mary Knight* for her life, remainder to her husband, *J. W. Knight*, for life, and after the decease of the survivor upon trusts in favour of their children, and bequeathed the residue of his personal estate on the same trusts.

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By a codicil dated the 24th of November, 1865, the testator, in lieu of the directions contained in his will as to the division of the annuity fund in the event of his daughter not having any such child or children as mentioned in his will, directed that only £40,000 out of the annuity fund should be so divided, and that the residue of the fund should form part of his residuary estate. Provided always, that in case his daughter should be living at the expiration of five years from the death of his wife, and should not then have had any child or children, he directed that the said sum of £40,000 should be at once paid and divided between his said cousin, brothers-in-law, and sisters-in-law, in the proportion and manner directed by his will, as if his daughter were dead without children, after the decease of his wife.

The testator died on the 29th of December, 1865, and his widow died on the 9th of November, 1867, without having married again. The first child of the testator's daughter was born on the 4th of May, 1873, she having been *enceinte* at the death of the widow.

The Plaintiffs, who were assignees of the interest of *Richard Ovington* in the £40,000, presented their Petition for transfer to them of a fund in Court representing a moiety of that sum. Vice-Chancellor *Wickens* dismissed the Petition with costs, being of opinion that the gift over in the codicil had not in the events which had happened taken effect. The Plaintiffs appealed.

Mr. *Hardy*, Q.C., and Mr. *Langworthy*, for the Appellants:—

The Courts have gone so far even as to bring a child *in ventre sa mère* within the description of a child "born;" but they have never applied the rule except to cases where the child if born would have become thereby the object of a gift: *Whitelock* v. *Heddon* (1); *Trower* v. *Butts* (2); *Blasson* v. *Blasson* (3); *Roper* v. *Roper* (4).

Mr. *Dickinson*, Q.C., and Mr. *Millar*, for the testator's daughter and her child, were not called upon.

Mr. *Marten*, for the trustees.

(1) 1 Bos. & P. 243.
(2) 1 S. & S. 181.
(3) 2 D. J. & S. 665.
(4) Law Rep. 3 C. P. 22.

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SIR W. M. JAMES, L.J.:—

The Vice-Chancellor said that the conclusion at which he arrived hardly extended the rule laid down in the cases. I am of opinion that it did not extend that rule at all. His Honour's decision was clearly right.

SIR G. MELLISH, L.J.:—

I am of the same opinion. Apart from the rule referred to, I doubt whether, on the construction of the present will, if the interest of the daughter alone had to be looked to, the result would not be the same, for the testator evidently went on the principle that if his daughter, who was a married woman when he made his will, survived her mother for five years without ever having had a child, it might safely be presumed that she never would have one. As to the application of the rule in question, it would be absurd to hold that it is to be applied in order to make a child *in ventre sa mère* an object of gift, but is not to be applied in order to prevent a gift to it from being divested.

Solicitors: Messrs. *Parker & Co.;* Messrs. *Waltons, Bubb, & Walton.*

L. JJ.
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July 19, 21.

CORSER *v.* CARTWRIGHT.

[1871 C. 179.]

Vendor and Purchaser—Estate subject to Charge of Debts—Power of Devisee to sell or mortgage—Misappropriation of Mortgage-money—Notice.

Where a testator directs all his debts to be paid, and afterwards devises real estate to a devisee specially charged with debts and legacies, the devise supersedes the power of sale in the executors, and the devisee can give a good title to the estate and a good discharge to a mortgagee, who has no notice of a breach of trust, without the executors joining.

Decision of the Master of the Rolls reversed.

Affirmed Law Rep. 7 H.L. 731

THIS was an appeal from a decision of the Master of the Rolls.

George Jones made his will, dated the 13th of November, 1855, and thereby first desired that all his just debts, and funeral and testamentary expenses, might be discharged as soon as conveniently

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might be after his decease. He then made numerous bequests and specific devises to various persons, and as to certain freehold estates therein mentioned, including the *Buckley Grange* estate, and all the residue of his real and personal estate, subject nevertheless and chargeable to and with the payment of all his just debts, funeral and testamentary expenses, and the legacies and sums of money thereinbefore bequeathed, the testator gave, devised, and bequeathed the same to the Defendant *John Jones*, his heirs, executors, administrators, and assigns, for his and their own absolute use and benefit; and he appointed *John Jones* and *Sidney Cartwright* the executors of his will.

The testator died on the 7th of March, 1857. His estates were of considerable value, but he was also largely indebted; and among other debts he owed a specialty debt to the Plaintiff *Charles Corser*.

In March, 1858, the debts of the Plaintiff and other creditors being still unpaid, *John Jones* borrowed £11,000 from *Thomas Colley* for his own purposes; and by an indenture dated the 8th of March, 1858, after reciting that *John Jones* was seised in fee of or otherwise well entitled to an estate of inheritance in fee simple in possession, free from incumbrances, of or to the hereditaments thereinafter described, and intended to be thereby conveyed, it was witnessed that *John Jones* granted the *Buckley Grange* estate to the use of *Thomas Colley*, his heirs and assigns, by way of mortgage, for securing the repayment of the sum of £11,000 and interest. This mortgage was afterwards transferred to the Defendants *R. H. Colley* and *Elizabeth Cartwright*. On the 30th of January, 1867, *John Jones* assigned all his property to trustees for his creditors and the deed was registered under the *Bankruptcy Act*, 1861.

The present bill was filed by the Plaintiff on behalf of himself and all other creditors of *George Jones*, for the purpose of obtaining a declaration that the mortgage deed was subject to the charge contained in the will for the testator's debts, funeral and testamentary expenses, and legacies.

The bill contained charges that *Thomas Colley*, the mortgagee, had notice that the sum advanced was intended to be used and was used by *John Jones* for his own purposes, and that Mr. *G. Potts* acted as solicitor for both *John Jones* and *T. Colley* in the matter

of the mortgage, and that he was expressly informed and was well aware that the money was required for the purpose of paying a debt, due from the firm of which *J. Jones* was a member, to the *Wolverhampton and Staffordshire Banking Company*.

On this point there was a direct conflict of evidence, but the Master of the Rolls was of opinion that Mr. *Potts* was aware that the money was being raised by *J. Jones* for the purposes of his firm, and that the mortgagee was affected by that notice. He therefore held that the mortgage was not an exercise of the power vested in the executors for paying the testator's debts, but was only a mortgage of the beneficial interest of *J. Jones*, and must be postponed to the charge of the creditors of the testator.

The Defendants, *R. H. Colley* and *Elizabeth Cartwright*, appealed from this decision.

Sir *R. Baggallay*, Q.C., and Mr. *Everitt*, for the Appellants:—

The mortgagee had no notice, express or implied, of the purpose for which *Jones* intended to apply the money. It is true that the evidence is conflicting, but it is for the Plaintiff to make out a clear case of such a nature as to affect the mortgagee with notice of a breach of trust.

In the absence of such notice this is the ordinary case of a mortgage by the devisee of an estate charged with debts; in which case it is well established that the mortgagee is not bound to inquire whether any debts are still in existence, or whether the money raised is expended in paying them: *Eland* v. *Eland* (1); *Sug.* Vendors and Purchasers (2); *Colyer* v. *Finch* (3); *Palmer* v. *Graves* (4).

Mr. *Southgate*, Q.C., and Mr. *Charles Hall*, for the Plaintiff:—

We contend that the balance of evidence is clearly in favour of the mortgagee having had notice, through his solicitor, of the purpose for which the money was wanted, which was in fact a breach of trust.

But independently of the question of notice, *Jones* had no power to give a discharge for the mortgage money, and the mortgagee

(1) 4 My. & Cr. 420.
(2) 13th Ed. p. 544.
(3) 5 H. L. C. 905.
(4) 1 Keen, 545.

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was bound to see to its application, especially as there was quite sufficient in the circumstances to put him upon inquiry: *Forbes* v. *Peacock* (1); *Watkins* v. *Cheek* (2). The testator at the commencement of his will directed all his debts and funeral and testamentary expenses to be paid, and thereby gave power to his executors to sell his real estate for that purpose. In such a case a purchaser can only take a title from the executors, and the devisee to whom any part of the real estate is devised, subject to the debts, cannot give a discharge for the purchase-money: *Robinson* v. *Lowater* (3); *Wrigley* v. *Sykes* (4); *Williams* on Real Assets (5). It is true that *Jones* was also an executor, but he did not profess to mortgage as executor, for the recital in the deed is simply that he was seised in fee.

Mr. *Fischer*, Q.C., Mr. *B. B. Rogers*, and Mr. *Phear*, for Defendants, in the same interest.

SIR W. M. JAMES, L.J.:—

The case that has been principally argued before us the greater part of the day has been upon a point to which I do not find any reference at all in the Master of the Rolls' judgment, namely, whether the mortgage in this case being made by the devisee has given the mortgagee a good title. It has been contended very strenuously before us that the simple direction in the beginning of the will to pay debts gave an implied power to the executors alone to raise money for the purpose of paying those debts, and that it was not the duty or function of the devisee to do it. It appears to me there is no authority for that proposition, but that all the authority that has been cited has been directly the other way. In the case of *Palmer* v. *Graves* (6) there was a direction in these words, "I direct my just debts, funeral expenses, and the charges of proving this my will, to be duly paid;" and then the testator made a charge upon certain portions of his real estate only in payment of his debts, and there the Master of the Rolls laid down the rule thus: "He commences his will by saying, 'in the first place, I direct my

(1) 1 Ph. 717.
(2) 2 S. & S. 199.
(3) 5 D. M. & G. 272.
(4) 21 Beav. 337.
(5) Page 77.
(6) 1 Keen, 545.

just debts, funeral expenses, and the charges of proving this my will, to be duly paid.' These words, if not limited or controlled by anything else in the will, are sufficient to constitute a charge of all the real estates with the payment of debts; not a clear express charge upon all the testator's lands, but a charge by implication, capable of being explained by subsequent words, or a subsequent provision for the payment of the debts. The testator, after employing the words I have stated, proceeds to make several devises and bequests, and then gives and bequeaths unto *John Graves* a small quantity of silver plate, together with the rents and profits of his freehold and leasehold premises due and accruing up to what is commonly termed a quarter-day, which should ensue next after his decease, 'which rents and profits I charge with the payment of my said debts, funeral expenses, and the charges of proving this my will.' The will contains nothing else from which the testator's intention, as to the payment of his debts, can be collected, and on the authority of *Thomas* v. *Britnell* (1) and *Douce* v. *Lady Torrington* (2), I think the general charge by implication is controlled by the specific charge made in the subsequent part of the will." So in this case I conceive that the implied charge is controlled by the subsequent charge, and that the subsequent express charge is the thing to be looked at to arrive at the testator's intention. The rule of law was laid down in the clearest terms most unhesitatingly by Lord *Cranworth*, sitting as Lord Chancellor, and advising the House of Lords in the case to which we were referred of *Colyer* v. *Finch* (3), in which he expresses it thus: that where there is a legal estate given to somebody else charged with the payment of debts, that implies that the thing is to be sold by him; that being completely consistent with the language used by Lord *Eldon* and Lord *Thurlow*, that a devise to a person charged with debts is in effect exactly the same thing as a devise to him with a trust to pay the debts thereout. So in this case I am of opinion that there being a devise to one of two executors of real estates specially mentioned, not a mere residuary gift but a specific devise of all the various real estates which did constitute the residue, charged with payment

(1) 2 Ves. Sen. 313. (2) 2 My. & K. 600.
(3) 5 H. L. C. 905

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of the debts, the testator has in the clearest possible terms indicated that it is a devise to him upon trust to pay the debts. That being so, he had authority to raise money by mortgage for the purpose of paying the testator's debts, and he had authority to mortgage it to anybody who might advance money without inquiring whether the debts were paid or not. Where a person advances money by way of purchase or charge on an estate so vested in the hands of a trustee, unless that person is absolutely a party to a breach of trust he cannot be deprived of the estate he has acquired. It was therefore necessary for the Plaintiff to make out by clear and satisfactory evidence that which was to deprive these persons of the express charge which they had obtained by law.

[His Lordship then considered the evidence, and said that he had no hesitation in coming to the conclusion that neither the mortgagee nor his solicitor had notice of the purpose to which the mortgagor intended to apply the money. The Plaintiff had therefore failed in establishing the case, and the decision of the Master of the Rolls must be reversed, and the bill dismissed with costs.]

SIR G. MELLISH, L.J.:—

I am of the same opinion. With reference to the question of law, it seems perfectly clear upon the authorities that if the devise of the *Buckley Grange* estate, and a variety of other estates, together with the personal property, to *John Jones*, subject to and charged with the payment of testator's debts and legacies, had stood alone, *John Jones* receiving the property specifically charged with those debts would have been the proper person to sell the estate for the purpose of paying the debts. But it is said that we ought to come to the contrary conclusion, because at the commencement of the will the testator desires that all his just debts and funeral and testamentary expenses may be discharged. Now if there had been no subsequent specific charge of debts at all it may be that the first part of the will would have constituted an implied charge, and that the executors being the persons to pay the debts would have been by implication the proper persons to have carried out that charge, and to have sold the property; but

the question which now arises is, there being both that charge of debts by implication and a specific subsequent charge, which of the two is to prevail. I am of opinion that according to the ordinary rule expressed in the well-known maxim, *Expressum facit cessare tactitum*, the specific charge must be held to explain the implied charge. In fact, if you look at the words of the testator, what he says is this:—In the first part of the will he desires all his just debts to be discharged, and then, in the subsequent part of the will, as far as regards his real estate, he shews how that is to be carried out by devising portions of his real estate to *John Jones* and his heirs, specifically charged with his debts. I am therefore of opinion that *John Jones* was the proper person to sell or mortgage the estate.

That being so, the question we have to determine is, whether the mortgagee, through Mr. *Potts*, had notice that *John Jones* was really mortgaging the estate, which no doubt he was, for the purpose of paying a debt of his firm, and not for the purpose of paying the debts of the testator.

[His Lordship then referred to the evidence in detail, and said that he entirely concurred in the conclusion to which the Lord Justice *James* had arrived,—that Mr. *Potts* had no notice of the purpose for which the money was to be applied, and that the Plaintiff had no ground for seeking to deprive the mortgagee of the estate.]

Solicitors for the Plaintiffs: Messrs. *Miller & Smith.*
Solicitors for the Defendants: Mr. *W. Lane;* Mr. *Needham.*

L. JJ.
1873
July 22.

SIMMONS *v.* PITT.

[1871 S. 151]

Void Accumulations—Thellusson Act (39 & 40 *Geo.* 3, *c.* 98)—*Next of Kin—Heir—Charge on Estate.*

1 Ch D 208

A testator having power to charge real estates did, by deed, charge them with the payment, after the deaths of himself and his wife, of £6000 and interest, to trustees upon such trusts as he should by will appoint. By his will he directed that the £6000 and interest should form part of his residuary personal estate, and directed the residue to be invested in the purchase of land, of which the trustees were to accumulate the rents in a manner which in part was void under the *Thellusson Act*:—

Held (affirming the decision of the Master of the Rolls), that that part of the interest as to which the directions to accumulate were void went to the next of kin of the testator, and did not sink into the estates on which it was charged, or go to his heir.

By indentures of lease and release, dated the 21st and 22nd of January, 1824, *Stephen Pitt* conveyed his own moiety of certain manors and lands in *Essex* to himself for life, with remainder to certain uses in strict settlement (which uses failed), with ultimate remainder to the use of *Stephen Pitt*, his heirs and assigns; power being reserved for *Stephen Pitt* to limit the said moiety to his wife for life, and to charge the same with £6000, to be raised and paid at such time and to such person or persons as he should think fit.

By a deed-poll, dated the 20th of June, 1845, *Stephen Pitt*, in exercise of the aforesaid powers, appointed the aforesaid moiety to his wife for life, and further charged the said moiety with the sum of £6000, to be raised and paid immediately after the decease of the survivor of *Stephen Pitt* and his wife to *Thomas Pitt* and *George Pitt*, their executors, administrators, or assigns, upon such trusts and for such purposes as he should, by his last will and testament in writing or any codicil thereto, direct, and in the manner hereinafter mentioned, together also with interest for the said sum of £6000 in the meantime, after the rate of £5 per cent. per annum, to be computed from the decease of the survivor of him and his wife, and all such costs, charges, and expenses as might be incurred in or about the raising of such sum of £6000 and interest.

Stephen Pitt, by his will, dated the 21st of June, 1845, after reciting the deed-poll, directed the sum of £6000 to be retained and applied by *Thomas Pitt* and *George Pitt* upon the trusts thereinafter declared concerning his residuary personal estate; and he devised and bequeathed the residue of his real estate and personal estate to *Thomas Pitt* and *G. Pitt* upon trust to convert into money the residuary personal estate, and during the term of twenty-one years from the day of his decease to receive the rents of his residuary real estate, and also of the lands thereinafter directed to be purchased, and invest the money so produced in the purchase of land, and receive the rents and profits of the estates to be settled from the expiration of the said term of twenty-one years, until the same should be settled as thereinafter mentioned, and invest the same, and invest and accumulate the income thereof, and stand possessed thereof upon trust and by way of portion for the eldest son, who, under the trusts of his said will, would be entitled to the first estate tail in the estates to be settled. The testator then directed his trustees, at the expiration of twenty-one years after the decease of the survivor of seven persons, to convey and assure the estates as therein mentioned.

Stephen Pitt died in 1848, leaving his widow, but no issue, him surviving.

His brother *Samuel Pitt* was the heir-at-law; and the widow, and *Samuel Pitt*, and certain children of a deceased sister, were the next of kin.

A suit was instituted for the administration of the estate of *Stephen Pitt*, and on a Petition by the personal representatives of the widow *Elizabeth Pitt*, and by some of the next of kin, an order was made by the Master of the Rolls for payment of the income of the residuary estate to the representatives of the widow and the next of kin, after the expiration of twenty-one years from the death of *Stephen Pitt*, it being admitted that the trusts for accumulation after the twenty-one years were void under the *Thellusson Act*, 39 & 40 Geo. 3, c. 98.

The bill in this suit was then filed by the personal representatives of the widow, for the purpose of having the £6000 raised out of the estate, and the only question was whether, so far as the bequest of the income of the £6000 was void, that part of the

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income was raiseable for the benefit of the next of kin of *S. Pitt.* or for the benefit of the heir, or was not raiseable and so sank into the estate.

Lord *Romilly,* M.R., held that the whole amount was raiseable for the benefit of the next of kin and the representatives of the widow. The first tenant for life of the estate appealed.

Mr. *Fischer,* Q.C., and Mr. *Sturges,* for the Appellant:—

To the extent that the power is well exercised the money is taken away from the estate, but so far as it is badly exercised nothing is raiseable: *Emblyn* v. *Freeman* (1). If the power had not been exercised at all, the trustees would have held for the benefit of the estate, and this amounts to the same thing: *Tregonwell* v. *Sydenham* (2); *Collins* v. *Wakeman* (3). In any case, as the money was to be invested in land, the undisposed part goes to the heir: *Ackroyd* v. *Smithson* (4).

[On this point they also referred to *Cogan* v. *Stephens* (5).]

Mr. *Southgate,* Q.C., and Mr. *Graham Hastings,* for the Plaintiffs, were not called upon.

Mr. *Spencer Butler,* for trustees.

SIR W. M. JAMES, L.J.:—

This is one of the clearest cases that ever came before the Court, and I quite agree with the Master of the Rolls. His Lordship is reported to have said: "It was not the ordinary and regular case of *Ackroyd* v. *Smithson,* or any other case resembling it or relating to it. Observe what the property was: the testator who made this charge had, before he made his will, and before he made this appointment, a charge of £6000 upon the land; and subject to that charge he had a life estate. His wife had a life estate with remainder to their children if they had any; if not, it went over, with an ultimate remainder in fee, to *Stephen Pitt* himself. The result was that, in His Lordship's opinion, *Stephen Pitt* had a charge upon the property, and nothing but a charge upon the pro-

(1) Prec. Ch. 541.
(2) 3 Dow. 194; Sugd. Law of Prop. 326.
(3) 2 Ves. 683.
(4) 1 Bro. C. C. 503.
(5) 5 L. J. (Ch.) 17.

perty. Having that charge upon the property, he, by a deed executed twenty-one years after the charge was created, made an appointment, and appointed this sum to such uses as he should direct by his will; and then by his will, which was made the next day, he gave the property expressly to form part of his residuary personal estate. His Lordship thought it was personalty when he disposed of it in that way; that he took the charge as personalty, and His Lordship was disposed to think that if *Stephen Pitt* had died without making any disposition of it, the ultimate remainder of the £6000 not appropriated would have gone to him as personalty. The testator directed the £6000 to be held by his trustees upon such trusts as 'he should declare of the same by his last will and testament.'" Then, after stating the terms of the will, His Lordship, the Master of the Rolls, said that "he did not think this like the case of a person who made a charge upon his real estate, giving directions that it should be converted into personalty, and then made an impossible provision, or directed an accumulation which the law would not allow, in which case it failed altogether. In His Lordship's opinion, here it did not fail at all, but formed part of the residuary personal estate, and went and belonged to the persons entitled to it as residuary personal estate. Then came the question which was raised in *Eyre* v. *Marsden* (1), where, under the circumstances, the next of kin took and not the heir-at-law. His Lordship was of opinion that this charge was disposed of as personal estate, and was personal estate before it was appointed; that it was taken as personal estate, and that the accumulations of it were personal estate, and went to the next of kin."

This is, in my opinion, very clearly expressed, and there is no ground whatever for the appeal, which must be dismissed with costs.

SIR G. MELLISH, L.J.:—

I am entirely of the same opinion.

Solicitors: Messrs. *White, Borrett, & Co*; Messrs. *Jones, Roberts, & Hale*; Messrs. *Gregory, Rowcliffes, & Rawle.*

(1) 2 Keen, 564.

L. JJ.
1873
July 26, 31.

COPE *v.* EARL DE LA WARR.

[1873 C. 136.]

Settlement—Construction—Shifting Clause—Proviso that on the Occurrence of a contingent Event the "Succession to" lands should "devolve upon" another Person—Patent of Peerage—Conditional Limitation—Power of the Crown.

By letters patent the barony of *B.* was conferred on *E.* for life, with successive remainders to her second and other sons and the heirs male of their respective bodies. The patent contained a proviso that if the second son of *E.* or any other person taking under the letters patent should succeed to the earldom of *D.*, the "succession to" the dignity of *B.* should "devolve upon" the son of *E.* or the heir who should be next entitled to succeed to the barony of *B.*, if the person so succeeding to the earldom of *D.* was dead without issue male.

Lands having been devised by a testatrix to trustees and their heirs, upon trust "to convey, settle, and assure" the same "in a course of entail to correspond as nearly as may be with the limitations of" the barony of *B.*, "and the provisoes affecting the same contained in the letters patent"—a settlement was executed in which was inserted a clause providing that, if the second son of *E.* (who had then by the death of *E.* become Baron *B.*) or any other person taking under the limitations therein contained should succeed to the earldom of *D.*, the "succession to" the lands thereby settled should "devolve upon" the son of *E.* or the heir who would be next entitled to succeed to the barony of *B.*, if the person so succeeding to the earldom of *D.* was dead without issue male.

The second son of *E.* afterwards succeeded to the earldom of *D.* He had issue male:—

Held (affirming the decree of *Bacon*, V.C.), upon the construction of the clause, that upon the second son of *E.* succeeding to the earldom of *D.*, the third son of *E.* became entitled in possession to the settled estates.

Quære, whether the Crown has any power to make a conditional limitation of a peerage.

THIS was an appeal from a decision of Vice-Chancellor *Bacon* as to the construction of a shifting clause contained in a settlement.

By Royal letters patent, dated the 27th of April, 1864, the barony of *Buckhurst* was conferred on *Elizabeth*, younger daughter of the third and last Duke of *Dorset*, and then wife of *George John* Earl *De la Warr*, for life, with remainder to the Hon. *Reginald Windsor Sackville West*, her second surviving son, and the heirs male of his body, with remainders to her third and other sons and

the heirs male of their respective bodies, successively. The patent contained the following proviso :—

"And we will and by these presents . . . do grant, direct, declare, and provide that if the said *Reginald Windsor Sackville West*, or any other person taking under these our letters patent, shall succeed to the earldom of *De la Warr*, and there shall upon or at any time after the occurrence of such event be any other younger son or any heir male of the body of any such other son, then and so often as the same shall happen, the succession to the honours and dignities hereby created shall devolve upon the son of the said *Elizabeth* Countess *De la Warr* or the heir who would be next entitled to succeed to the said dignity of Baron *Buckhurst*, if the person so succeeding to the earldom of *De la Warr* was dead without issue male."

On the 20th of July, 1864, *Mary* Dowager Countess *Amherst*, elder sister of *Elizabeth*, Countess *De la Warr*, and Baroness *Buckhurst*, died. By a codicil to her will, dated the 3rd of May, 1864, after referring to the creation of the barony of *Buckhurst*, and stating that it was her "intention to settle" the manors, hereditaments, and premises devised by her will "in a course of settlement to correspond as far as may be practicable with the limitations of" the barony of *Buckhurst*, she revoked the devise contained in her will, and devised and bequeathed the manors, hereditaments, and premises in the counties of *Kent*, *Warwick*, *Gloucester*, and *Sussex*, and elsewhere, belonging to her (including the mansion and park of *Knole*, in *Kent*), to trustees and their heirs, "upon trust, as soon as conveniently may be after my decease, to convey, settle, and assure" the same "in a course of entail to correspond as nearly as may be with the limitations of the said barony of *Buckhurst* and the provisoes affecting the same contained in the letters patent." . . .

In March, 1866, a suit of *Viscount Holmesdale* v. *West* was instituted by the trustees of the codicil of the Countess *Amherst* to obtain the direction of the Court as to the proper form of settlement to be executed of the estates devised by her to them. The draft of a proposed settlement was approved by the Chief Clerk of Vice-Chancellor *Wood*. On the 26th of June, 1867, a summons was taken out to vary the Chief Clerk's certificate, and this sum-

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mons was dismissed by the Vice-Chancellor: *Viscount Holmesdale* v. *West* (1). The settlement, as approved by the Chief Clerk, was executed on the 15th of August, 1867. An appeal from the Vice-Chancellor's decision was presented to the House of Lords.

On the 23rd of February, 1869, *George John* Earl *De la Warr* died, and was succeeded in the title by his eldest surviving son *Charles Richard.*

On the 9th of January, 1870, *Elizabeth,* Countess *De la Warr* and Baroness *Buckhurst,* died, whereupon *Reginald Windsor Sackville West* became Baron *Buckhurst.*

On the 16th of May, 1870, judgment was pronounced by the House of Lords in the above appeal (2), reversing the decision of the Vice-Chancellor as to the proper frame of the settlement, and in pursuance of this order a fresh settlement of the *Amherst* estates was, in or about July, 1871, approved by Vice-Chancellor *Bacon,* and was executed on the 2nd of August, 1871.

By this settlement the *Amherst* estates were limited to *James Walter* Earl of *Verulam* and *Francis Vernon Harcourt* in fee, to the use of *Reginald Windsor* Baron *Buckhurst* and his assigns for his life, with remainder to the use of his first and other sons successively in tail male, with remainder to the use of *Mortimer Sackville West* (third surviving son of *Elizabeth* Countess *De la Warr*) and his assigns for his life, with remainder to the use of his first and other sons successively in tail male, with similar remainders to the use of the fourth and fifth sons of the Countess for their lives respectively, and their respective sons in tail male. Then followed this proviso:

"Provided always, and it is hereby declared, that if the said *Reginald Windsor* Baron *Buckhurst,* or any other person taking under the limitations hereinbefore contained, shall succeed to the earldom of *De la Warr,* and there shall upon or at any time after the occurrence of such event be any other younger son or any heir male of the body of any such other son, then and so often as the same shall happen, the succession to the said manors, hereditaments, and premises hereby settled shall devolve upon the son of the said *Elizabeth* Countess *De la Warr* or the heir who would be next entitled to succeed to the said dignity of Baron *Buckhurst,* if the

(1) Law Rep. 3 Eq. 474. (2) Law Rep. 4 H. L. 543.

person so succeeding to the earldom of *De la Warr* was dead without issue male."

By this settlement also certain copyhold and leasehold estates for life, respectively devised by the codicil of the Countess *Amherst*, and certain sums of consols and other personal property bequeathed by the codicil, were vested in the trustees of the settlement, upon trusts to correspond as nearly as might be with the uses declared concerning the freehold estates.

On the 22nd of April, 1873, *Charles Richard* Earl *De la Warr* died, whereupon *Reginald Windsor* Baron *Buckhurst* succeeded to the earldom of *De la Warr*.

On the 3rd of June, 1873, the bill in this suit was filed by the trustees of the settlement against *Reginald Windsor* Earl *De la Warr*, his eldest son, an infant, his next younger brother, the Hon. *Mortimer Sackville West*, and three other younger sons of *Elizabeth* Countess *De la Warr* and Baroness *Buckhurst*, alleging that *Mortimer Sackville West* claimed the title of Baron *Buckhurst*, and that *Reginald Windsor* Earl *De la Warr* had entered an objection to his being allowed to take his seat in the House of Lords; also that *Mortimer Sackville West* claimed to have become entitled in possession to the settled estates; but that *Reginald Windsor* Earl *De la Warr* disputed such claims.

The bill prayed that the trusts declared by the settlement of the copyholds, leaseholds, and personal chattels and funds thereby settled might be carried into execution by and under the direction of the Court, and that the rights and interests of the several Defendants therein might be ascertained and declared.

The Vice-Chancellor made a decree (1) declaring that, according

(1) 1873. June 27. WM(B73)151.
SIR JAMES BACON, V.C.:—

Having listened to the learned and elaborate arguments that have been addressed to me, I cannot say that I entertain any doubt upon the subject. If I did, of course it would be necessary for me to hear the counsel opposed to Mr. *Kay's* client, and his contention. But not entertaining any doubt, I think it my duty, notwithstanding the interest and the importance of this case, to decide it at once.

Now the facts are all very clearly stated on the record, and they may be summed up thus: Lady *Amherst*, having, I was going to say, procured, or obtained, letters patent from the Crown, by the codicil to her will directs a settlement, which settlement has been executed, and that settlement contains the proviso which has been mentioned. Now the letters patent are the first

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to the true construction of the settlement of the 2nd of August, 1871, and in the events which had happened, the Defendant

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thing that is necessary to be considered, and they are in these terms:—[His Honour read the clause, and continued:—]

The terms are clear and distinct, and not capable, I think, of any doubt as to their construction and meaning.

The question has been raised whether the Queen, in the exercise of her prerogative, could grant any such letters patent. There are the letters patent; nobody has ever called them in question; there has been no doubt of their validity up to this time, and I am not called upon, if I had the power, to pronounce any opinion as to their validity.

The argument has assumed that the Queen has no power to grant limited peerages. I know of no law that prevents her; I know of no limit to the Royal prerogative. The authority read from *Blackstone* as to the power to grant life peerages has always been considered to be the law; and as by the constitution of this country and the law of this country the Queen is the fountain of honour, the only donor, and the only person entitled to confer ranks and dignities, I know of no rule of law, nor has any instance been referred to in which that power and prerogative have been subject to any limitation whatever. But however that may be (with which I have nothing to do), and whatever may be the doubts which, from the report of the case in the House of Lords, appear to have been suggested by the learned Lords who then spoke of the letters patent, they must remain unaffected by anything that is done on this occasion. All I have to do here is to construe the settlement which has been executed under the authority of the Court, with the knowledge that the letters patent were in these terms, and with the knowledge of those doubts which have been expressed in the House of Lords.

Now, I do not suppose that the attention of the persons who framed this settlement, or of those who approved it after it was framed, was so directed to the terms of the letters patent as that it was, in their opinion, to influence the carrying into effect the codicil to Lady *Amherst's* will, because all that the Court meant to do by the settlement was to carry into effect the intentions of Lady *Amherst*, and her intentions seem to me to be as plain as I conceive the intentions of the Crown in granting these letters patent to have been. The Crown, knowing that there is a Lord *De la Warr*, and desiring to create a Baron *Buckhurst*, provides that if the person who shall be Baron *Buckhurst* shall afterwards become Lord *De la Warr*, then the honours and dignities thereby created shall devolve upon some other person, as if the man who had succeeded to the earldom of *De la Warr* was dead without issue male. Lady *Amherst* knows (I say Lady *Amherst*, because the settlement must be taken as if it were the act of Lady *Amherst* for all purposes which we have to consider) that this has been the intention of the Crown in granting the letters patent; every line of the settlement as well as of her will and codicil shews that it was her intention to keep distinct the estates of which she was the mistress, and had the power to dispose, from the title and estates of *De la Warr*, and accordingly she, the absolute mistress of this property, provides, in terms which I cannot think doubtful, that if in any event the person called Baron *Buckhurst* should become Lord *De la Warr*, thereupon the next person

Mortimer Sackville West became, on the decease of *Charles Richard* Earl *De la Warr*, and the consequent succession of *Reginald*

entitled shall take the estates, as well as the honours and dignities as the patent had provided, and the terms of the settlement, which are nearly the same as those of the patent, were advisedly so introduced, not only to limit and direct the succession which should take place, but to limit and direct them according to the will and disposition of Lady *Amherst*. Now these are the words: "If Baron *Buckhurst*, or any other person taking under the limitations hereinbefore contained, shall succeed to the earldom of *De la Warr*"—an event plainly expressed beyond the possibility of doubt—then something shall happen, and I will consider what presently, as "if the person so succeeding to the earldom of *De la Warr* was dead without issue male." Those are the last words in the sentence, but they are words which, for the purpose of construction, must be borne in view in connection with the first event which is mentioned, namely, if Baron *Buckhurst* shall succeed to the earldom of *De la Warr*; and the proviso goes on in that event, if "there shall, upon or at any time after the occurrence of such event, be any other younger son, or any heir male of the body of any such other son, then, and so often as the same shall happen, the succession to the said manors, hereditaments, and premises hereby settled shall devolve upon the son of the said *Elizabeth* Countess *De la Warr* or the heir who would be next entitled to succeed to the said dignity of Baron *Buckhurst*, if the person so succeeding to the earldom *De la Warr* was dead without issue male." I have listened with the greatest attention to what has been said to me about there being doubts as to the meaning of these words. The word "succession" has been commented on as if there was a particular magic in the word. The word is only an instrument to express the intention of the parties.

The word "succession" seems to me to be an apt and proper word, because it relates to that time at which, by operation of law and the events which shall happen, the actual possession and the right shall be vested in the person there indicated; and the direction that the succession shall devolve on the younger son of Lady *De la Warr*, or the heir next entitled to succeed, shews it to be as proper and apt a word as can be used for the purpose. It assists the construction of instruments very little to resort to the etymological signification of words; but if I were to resort to the etymological signification of this word, I think it is wholly without confusion or doubt. The event contemplated has happened. He who was Baron *Buckhurst* has succeeded to the earldom of *De la Warr*. There is another person on whom the succession is to devolve, and the settlement provides that it shall devolve on that person who would be next entitled to succeed to the dignity of Baron *Buckhurst* if the person who so succeeded to the title of the earldom of *De la Warr* was dead without issue male. I think the words are plain. Cases may be suggested and supposed; but reading this, as I must read it, as a part of the settlement, shewing the intention, which was perfect and complete—the intention of Lady *Amherst* being that the earldom of *De la Warr* and the barony of *Buckhurst* should be distinct, because the letters patent had already provided it, it did not signify to her in the least whether the patent was good or not.

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Windsor Earl *De la Warr* to the earldom of *De la Warr*, entitled in possession to the copyhold and leasehold estates, and the per-

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It was enough for Lady *Amherst* to know that it had been so provided in the letters patent. She says: "All I have to do is to dispose of my own property;" and that being her intention (and it being also the sole intention of the settlement), she so prescribes the succession and devolution of this property, believing no doubt that the letters patent were perfectly valid. As far as anything I have heard to-day is concerned, I cannot say they are not in all respects valid; but I bear in mind the doubts which have been thrown upon them, and the opinion which was expressed in the House of Lords. Lady *Amherst*, however, assuming, no doubt, that the letters patent were valid, and probably indifferent to the fact of whether they were valid or not, provides and directs that, in an event which in the course of nature must necessarily happen, the succession and the devolution of her estates shall go in the order in which she prescribes.

Against this—the argument as to the validity of the patent being exhausted—it is said that, according to precedents in conveyancers' books, the shifting clause ought to be in a certain form. Now, although I have the greatest possible respect for all the authorities which have been referred to (and the profession at large is greatly indebted to those members of it who have pointed out easy and safe forms of framing instruments), I cannot take them as an exposition of the law, nor can I say that there is anything in those precedents or forms of conveyancing that should affect the construction of this instrument.

If I were to assume, therefore, that the power of the Royal prerogative had been exceeded, which I have not the slightest reason for believing, I should still say that, having regard only to Lady *Amherst's* settlement, the meaning is distinct and plain, and that that part of the property which was her own, and which is subject to the jurisdiction of this Court, goes according to the plain trusts of the settlement.

Nor can I see that there is any ground whatever for the argument which Mr. *Langworthy* has suggested to me. I think that the trusts of this settlement, with this exposition, are perfectly consistent and operative, and that there is no ground for the argument as to perpetuity, and no ground whatever for introducing the principles which have been read and commented on from *Earl of Scarborough* v. *Doe* (3 A. & E. 897), and which have, in my judgment, no application whatever to the present matter.

Now, I believe I have, in the observations I have made, exhausted all I had to say on the subject.

There will be a declaration that, according to the true construction of the settlement of 1870, the Defendant the Hon. *Mortimer Sackville West* became, on the decease of *Charles George* Earl *De la Warr*, and the consequent succession of the Right Hon. *Reginald Windsor Sackville* Earl *De la Warr* to the earldom of *De la Warr*, entitled in possession to the copyhold and leasehold estates, and to the personal chattels comprised in the settlement, and to the income of the personal funds subject to the trusts of that settlement.

The costs of all parties as between solicitor and client will come out of the fund.

sonal chattels comprised in the settlement, and to the income of the personal funds subject to the trusts of the settlement.

From this decision *Reginald Windsor* Earl *De la Warr* appealed. An appeal was also presented on behalf of his infant son.

Mr. *Kay*, Q.C., and Mr. *Cookson*, for Earl *De la Warr* :—

We contend that the estates do not go over, at any rate during Earl *De la Warr's* life; it is only the right to the succession at his death which is shifted. No doubt the shifting clause in the settlement must be construed in the same way as that in the patent, whether the latter be legal or illegal. But if two constructions can be given to the shifting clause in the patent, one of which would be manifestly illegal and the other only doubtfully so, the Court would prefer the latter.

[The LORD JUSTICE MELLISH :—If both constructions are illegal there is no reason for preferring the one to the other. There are no degrees of illegality.]

It is clear that a peerage cannot shift from the holder of it during his life. Sir *W. Blackstone*, in his Commentaries (1), says: "The right seems to have been originally territorial; that is, annexed to lands, honours, castles, manors, and the like, the proprietors and possessors of which were (in right of those estates) allowed to be peers of the realm, and were summoned to Parliament to do suit and service to their sovereign; and when the land was alienated the dignity passed with it as appendant."

[The LORD JUSTICE JAMES :—With all respect to Sir *William Blackstone*, I believe that to be an inaccurate statement of the law. I believe that if the holders of the estate lost it they lost the title, but the estate did not carry the title with it.]

Blackstone also remarks that peers are created by writ or by patent, and adds (2): "Creation by writ has also one advantage over that by patent; for a person created by writ holds the dignity to him and his heirs without any words to that purport in the writ; but in letters patent there must be words to direct the inheritance, else the dignity enures only to the grantee for life." And he

(1) Vol. i. p. 399. (2) Page 400.

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says (1): "A peer cannot lose his nobility but by death or attainder."

The very words of the clause shew that it was intended that, on the happening of the specified event, only the right to succeed to the barony, not the barony itself should shift. Moreover, there are no words of time in the clause, as is usual, for instance, in a name and arms clause. It does not say, "then and immediately thereupon" the title shall shift. The natural construction is, that if *Reginald Windsor*, or any other person entitled, becomes Earl *De la Warr*, then the succession to the barony of *Buckhurst* shall be altered, not that the title shall at once go over. And so in the clause in the settlement, it says that the "succession" is to devolve, not that the estates are at once to go over as if the then holder were dead. *Corbet's Case* (2); *Fearne* on Contingent Remainders (3), and *Doe* v. *Yates* (4), shew the strictness with which conditions determining an estate are construed. The ordinary form of a name and arms clause is given in *Davidson's* Conveyancing (5). In *Fazakerley* v. *Ford* (6) there was a clause very like the proviso in the present case, purporting to shift an estate in case another estate should devolve upon the person in possession under the limitations of a settlement, and yet it was held that the shifting did not take place because the land had been sold and was then represented by money. In these cases the usual practice is to use words of cesser. In giving judgment in *West* v. *Viscount Holmesdale* (7), Lords *Hatherley*, *Chelmsford*, and *Westbury*, all questioned the validity of the shifting clause in the patent. In the *Earl of Shrewsbury's Case* (8) it was held that although a duke has not any possessions to support his dignity, yet it cannot be taken from him without an Act of Parliament. There being no proviso for cesser of the estate, the clause does not operate to accelerate the remainder; and there being no words of inheritance, there is nothing but a limitation of successive life estates. This would be void: *Seaward* v. *Willock* (9).

[They also referred to *Earl of Scarborough* v. *Doe* (10).]

(1) Page 402.
(2) 1 Rep. 83 b.
(3) Page 253.
(4) 5 B. & A. 544, 554.
(5) 2nd Ed. vol. iii., p. 1021.
(6) 1 A. & E. 897.
(7) Law Rep. 4 H. L. 558, 564, 569.
(8) 12 Rep. 10 b.
(9) 5 East, 198.
(10) 3 A. & E. 897.

Mr. *Langworthy*, for the infant son of Lord *De la Warr*, said that he did not dispute that the possession of the estates had gone over to *Mortimer Sackville West*, but he feared that the Vice-Chancellor's judgment would prejudice the future rights of the infant.

The LORDS JUSTICES held that, as the infant's right was not a present one, his appeal could not be heard.

Mr. *Eddis*, Q.C., and Mr. *Pemberton*, for *Mortimer Sackville West*, and

Mr. *Joshua Williams*, Q.C., and Mr. *Bagot*, for the other younger sons of *Elizabeth* Countess *De la Warr*, were not called upon.

Mr. *Amphlett*, Q.C., and Mr. *Charles Hall*, for the trustees.

SIR G. MELLISH, L.J.:—

This is an appeal from a decree of the Vice-Chancellor *Bacon*. It raises the question, what is the proper construction of a settlement, made in pursuance of an order of the House of Lords and settled in Chambers, and the question turns upon the construction of a proviso contained in that settlement.

[His Lordship stated the effect of the settlement, and read the proviso.]

There are certain copyhold and leasehold estates, and certain personal property, the legal estate in which is vested in the trustees, but the trusts of which are declared in accordance with the way in which the freehold estates are settled. Therefore we have, in effect, to determine what is the true construction of this proviso with reference to the freehold estates.

Now what has happened is this: *Reginald Windsor* Baron *Buckhurst* has, by the death of his elder brother, *Charles Richard* Earl *De la Warr*, without issue male, become Earl *De la Warr*, and therefore that which is contemplated by this proviso has beyond all question happened. According to the proviso, "the succession to the manors, hereditaments, and premises settled" is to "devolve upon the son of the said *Elizabeth* Countess *De la Warr* or the

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heir who would be next entitled to succeed to the said dignity of Baron *Buckhurst*, if the person so succeeding to the earldom of *De la Warr* was dead without issue male." If *Reginald Windsor* Baron *Buckhurst*, who has succeeded to the earldom of *De la Warr*, was dead without issue male, beyond all question the Defendant *Mortimer Sackville West* would be the person who, according to the limitations in the patent with reference to the barony of *Buckhurst* (assuming for the present purpose that those limitations are good), would be entitled to become Baron *Buckhurst*. That being so, this proviso says, in perfectly plain terms, that the succession to the manors, hereditaments, and premises settled shall devolve upon him.

Now the first question is, what is the plain and simple meaning of the words, and it seems to me that there really can be no reasonable doubt about it. I am speaking now merely with reference to the construction of the words. There are two things which have been contended for by Mr. *Kay* and Mr. *Cookson*. They did not, as it appeared to me, quite agree as to which was the preferable contention. Mr. *Kay* has principally argued that no time is appointed at which the succession is to devolve, and he said that the succession is not to devolve immediately on the happening of the event, viz., on Baron *Buckhurst* becoming Earl *De la Warr*, but that it is not to devolve until Baron *Buckhurst* dies. But there is not a word of allusion in the proviso to the death of the man who, being Baron *Buckhurst*, becomes Earl *De la Warr*. The only time that is spoken of is the time when Baron *Buckhurst* becomes Earl *De la Warr*. It may be true that in some of the ordinary forms of shifting uses conveyancers are not satisfied with resting their proviso on the word "then," but say "then and immediately thereupon;" but that can make no difference. The word "then" points to the time, and not only does it point to that time, but there are no words pointing to any other time. If the succession does not devolve immediately, there is no reason why it should devolve on the death of the then Baron *Buckhurst* rather than at any other time that might be suggested. It appears to me that if it is to devolve (whatever that may mean), the devolution is to take place immediately on Baron *Buckhurst* becoming Earl *De la Warr*.

Then the second contention, which seemed to me at first to be rather the more plausible contention of the two, was this, that the

words "the succession shall devolve" do not mean that the estate shall pass over, but that the man upon whom the succession is to devolve is to become the next person in the succession. Whatever it does mean, I am quite clear that it does not mean that. I might illustrate it by putting this question: Did the succession to the Crown of *England* devolve on the House of *Hanover* when the *Act of Settlement* passed, or when Queen *Anne* died? Beyond all question when Queen *Anne* died, and it makes no difference whether you say that the succession to the Crown of *England* devolved on the House of *Hanover* when Queen *Anne* died, or that the House of *Hanover* came into the succession of the Crown of *England* when Queen *Anne* died, or whether you say, still more correctly, that the House of *Hanover* succeeded to the Crown of *England* when Queen *Anne* died. All those forms of expression mean exactly the same thing. They mean this, that there being a series of persons to whom there is a limitation made—*A.*, *B.*, *C.*, *D.*, *E.*, *F.*, *G.*, and so on—if on a certain event happening when *A.* has the estate, the succession is to devolve as if *A.*, *B.*, and *C.* were dead, then the estate is to go to *D.* That appears to me to be the plain and simple meaning of the words, and if anybody were to say that the succession to the Crown of *England* devolved on the House of *Hanover* during the life of Queen *Anne*, he would certainly be understood as saying that the Crown of *England* had passed from Queen *Anne* during her lifetime, which would be contrary to the fact. But to say that the succession to the Crown of *England* devolved on King *William* and Queen *Mary* during the lifetime of King *James II.* would be perfectly correct. It appears to me that, according to the clear, plain, ordinary and grammatical sense of the words, the expression "the succession shall devolve" means that the estate shall immediately pass over to that person in the series to whom the succession is to devolve. I am also of opinion (and I think I must state it in order to shew what construction I put upon the words) that the meaning is not necessarily that that person is to take an estate for life only (in the present case the Defendant *Mortimer Sackville West* would take an estate for life, because the limitation in the settlement to him is for life), but I think the meaning of the words is (and it is implied in the word "succession") that he is to take exactly in the same manner as he was to take

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under the original limitations in the settlement, and with the same remainders over. The settlement implies that there is to be a perpetual succession to the persons on whom the estate is to devolve one after the other. Then the proviso says that if a certain event happens some of those persons are to be left out, and then the succession is to devolve on some one else in the series. That is, according to my opinion, the plain and obvious meaning of the words. The argument which was put forward against it comes to this: it was said, and I think correctly, that although the proviso to be construed is a proviso relating to the estates, yet, having regard to the objects of the settlement, and to the recital of the patent, and to the reference to the patent in the proviso itself, the words "succession shall devolve," in the proviso relating to the estates, must mean the same thing as in the corresponding proviso in the patent; and then it was argued by Mr. *Kay* that the succession under the patent going over immediately, so as to make the title of Baron *Buckhurst* go over immediately that the existing Baron *Buckhurst* became Earl *De la Warr*, would be unquestionably bad in point of law, and that being so some other construction must be adopted; and then he said the only possible construction which could make the proviso good would be one which, in my opinion, is not the natural construction, and which I think the words will hardly bear, viz., that the words "the succession shall devolve" meant that the title was to go over when the person then in possession of it died, and not before.

Now to make anything of that argument we must be convinced in point of law that the patent, if it makes the title go over at once, would be bad; but that if it only makes it to go over on the death of the existing Baron *Buckhurst*, it would be good; because the only ground for altering the construction by reason of this argument must be, that the one limitation would be unquestionably bad, while the other would be good. Mr. *Kay* himself did not venture to put it so strongly as that. He only said the one limitation would be very bad; while the other would be only slightly or moderately bad. I am at a loss to see how that can be. Perhaps it cannot be assumed that the Judges know the law, but I think it must be assumed that they are able to find out what the law is, and therefore, when an argument is presented to us on the

ground that a particular limitation is bad, we must find out to the best of our ability whether it is bad or not. However, we need not in this case determine whether either limitation is actually bad or good, because the strength of the argument consists in this, that there is an essential and material difference as to legality between the one limitation and the other. After considering that question, in my opinion there is no such difference. I cannot agree altogether with what the Vice-Chancellor said as to the Crown having an unlimited power of limiting dignities in any way that it pleases. I should think, for instance, that if the Crown attempted to limit a dignity to *A. B.* and his youngest son, and the youngest son of his youngest son, and so on for ever, so that the youngest son (or the second son) of every existing peer should always succeed to the title instead of the eldest son, that limitation would be held to be bad. I think the Crown could not create that mode of succession to a title any more than it could create in respect of an estate a mode of succession totally unknown to the law. The legal question which would have to be determined whenever it arose seems to me to be this, whether what in the conveyance of land may be described as a shifting use would be good in a patent creating a dignity, and it is material to observe that in the present case it will be just as much a shifting use, and not a remainder, if it takes effect on the death of the existing Baron *Buckhurst*, as if it takes effect during his lifetime, because it is something that is to take effect in defeasance of an estate tail. It is not a limitation (which of course would be perfectly good) to take effect on the expiration of that estate, that is to say, when he has ceased to have any heirs male of his body. In that case the limitation over to the other brother and the heirs male of his body would be perfectly good. But it is a limitation to take effect by way of defeasance and destruction of that dignity which had been previously granted, and it appears to me that it operates in that way just as much if it takes effect on the death of the existing Baron *Buckhurst* as if it takes effect immediately. The real question which, as it appears to me, would have to be determined, would be whether such a shifting use can be created in a patent of peerage. The argument against it is that it is unknown to the law. Whether that is a sufficient reason would be a question

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for the House of Lords to determine. At common law, previously to the *Statute of Uses*, I apprehend that no such limitation could be made with reference to land. Even after the statute *de donis*, though you might, of course, limit an estate for life with remainder to the first son or some one else in tail, and you might limit it to somebody else after the expiration of that estate tail, you could not at common law before the *Statute of Uses*, after you had limited an estate of inheritance, limit some other estate which was to take effect by destruction of the former estate of inheritance. Then the question would be, whether that can be done in a patent creating a dignity. It may be, no doubt, that the making it go over during the lifetime of an existing holder, appears to be a stronger thing than making it go over at his death. But it appears to me that the argument against it is very much the same in the one case as in the other; and, indeed, if there is any argument in favour of this particular patent, I should think it would be by reason of the peculiar character of the condition on which the title is to go over, viz., on the holder of it getting a higher dignity, so that the shifting certainly does not take away from him his right to sit in the House of Lords. Whether that would be sufficient to support it, I give no opinion, but it certainly seems to me a very doubtful thing whether the Crown could ever have a right to limit a dignity on a condition, whether the Crown could create a peer on a condition which would make him in a great degree dependent on the Crown. It is very difficult to say what limit you could put upon the nature of the condition on which the title should go over. It would be very easy to make a condition which would, to a certain extent, sacrifice the independence of the peer. However, I do not think it necessary to go further into that question. All I think it necessary to say is that there appears to me to be no such distinction as has been contended, between making the dignity go over immediately on Baron *Buckhurst* becoming Earl *De la Warr*, and making it go over on the death of Baron *Buckhurst*, as to afford any ground for saying that the one is clearly bad and the other clearly good in law. That being so, it appears to me that there is no reason why the proviso in the settlement relating to the estates should not be construed according to the plain and natural meaning of the words. Therefore I think the decree of the Vice-

Chancellor is perfectly correct, and this appeal must be dismissed with costs.

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SIR W. M. JAMES, L.J.:—

I desire only to add a very few words. I agree with the Lord Justice in saying that I am not prepared to affirm the proposition of the Vice-Chancellor (which is not necessary for the decision of the present case) as to the prerogative of the Crown to make these limitations. It is not necessary to decide that question, but I agree with the Lord Justice that if the one shift is bad the other is bad, and if the one is good the other is good also. There is no reason for altering the natural construction of the words in the proviso with reference to the estates.

Solicitors for the Appellants: Messrs. *Cope, Rose, & Pearson.*
Solicitors for the Respondents: Messrs. *Meynell & Pemberton.*

Ex parte RUFFLE. *In re* DUMMELOW.

L. JJ. 1873 *Aug.* 1.

Liquidation by Arrangement—Creditor's Right to Vote—Unliquidated Debt—Untaxed Costs—Bankruptcy Act, 1869, s. 16, *sub-s.* 3.

A liquidating debtor was indebted to a creditor in £357 recovered by a verdict at law, and costs, which had not been taxed. The creditor attended the first meeting of creditors, and stated in his affidavit that the debtor was indebted to him in £357 on the verdict and an amount of costs which he estimated at £200; and claimed to vote in respect of the aggregate amount. The creditor had been restrained by injunction from taking any further proceedings in the action:—

Held, that the estimated amount of untaxed costs was an unliquidated debt within the *Bankruptcy Act*, 1869, s. 16, sub-s. 3, and that he could not vote in respect thereof.

The proper course for the creditor to pursue was either to apply for leave to sign judgment and tax his costs, or else to swear to such a sum as the costs when taxed would at least amount to.

THIS was an appeal from a decision of Mr. Registrar *Murray* sitting as Chief Judge in Bankruptcy.

Mr. *H. Ruffle* brought an action in the Court of Queen's Bench against the debtor *James Dummelow*, which was tried at the

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Spring Assizes in April, 1873, when it was ordered that a verdict should be entered for the Plaintiff and that the Defendant should bring £357 into Court on or before the 21st of April, 1873, and the cause to be referred to a barrister, and if the money was not paid into Court the Plaintiff was to sign judgment for the amount claimed. The debtor did not pay the money into Court, and on the 22nd of April, 1873, he filed a petition for liquidation by arrangement. On the same day he obtained *ex parte* an order for an injunction to restrain *Ruffle* from proceeding with his action unless he should shew cause against it on the 30th of April. On that day the creditor did not appear, and the injunction was made absolute against him.

On the 9th of May the first meeting of creditors was held. *Ruffle* was present, and filed an affidavit, in which he swore "that the said *James Dummelow* is indebted to me in the sum of £357, for which sum I have obtained a verdict against him, and also for the sum of £200, which I estimate as the amount of costs which will be payable in the said action by the said *J. Dummelow* to me, making together the sum of £557." The debtor admitted the amount of the principal debt, but disputed the amount due for costs. He entered the debt in his statement as £357.

Ruffle voted against the resolution for liquidation, and Mr. *Keene*, the Registrar, allowed his vote in respect of £357 debt and £200 costs. The consequence of allowing his vote was, that there was not a requisite majority of creditors as to value in favour of the resolution and it was not carried. The debtor appealed from the Registrar's decision, and Mr. *Murray*, acting as Chief Judge, held that *Ruffle* was not entitled to prove for the costs but only for the original debt. The disallowance of the proof for costs turned the scale of the votes, and it was therefore referred back to Mr. *Keene*, to reconsider the question of registration, but the order was to be without prejudice to the right of the creditor, notwithstanding the injunction, to sign judgment and tax his costs, and prove for the amount as he should be advised.

From this order *Ruffle* appealed.

Mr. *De Gex*, Q.C., and Mr. *Bagley*, for the Appellant:—

The question turns upon the construction of the 2nd and 3rd

sub-sections of the 16th section of the *Bankruptcy Act*, 1869 (1). This is not a contingent nor an unliquidated debt, nor one the value of which cannot be ascertained: *Ex parte Llynvi Coal and Iron Company* (2).

In *Ex parte Peacock* (3) this Court held, that where a compounding debtor had entered in his statement an estimate of the amount of untaxed costs due from him to a creditor that was sufficient, and the creditor could claim the composition without further proof. Here the creditor had estimated the costs by his affidavit at £200, and that ought to be held sufficient for the purpose of voting. If the debtor merely by objecting to the amount of his creditor's debt can prevent him from voting he can always get a majority by objecting to adverse creditors. The debtor, by his own act, has prevented the creditor from getting his costs taxed, for he had obtained an injunction restraining him from taking any further proceedings in the action; and, indeed, the dividend will be so small that it would not be worth while to incur the costs of taxation.

SIR W. M. JAMES, L.J., referred to *Ex parte Simpson* (4).

Mr. *Brough*, for the debtor:—

This is clearly an unliquidated debt within the 3rd sub-section of the 16th section. *Ex parte Peacock* did not decide that a creditor could vote on a mere estimate of untaxed costs; but only that where a debtor admitted the debt to be of a certain amount, he was bound to tender a composition on that amount until further proof. It was the creditor's own fault in the present case that he did not get the costs taxed, for he might have obtained leave to proceed to sign judgment and tax the costs, notwithstanding the injunction. Rule 67 of the *Bankruptcy Rules*,

(1) 32 & 33 Vict. c. 71, s. 16, sub-s. 2: "A person shall not be entitled to vote as a creditor unless at or previously to the meeting he has in the prescribed manner proved a debt proveable under the bankruptcy to be due to him."

Sub-s. 3: "A creditor shall not vote at the said meeting in respect of any unliquidated or contingent debt, or any debt, the value of which is not ascertained."

(2) Law Rep. 7 Ch. 28.

(3) *Ante*, p. 682.

(4) 1 Atk. 70.

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1870, prescribes the manner of proving debts, namely, according to the form in the schedule. The creditor did not comply with this rule, for he only swore to his "estimate of the debt."

Mr. *De Gex*, in reply.

SIR W. M. JAMES, L.J.:—

Now that the matter has been fully argued before us, it appears to me to admit of very little doubt. I think that the argument of the Respondent is a valid one, and does not lead to the consequences with which Mr. *De Gex* has endeavoured to terrify us. There would be no difficulty in the creditor's making the affidavit which is required of a sum which he pledges his oath the debtor is at least indebted to him. In the same way as in the Court of Chancery, where a person wishing to obtain a writ of *ne exeat regno* against a debtor, the creditor is not expected to state the amount of the debt with absolute certainty—it may be an open account between them—but he is required to make an affidavit that at least so much is due to him, and the Court takes that statement as sufficient evidence of the debt. So in the case referred to, *Ex parte Simpson* (1), the creditor was allowed to make an affidavit that "the sum of £8000 and upwards was then actually due," and on this was admitted to vote in the choice of assignees. In the present case the creditor ought to have sworn that at least some certain sum was due. He might easily have ascertained from his attorney how much was likely to be taxed off, so as to fix a sum to which he might have safely sworn. But he does not do that: he makes an estimate of what he thought would probably be due. I am of opinion that this is not sufficient; he ought to have pledged his oath to some particular sum. Then the Registrar would have considered the matter, and the creditor would have been allowed to receive dividends on the sum which would be found ultimately due to him.

SIR G. MELLISH, L.J.:—

I am of the same opinion. The question depends on the 2nd and 3rd sub-sections of the 16th section of the *Bankruptcy Act*,

(1) 1 Atk. 70.

1869. [His Lordship read the clauses.] In order to vote, the creditor must state the particular amount in which the debtor is indebted to him. Here the creditor only said, "which I estimate" at so much; he does not pledge his oath to any particular amount at all. It is true that if the Court allowed every objection which the debtor might wish to prevail, the result might follow which Mr. *De Gex* anticipated; but on the other hand, if any creditor might estimate his debt at what he liked, without swearing to any fixed amount, this might be done by friendly creditors as well as by hostile ones, and very bad results would ensue.

The question really is, what is meant by an "unliquidated debt" in the 3rd sub-section. The fair construction of the clause seems to me this: "a contingent debt" refers to a case where there is a doubt if there will be any debt at all; "a debt, the value of which is not ascertained," means a debt the amount of which cannot be estimated until the happening of some future event; and "an unliquidated debt" includes not only all cases of damages to be ascertained by a jury, but beyond that, extends to any debt where the creditor fairly admits that he cannot state the amount. In that case there must be some further inquiry before he can vote. In the present case there is really no injustice done to the creditor; he might have applied for leave to sign judgment and tax his costs, and asked for the meeting to be adjourned till that was done. But it was said that the debtor was only able to pay a shilling in the pound, and it would not have been worth while to incur the costs of taxation. In that case he must be content to prove for such an amount as he can safely swear the costs would at least amount to. The appeal must be dismissed with costs.

Solicitor for the Appellant: Mr. *W. Beck.*
Solicitor for the Respondent: Mr. *Noton.*

L. JJ.
1873
July 31;
Aug. 4.

In re UNITED PORTS AND GENERAL INSURANCE COMPANY.

WYNNE'S CASE.

Amalgamation of Companies—Void Amalgamation—Variance between two parts of Indenture—Variance between Application for Shares and Letter of Allotment—Laches—Acquiescence—Contributory.

An amalgamation was agreed on between the *P. Company, Limited*, and the *U. Company*, which was an unlimited insurance company, under which the paid-up shareholders in the *P. Company* were to have paid-up shares in the *U. Company* to the like amount, and the other shareholders in the *P. Company* were to have corresponding shares in the *U. Company*. It was also agreed that the *P. Company* should assign all their assets to the *U. Company*, and that the *U. Company* should indemnify them against all liabilities. An indenture in two parts, embodying these terms, was drawn up and executed by the two companies; but the covenant of indemnity in the part executed by the *U. Company* differed materially from the covenant in the part executed by the *P. Company*.

W. was a paid-up shareholder in the *P. Company*, and made an application to the *U. Company*, in pursuance of the amalgamation, for paid-up shares of the same value as his former shares. He received a letter of allotment, signed by a person professing to be the managing director of the *U. Company*, giving him notice that the directors had allotted him the number of shares applied for, on which he was to be credited with an amount proportionate to the assets of the *P. Company*. There was no evidence on what authority this letter was written, but *W.'s* name was placed on the register as an ordinary shareholder. *W.* received the letter at the end of August, while he was on a yachting cruise, and on his return to *London*, early in October, applied personally to the chairman and solicitor of the company for an explanation of the letter, and objected to take the shares, but was informed by them that his name was not on the register. On the 15th of October he wrote to the secretary, formally repudiating the shares. On the 9th of November the *U. Company* was wound up on a petition presented on the 7th of October:—

Held, first, that the variation in the two parts of the indenture rendered the indenture void, and that the amalgamation was incomplete:

Secondly, that there was no contract between *W.* and the company to take shares:

Thirdly, that, under the circumstances, *W.* was not bound by acquiescence to take shares in the company; and his name was therefore removed from the list of contributories.

Decision of *Bacon*, V.C., reversed.

THIS was an appeal from a decision of Vice-Chancellor *Bacon*, made in the winding-up of the *United Ports and General Insurance Company*.

The company was an unlimited company for fire and life insurance; but the policies contained the usual clause limiting the claim of the insured to the assets of the company. The capital was divided into shares of £1 each.

The *Progress Assurance Company, Limited,* was a limited company for similar objects, its capital being divided into shares of £5 each. By the articles of association the directors had full powers to sell the property and business of the company on such terms and conditions as they might think fit, and to amalgamate with any other company established for similar objects.

In June, 1869, the directors agreed to sell their business to the *United Ports Company,* and to amalgamate with that company, and a committee was appointed to carry the amalgamation into effect. The terms of the amalgamation were embodied in an agreement under the seals of the two companies, dated the 8th of June, 1869, whereby it was agreed that the *Progress Company* should sell all their business and property to the *United Ports Company;* that the *United Ports Company* should pay £12,000 in cash or bills, and should issue to the paid-up shareholders in the *Progress Company* shares of £1 each in the *United Ports Company,* on which the full sum of £1 should be considered as paid up, to the same amount as their former shares, and that no further liability should attach to the holders thereof; and that they should issue to the holders of partly paid-up shares in the *Progress Company* shares in the *United Ports Company,* on which an amount should be considered to have been paid proportionate to the amount credited on the shares in the books of the *Progress Company.* It was further agreed that the purchase should be completed on the 8th of June, and that from that day the *United Ports Company* should take upon itself all the debts, engagements, and liabilities of the *Progress Company,* and should at all times thereafter protect and indemnify the directors and officers of the *Progress Company* against the same; and that the *Progress Company* should be forthwith wound up voluntarily, either with or without the supervision of the Court.

This agreement was engrossed in two parts, and one part was sealed with the seal of the *Progress Company* and delivered to the *United Ports Company,* but the *United Ports Company,* before executing their part, added a proviso at the end of the agreement in the following terms:—

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"Provided always that the capital, stock, and property of the said *United Ports Company* shall alone be liable to answer and make good all claims and demands whatsoever under or by virtue of this agreement, and that no director, officer, shareholder, or member of the said company shall be in anywise subject or liable to any such claims or demands, nor be in anywise charged, by reason of this agreement, beyond the amount of his or her share or shares of such capital, stock, or property: it being a part of this contract that the responsibility of the individual members shall in all cases be limited to the amount unpaid on the shares respectively held by them at the time of such claim or demand."

This agreement, as executed by the *United Ports Company*, was accepted by the directors of the *Progress Company*, and entered on their minutes on the 10th of June, 1869; and an extraordinary meeting of the shareholders was held on the 24th of June, when the agreement was confirmed, and a resolution passed to wind up the company voluntarily.

On the 22nd of June a petition was presented to wind up the *Progress Company* compulsorily, and an order to that effect was made on the 26th of June; but on the 30th of July the compulsory winding-up was stayed and a voluntary winding-up continued under supervision.

Mr. *James Wynne* was a director of the *Progress Company* and the holder of twenty fully paid-up shares in it.

On the 27th of July, 1869, he filled up and forwarded a form of application for shares in the *United Ports Company*. The printed form of application was as follows:—

"*Progress Assurance Company Limited.*

"Amalgamated with the *United Ports and General Insurance Company.*

"To the Directors of the *United Ports and General Insurance Company.*

"In accordance with the terms of the agreement for amalgamation entered into between the above companies, and confirmed by an extraordinary general meeting of the shareholders of the *Progress Assurance Company, Limited*, held on the 24th June, 1869, I hereby request that you will allot me shares in the *United Ports*

and General Insurance Company, credited with £ thereon, in exchange for shares held by me in the *Progress Assurance Company*, upon which the sum of £ has been paid, the scrip certificates for which are herein inclosed.

"Number of shares in *Progress* . . . .

"Amount paid per share . . . . . ."

It was alleged, and not denied, that this form was filled up by Mr. *Wynne* for 100 fully paid-up shares of £1 each in the company; but the original letter of application was lost.

On the 29th of July, 1869, he wrote to the secretary of the *United Ports Company* the following letter:—

"Dear Sir,—In my letter of Tuesday last, enclosing to you and to the committee the scrip certificate of my twenty shares in the *Progress Assurance Company*, I omitted to request, as I intended, that the committee would not place my letter to the directors of the *United Ports Company* in their hands until such time as the compulsory winding-up of the *Progress Company* shall have been changed into a voluntary winding-up, and all impediments in the way of amalgamation of the two companies removed. If, as I suppose, you shall receive this before the committee have forwarded my letter to the directors of the *United Ports Company*, I request that they may retain it until the arrangements shall be in such a state, by the removal of all impediments, as that the amalgamation of the companies can certainly be effected.

"I am, &c.,

"*James Wynne.*"

On the 7th of August a letter of allotment was sent from the office of the company to Mr. *Wynne* in the following terms:—

"The *United Ports and General Insurance Company*,

"17 & 18, *Cornhill, London*, E.C.,

"7th August, 1869.

"Sir,—The directors of the *United Ports and General Insurance Company* have allotted you 100 shares in pursuance of an arrangement with the liquidators of the *Progress Assurance Company* and the *United Ports and General Insurance Company* for a transfer of the former to the latter company, and have entered your name in

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the register of members of the *United Ports and General Insurance Company* as a member of the company in respect of such shares. The amount to be credited on such shares will be the proportionate amount of the net assets of the *Progress Assurance Company, Limited.* Certificates for such shares will be issued in exchange for this allotment letter when requested in writing so to do.

"I am, Sir, your obedient servant,

"*J. E. Leyland,* General Manager."

Mr. *Leyland,* who signed this letter, was not the general manager of the company, but was employed by them in some other capacity, and there was no evidence by what authority he wrote the letter. A minute appeared in the minute book of the directors that on the 7th of August, 1869, the directors had allotted 100 shares to Mr. *Wynne;* but the minutes of the meeting were not signed by any person as chairman. Mr. *Wynne's* name was, however, placed in the share register as the holder of 100 ordinary shares.

Mr. *Wynne,* being absent on a yachting cruise, did not receive the letter of allotment till the end of August. On the 31st of August he wrote Mr. *Leyland,* as the general manager of the *United Ports Company,* the following letter:—

"Dear Sir,—I enclose a copy of an account settled and certified by Mr. *Braithwaite* as general manager of the *Progress Assurance Company.* In it you will see an item of £75 12*s.* due to me, and £6 6*s.* travelling expenses. A great part of this was money out of my own pocket for travelling and living for thirty-five days, and the rest was for professional business under agreement. I do not require payment of this account at present unless perfectly convenient to the *United Ports Company,* but I shall feel much obliged to the directors if they will let me have on account of it a sum of £30, which I have a present occasion for; and I shall thank you if you will lay this my letter and request before your board.

As I am now staying in *Dublin* for a short time, I may be able to do something in the way of forwarding the interests of the company if you will let me know in what way.

"I am, &c.,

"*James Wynne.*

"P.S.—The portion of the account which is for fees as director will remain until the other directors can be paid. It is only the money out of my own pocket and under agreement that I request of the directors to be so good as to let me have on account."

On the 6th of October Mr. *Wynne* came to *London*, and on the 10th he called on Mr. *Leyland* and asked him for an explanation of the letter of allotment; but Mr. *Leyland* said he was unable to give him any information about it. He then made inquiries of the chairman and the solicitor of the *United Ports Company*, and in conversation with them objected to take the shares, but was informed by both of them, as he alleged, that his name was not entered on the register as a shareholder.

On the 15th of October Mr. *Wynne* wrote a letter to the secretary of the company formally repudiating the shares as having been allotted in a manner directly contrary to the agreement. In the meantime he attended no meetings of the company and took no part in its business.

On the 7th of October, 1869, a petition was presented to wind up the *United Ports Company*, and an order to that effect was made on the 9th of November following.

Under these circumstances the Vice-Chancellor held that Mr. *Wynne* ought to be settled on the list of contributories of the *United Ports Company* for 100 shares, and Mr. *Wynne* appealed from this decision (1).

(1) 1873. May 30. WN/1873/116

SIR JAMES BACON, V.C.:—

The Act of Parliament points out distinctly that in order to constitute a person a member of a company he must be one who has agreed to take shares in the company, and whose name is on the register. In the present case there is no doubt about the latter point. The only question is, whether Mr. *Wynne* agreed to take shares in the company; and all the argument which I have listened to upon the subject of the invalidity of the agreement for amalgamation, and of the application of the clauses in the Act of Parliament, is not within this case. There was an agreement to amalgamate; the agreement of the 8th of June, 1869, is a fact beyond all question. The complaint against the claim of the liquidator might deserve consideration if the question were simply between Mr. *Wynne* and the *United Ports Company*. It is not that at all. The question is, whether Mr. *Wynne* has agreed to take shares—no matter what shares, no matter under what circumstances. Now, in pursuing this inquiry, the first thing that strikes me is that the agreement for amalgamation was entered into with the full knowledge and sanction of Mr. *Wynne*. He

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When the matter was heard before the Vice-Chancellor, the discrepancy between the parts of the agreement executed by the

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was an active director of the *Progress Company*, and he approved the agreement and did his best to carry it into effect. The proceedings were accidentally delayed by the proceedings of a hostile creditor who obtained an order for a compulsory winding-up; but when that was put an end to, and the supervision order was made, the agreement was carried out. The 161st section of the Act of 1862 applies to totally different circumstances, and has no bearing on the present case. The only question, therefore, is, whether Mr. *Wynne* had agreed to take shares in the *United Ports Company*; and the circumstances under which he agreed to take the shares have nothing whatever, in my opinion, to do with the matter. [His Honour then reviewed the evidence in the case, and read the letter of application, the letter of allotment, and Mr. *Wynne's* letter of the 31st of August, 1869, and proceeded to say:—] I take the case, therefore, to be clear and complete; and whether the agreement for amalgamation was valid or not is a matter of perfect indifference as between the creditors of the *United Ports Company* and Mr. *Wynne*, because I think it clearly proved, and not disputed by him, that he did apply for shares in the *United Ports Company*, and that his application was acceded to, and that he received the letter of allotment; and if he had not received the letter of allotment, I think the case would have been equally clear; and I do not think that its strength is in any degree impaired because in this printed circular, addressed to all the shareholders to whom shares had been allotted—and properly so addressed—in two lines addressed more particularly to those who did not hold paid-up shares, it is stated that the amount to be credited in respect of such shares would be the proportionate amount of the net assets of the *Progress Assurance Company*, because he must have known that the insertion of those two lines had no application to him under the agreement for amalgamation. Then, being, as I have said, clearly proved to be a person who had agreed to take shares in the *United Ports Company*, and being on the share register, what does he do? What was more easy and clear than the course which he ought to have pursued if the case which he has set up at the bar could be maintained? The *United Ports Company* was a going concern at that time, with directors and secretary, and there was nothing to prevent Mr. *Wynne* from remonstrating with them, and saying, "I have received a letter of allotment, but I am not bound by it. I do not accept these terms; I withdraw the application for shares." He does nothing of the kind. He busies himself with going about the city of *London* looking for the secretary and other people; he has conversations with them, which, whatever they were, cannot affect the case in the slightest degree. He never at any time objects to his being on the register or a member of this company until after the winding-up petition, and not effectually until the official liquidator calls upon him to sustain the obligation which the fact of his being a member fixes on him. If the case respecting the validity or invalidity of the agreement for amalgamation were now to be gone into, there would have been a great deal more to be said on it than I think it now necessary to say, as, in my opinion, it has nothing to do with

two companies had not been discovered, but that fact was put in evidence before the hearing of the appeal.

Mr. *Jackson*, Q.C., and Mr. *Graham Hastings*, for the Appellant:—

Mr. *Wynne* never agreed to become a shareholder in the *United Ports Company*. In the first place, his application was conditional on the amalgamation taking place; and the amalgamation never did take place. The two parts of the agreement differed materially, and were therefore void, and the agreement fell through. His application consequently failed also: *Shackleford's Case* (1); *Dougan's Case* (2); *Gorrissen's Case* (3). In the second place, independently of the amalgamation, there was no complete contract to take shares at all. Mr. *Wynne* applied for paid-up shares, and the directors allotted him shares the amount paid on which depended on the assets of the *Progress Company*. Mr. *Wynne* was on a cruise when the letter was sent, but as soon as he returned to *London* he lost no time in repudiating the allotment. Even if he had not repudiated it he could not be bound, for there is no proof that *Leyland* had any authority to write the letter; nor was the minute of the board meeting signed, as it ought to have been, under the *Companies Act*, 1862, s. 67.

Mr. *Amphlett*, Q.C., and Mr. *Brooksbank*, for the official liquidator:—

With respect to the amalgamation, the copy of the agreement

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the question; and I decide the case only upon evidence of the fact that Mr. *Wynne*, knowing very well what he was doing, applied for shares in the *United Ports Company*, and that his application was acceded to. Whether there would have been any question between him and the company as to the terms on which they acceded to his application, is a matter which I have not to inquire into, but that they did accede to his application, that he had full notice that they did accede to his application, that he wrote the letter of the 31st of August, 1869, knowing that they had acceded to it, and adopting the amalgamation that had taken place, and asking to be paid a debt by the *United Ports Company* which was originally due from the *Progress Company*, and that from that time to the time when this question arises he has neither done nor said anything which expresses a dispute on his part as to his liability as a person who has agreed to take shares, and whose name is on the register of the company. My opinion, therefore, is that he must be retained on the list of contributories.

(1) Law Rep. 1 Ch. 567. 12 Jur 695

(2) *Ante*, p. 540.

(3) *Ante*, p. 507.

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executed by the *United Ports Company* was accepted by the *Progress Company* and acted on by them. It was, therefore, *de facto* concluded, and was considered to be so by both parties. But whether it was void or not the application was unconditional as against the creditors of the company; they have nothing to do with Mr. *Wynne's* motives for making the application. The allotment to Mr. *Wynne* was binding on him. Although the chairman's signature to the minute is the best evidence, it may be proved *aliunde*. His name was on the register, and it is for him to shew that it was improperly placed there. The books were not very regularly kept, but the share register contained everything that was necessary, and it is *primâ facie* evidence of all that it contains: *Whittet's Case* (1); *Companies Act*, 1862, s. 37.

The fact that a man applies for paid-up shares, and the directors allot him unpaid shares, may be a ground of complaint against the directors; but, if he allows himself to be placed on the register, he is a member of the company, and is liable as such to the creditors. Mr. *Wynne* might, perhaps, have repudiated the shares if he had done so at once, but he did not make any formal remonstrance till after the petition for winding-up had been presented, and contented himself with holding conversations with the chairman and solicitor; and, in fact, he expressly sanctioned both the amalgamation and the allotment by writing the letter of the 31st of August to the manager, claiming the debt due to him from the *Progress Company*. It is therefore too late for him now to repudiate the shares: *Hare's Case* (2); *Kincaid's Case* (3); *Lawrence's Case* (4); *Pellatt's Case* (5); *Black & Co.'s Case* (6); *Perrett's Case* (7). If the company had been successful, *Wynne* might have insisted on the company giving him the shares.

SIR W. M. JAMES, L.J.:—

In this case I am of opinion that the decision of the Vice-Chancellor cannot be sustained. A very material fact has been

(1) 2 De G. & J. 577.
(2) Law Rep. 4 Ch. 503.
(3) Ibid. 2 Ch. 420.
(4) Law Rep. 2 Ch. 412.
(5) Ibid. 527.
(6) *Ante* v. 254.
(7) Law Rep. 15 Eq. 250.

added to the case, which was not before the Vice Chancellor. It is now made out beyond all question, according to my view of the facts and the law, that there never was any amalgamation between the two companies at all. The facts were these: The managing bodies, the directors of the two companies, had preliminary negotiations and came to what is called an agreement for amalgamation, but when the documents come to be produced there is this most extraordinary thing, which I never saw before in any case. The document under the seal of the one company is substantially different from the document under the seal of the other company, although they were intended to be the two parts of one agreement. In one document there is an unqualified covenant by the purchasing company, but when you come to look at the document which was executed by the purchasing company the covenant is very different; it is limited to the assets of the company, and you cannot possibly say that those two documents can be part of one agreement when they do not agree. There never was in fact the amalgamation which was the basis of the whole of the arrangement between the companies.

Then starting with this fact, that there was no amalgamation, we find that Mr. *Wynne* writes a letter supposing that that amalgamation is about to be effected, or that it had been effected. If in answer to that letter there had been a simple assent to the terms, or if he had said, "Having regard to the amalgamation, I apply for so many shares," and the company had allotted him so many shares, very possibly he might have found himself fixed with the shares; because, although the amalgamation was the motive and the cause of his applying for them, if he had applied for shares, and they had been allotted and he was put on the register, and found on the register at the time of the winding-up, he would have been in the same position as other persons who, under a mistake of fact or law, had applied for shares and had them allotted, and found themselves registered according to their contract.

But what occurred was this: He writes a letter asking to have shares allotted to him upon certain terms, the terms being very material to him, namely, that he shall have paid-up shares allotted to him in consideration of shares in another company. In answer

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to that a letter written nobody knows how, or by whose authority, or under what circumstances, is sent to him containing a totally different bargain, saying that the *United Ports Company* have allotted to him so many shares, and he will be credited with the proportion of the assets as they come in from the company which has proposed to amalgamate with it. Those are different terms. If it stood on those two letters I did not understand Mr. *Amphlett* to contend seriously that there was any contract between them. But he says that the second letter went on to say, "We have put you on the register on these terms," and then that Mr. *Wynne*, having received this letter, so far acquiesced in it and so far abstained from objecting to it, and that he must be considered to have entered into an implied agreement to accept the shares upon the terms contained in that letter. Mr. *Wynne* seems to be a lawyer, and the time when this happened was during the Long Vacation, when he was yachting, and he happened to put into *Dublin* at the end of August, when he received this letter. Nothing further was done by him, except that he wrote to apply for money which was due from the company about to be amalgamated, and that letter was addressed to some person from whom he had received a communication, merely applying for the payment of a debt which he alleged to be due. There were no certificates of shares received by him. He never attended any meeting, he never did any act, he never received anything whatever, and coming to town early in October, before the winding-up, he goes to the authorities at the office, and says, "I entirely repudiate this; I will not have it; I have nothing to do with it;" and he goes to the chairman and the attorney, and he is assured by one or both of them that his name is not on the register of shareholders. It appears to me that it would be carrying the doctrine of acquiescence—the making of an agreement by implication, for that is the meaning of acquiescence—to an extravagant length to say that a man is not to have from the end of August till the beginning of October to consider whether he shall or not become a member of a company with this alteration in his proposal, which he would have objected to at once if his occupation of yachting had not prevented his considering it. He found himself, instead of being the holder of shares which were paid up, the holder of shares which

were not paid up, which makes a material difference. I think this gentleman is not estopped by any act, or any length of time or laches, from saying that the letters of application and allotment did not constitute an agreement, and that in October he was in sufficient time to say, "I will not accept the terms on which you say you have allotted the shares to me." I am of opinion that there never was an agreement between these parties either expressly or by implication or acquiescence. The order of the Vice-Chancellor must therefore be discharged.

SIR G. MELLISH, L.J :—

I am of the same opinion. In the first place, I entirely agree that there was no binding agreement for amalgamation between these two companies. That agreement was intended to be, and could only be, by deed. It may be that the shareholders in both companies agreed to it, but the agreement was simply to give authority to the directors to make an agreement for amalgamation between the companies under the seal of the two companies, and that was manifestly necessary, because of course if the assets of the *Progress Company* were to be handed over to the *United Ports Company* it was the very essence of the agreement that the *Progress Company* should have a covenant from the *United Ports Company* that they would pay the whole of their debts; and in the notice for amalgamation it does not appear that anything was said about there being any limitations on the covenant of the *United Ports Company.* Then the terms having been arranged, and the indenture drawn in two parts, without any clause limiting the agreement, the *Progress Company* execute their part, by which they transfer their assets to the *United Ports Company*, professing to have in the part they execute an unlimited covenant from the *United Ports Company* to pay their debts and perform the agreement; but the *United Ports Company*, before they execute the other part of the agreement, insert a clause or proviso which has the effect of limiting their liability to the amount of their capital, stock, and shares. The question is, what is the effect of that in point of law? I am not aware that that point has ever been raised. I never met with a case where there has been that variation between the two parts of a deed. In mercantile cases a variation between the bought

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and sold notes is a matter that has often occurred, and the result of it always is that there is no contract, and it may be that both parties, after they thought they had entered into an agreement by the bought and sold notes, acted upon the agreement, but even though they have done that, unless you can find out from their acts which of the two agreements, namely, that contained in the bought note or that contained in the sold note, is the one upon which they acted, there is no confirmation of the agreement. So it is here. Assuming that the companies can be bound (about which I have great doubt) without a contract under seal, yet, in order that it may be confirmed by their acting upon it afterwards, there must be something to shew whether they were acting on the part of the indenture executed by the *United Ports Company*, or the part executed by the *Progress Company*. I do not see anything by which to discover on which of the two parts they were acting, so that if it was held to be a binding agreement between the two companies, it would be impossible to discover, what in the events that have happened would be a most material thing to know, namely, whether the *United Ports Company* were only liable out of their capital, stock, and funds, in which case the *Progress Company* would only take *pari passu* with the policy-holders; or whether it is an absolutely unlimited covenant, in which case the *Progress Company* might compel payment from all the shareholders. The only result is that the decision must be that there is no agreement at all.

Then, there being no amalgamation, an application is made by Mr. *Wynne* for shares in the company in accordance with the amalgamation. No doubt he made that application under a mistaken supposition that there was an amalgamation, when in fact there was none. An answer to that application was sent, the irregularity of which is certainly most surprising. In the first place, it turned out when they offered in evidence the resolution for allotment, that it was not signed, and therefore there is not the particular evidence pointed out by the Act of Parliament. Then there is nobody found to give evidence who was present at that meeting, and therefore the allotment cannot be proved *aliunde*. The next thing is, that with the notice of the allotment

a notice is sent by a person having very little connection with the company, containing terms totally different from the terms which Mr. *Wynne* had offered to take; and although it refers to the agreement for amalgamation, yet such terms are most materially different from the agreement for amalgamation, because, according to the agreement for amalgamation, Mr. *Wynne*, having been a shareholder in a limited company with paid-up shares, and therefore liable for nothing, was to receive paid-up shares to a similar amount in a company, unlimited it is true, but nevertheless a company which in all its contracts inserted a clause that there was to be no liability to pay, except out of their capital, stock, and shares. The practical effect would not be precisely the same, because he would be liable to the costs of the amalgamation and any incidental debts which were not covered by the limitation, but he would be very nearly in the same position as a shareholder with shares fully paid up in a limited company. Then this answer which is sent states that they have allotted the shares, but it states merely that he is to be credited with his proportion of the assets of the *Progress Company*. We know what the result of that would be. Some portion of the assets had been handed over, and some portion of the liabilities paid, and there was a small balance one way or the other, it does not appear which, but the matter could not be completed on account of the variation in the deeds. The practical result would be that *Wynne* would be a shareholder in an unlimited company without anything paid at all. In my opinion it is our duty to say that he has not become a shareholder. The Act of Parliament says that to constitute a shareholder a man must have agreed to become a member of the company, and must be put on the register. The result of the documentary evidence is that there is no agreement and no amalgamation, neither is there any agreement between him and the *United Ports Company*. There is an offer and no acceptance of the offer. There is a letter written by a person having no authority to write what he did, pretending to make an acceptance on different terms. The whole case as put against Mr. *Wynne* is that he was told that he was on the register, and that he did not object to that in time. It is not necessary to lay down in this case that if a man is told he is on the register,

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when he never sent any offer or proposal at all, he is not obliged to answer that; for I think that if, as in this case, a person makes some proposal, and he knows that there is some mistake, it is his business, within a reasonable time, to take some steps. But we have to look at all the circumstances, and we find that in this case Mr. *Wynne* is a lawyer, and he was away for the Long Vacation, yachting, and he got this letter when he put into *Dublin*. He could not very well have taken any immediate steps, for the Courts were not open, and if he had gone to the Vacation Judge, I doubt whether he would have entertained a summons to take him off the register. He did not receive the letter till the end of August, and he made his application tolerably early in October. I do not believe that any creditor could really be prejudiced in the interval, and before the winding-up order he made his objection. There is a considerable distinction, I apprehend, between a voidable contract which is capable of being avoided and a void contract which is capable of being affirmed. Here there is no contract at all, and the most you can say is that he has notice that they are going to treat him as a shareholder, and by not objecting to it he may have ratified and assented to it.

Under these circumstances I think we are justified in holding that he has not assented to the contract, and therefore the order of the Vice-Chancellor must be reversed.

Solicitors for the Appellant: Messrs. *Woodrooffe & Plaskitt.*
Solicitor for the Respondent: Mr. *Pulbrook.*

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[1871 H. 180.]

Production of Documents—Protection—Further Affidavit.

Plaintiffs, being called upon for an affidavit of documents, filed an affidavit specifying various documents as to which they claimed protection, on the ground that they were evidence of their own title. An order was made for their production. The Defendant afterwards obtained an order for a further affidavit, and the Plaintiffs filed an affidavit specifying various documents, including some which had been produced under the former order, and contained matter appearing to support the Defendant's case, and claiming protection for them on the ground that they exclusively related to the Plaintiffs' title, and did not evidence or support any part of the case made by the Defendant. Vice-Chancellor *Malins* having ordered their production:—

Held, on appeal, that production ought not to be ordered at once, but that the Plaintiffs must file a further affidavit, and that the form in *Minet* v. *Morgan* (1) was the right form.

THIS was a motion by the Plaintiffs by way of appeal from an order of Vice-Chancellor *Malins* for production of documents.

The bill was filed in July, 1871, by the Corporation of *Hastings* to prevent the Defendant, who was a contractor, from depositing earth and stones on the beach in front of *Warrior Square* at *Hastings*, between high and low water mark. The Plaintiffs claimed to be owners of the shore under letters patent granted by Queen *Elizabeth*. The Defendant, by his answer, did not set up any title in himself, but alleged that the shore at this point was not included in the letters patent, and belonged either to the Crown or to a Mr. *Eversfield*. In support of this, he referred to an action of *Mace* v. *Philcox*, in which, in 1864, *Mace*, a lessee from the Crown, recovered judgment in an action for trespass against a person who had placed bathing machines on the shore under a license from the corporation; and to an action of ejectment, in which *Tutt*, who claimed title under Mr. *Eversfield*, had recovered part of the foreshore from *Dewdney*, who claimed under the corporation.

The Defendant, having answered the bill, took out a summons

(1) *Ante*, p. 361.

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for the production of documents by the Plaintiffs. The Plaintiffs filed an affidavit, setting forth two schedules of documents, and objecting to produce those in the second schedule, as to those in the first part, on the ground that they were privileged communications, and as to those in the second part, on the ground that they were "title deeds and documents evidencing and shewing the title of the Plaintiffs to the beach in question in this suit." Among them were the corporation accounts from the year 1838 to the year 1872.

On the 10th of May, 1872, an order was made for production of the documents in the second part of the second schedule.

A further affidavit as to documents was filed by the Plaintiffs on the 11th of May, 1872. By this affidavit the town clerk stated that the documents mentioned in the second part of the second schedule to the former affidavit were title deeds and documents evidencing the title of the Plaintiffs to the beach in question, and did not, nor did any of them, as he believed, make out, evidence, or support the case, or any part of the case made by the Defendant, save that in the corporation accounts from 1838 to 1872, mentioned in such second schedule, were books numbered 17 and 18, which contained items relating to the actions of *Tutt* v. *Dewdney* and *Mace* v. *Philcox*; and he submitted that he was not bound to produce any of the books, but that, if the Court held him bound to produce the books 17 and 18, he ought to be at liberty to seal up all except the above-mentioned items. He also stated that he had found a number of documents, which he scheduled, but claimed protection for them, as having been prepared by the then professional adviser of the corporation for the purposes of litigation then pending.

On the 10th of December, 1872, an order was made by which the Judge, being of opinion that the former affidavits were insufficient, directed the Plaintiffs to file a further affidavit.

The town clerk, on the 13th of February, 1873, filed a further affidavit, stating that he had, since filing his former affidavit, discovered a large mass of old documents, which he had set forth in the schedule thereto, and that all such last-mentioned documents mentioned in the second part of such schedule, so far as they related to the matters in question in this suit, were, as he

verily believed, title deeds and documents evidencing and shewing and relating exclusively to the title of the Plaintiffs to the beach in question, and did not, or did any of them, as he believed, make out, evidence, or support the case, or any part of the case, made by the Defendant.

Part 2 of the schedule contained a list of considerably more than 1000 documents, and included a good many which had been actually produced and examined under the previous order of the 10th of May, 1872, and the Defendant considered that some of them contained material evidence in his favour.

The Defendant then took out a summons for the production of various documents comprised in the second part of the schedule to the last affidavit. This summons was adjourned into Court, and on the 12th of July Vice-Chancellor *Malins* made an order for production (1).

(1) 1873. July 12. WN (8/3)/168

SIR R. MALINS, V.C.:—

I have already intimated the opinion, to which I adhere, that if the question between the parties rested solely upon that passage in the affidavit, it does sufficiently protect the documents by swearing that they relate exclusively to the title of the Plaintiffs, and that therefore the production of them could not be enforced. Then the second point which has been mainly argued is this, that it has happened that some of the documents scheduled to this affidavit, all of which are stated not to contain any evidence whatsoever in support of the Defendant's title, and to relate exclusively to the Plaintiffs, have accidentally been produced. Mr. *Cotton*, in his opening, specified particularly the documents included under No. 99—No. 99 books of record, marked respectively 14, 15, 16, 17, 18, 19 and 20, to the year 1872. Now those documents have been previously produced to the Defendant; he has had an opportunity of inspecting them, and there have been read, particularly from the books 15, 17, and 18, many entries which it is contended by the Defendant go to prove his title, and to disprove that of the Plaintiff. Then, if that be true, on the principle laid down by Lord Justice *Knight Bruce*, in *Combe* v. *Corporation of London* (1 Y. & C. Ch. 631), as I conceive, they are privileged, unless the Court sees on the affidavit itself that the Defendant erroneously represents or misconceives their nature. Nobody suggests here that the town clerk intended to misrepresent, but it has been contended that he has misconceived the nature of the books, and having misconceived the nature of the books, it comes within the principle of *Noel* v. *Noel* (1 D. J. & S. 468), and *Wright* v. *Pitt* (Law Rep. 3 Ch. 809), in which *Noel* v. *Noel* was mainly relied on, and which authority was followed only this week in the case of the *Imperial Land Company of Marseilles* v. *Masterman*, which is in the *Weekly Notes* published to-day, in which also a certain document having been produced which referred to another document, that led to a suspicion whether there were not other documents which had not been disclosed,

(a) 8 C. 9 Jur. N.S. 589
(b) WN (8/3)/168

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CORPORATION OF HASTINGS v. IVALL.

Mr. *Glasse*, Q.C., and Mr. *Ellis*, for the Appellants, referred to *Wright* v. *Pitt* (1); *Noel* v. *Noel* (2); *Combe* v. *Corporation of London* (3); *Minet* v. *Morgan* (4).

and, considering that the documents referred to in the document which had been produced belonged to the Defendants, the Messrs. *Goschen*, because they were in the hands of the firm of solicitors whom I regarded as their solicitors, I ordered a further affidavit to be made with a view to production. In the present case the entries have been read, and I will take only one. The corporation by this bill assert that they are entitled to the stone beach—the sea shore, in fact, where this rubbish has been shot. Now are they so? That is a question that will have to be decided in the cause. There is an entry in book 15, at page 327, in which the town clerk suggests that steps should be taken to ascertain or to do something between the corporation and the Crown with reference to this very part of the shore. "I have to recommend," the town clerk says, "that an application should be made to the Commissioners of Woods," that is, to the Crown, "for a lease for public purposes of the local board alone of the sea shore at low water mark, from the *Priory* to *St. Leonards*," which covers the *locus* in dispute. Therefore, here is the town clerk recommending to the town council to apply to the Commissioners of Woods for a lease of the very sea shore to which they now in this suit say they are absolutely entitled, and have been entitled ever since the reign of *Elizabeth*. It is very true at p. 130 there is another entry, in which the board determine not to apply to the Commissioners of Woods for a lease of the stone beach west of the *Priory*. If that entry had gone on to say that they declined, inasmuch as they had a good title to that under the charter of *Elizabeth*, that would have been something entirely negativing the former entry; but I do not read it as amounting to anything of the kind. There is no denial, no assertion on their part, and therefore this entry cannot be regarded as unimportant, because it goes to shew that in the view of their legal adviser, the town clerk, they had not got the title, and were to apply to the Crown for it; whereas in this suit they are asserting that they have had it ever since the reign of *Elizabeth*. It is not necessary in these cases to prove entries, or to prove documents which will prove the title. All that is necessary is, that they may have some influence in affecting the views of the Court, enabling the Court to come to a right conclusion as to whether there is a title or not. The entry as to the pier masters applying for extra salary appears to me to have very little bearing upon the case, and I do not attach much importance to it. Still I cannot say that even that may not have some effect in enabling the Court at the hearing of this cause to come to the conclusion whether the corporation are or are not entitled to the right they claim over this part of the sea shore.

Now, therefore, it seems to me that these entries fall within exactly the description in *Noel* v. *Noel* and *Wright* v. *Pitt*, and the passage I have referred to in the judgment of the Lord Justice

(1) Law Rep. 3 Ch. 809.
(2) 1 D. J. & S. 468.
(3) 1 Y. & C. Ch. 631.
(4) *Ante*, p. 361.

Mr. *Cotton*, Q.C., and Mr. *Hemming*, for the Defendant :—

Our case is, that for a long time the Plaintiffs claimed nothing under their grant except a tract lying east of the *locus in quo*. We admit that if the Plaintiffs state sufficiently by affidavit that the documents contain nothing but evidence in support of their own case, they are not bound to produce them; but if anything else put in by the party contradicts his affidavit, the affidavit is not conclusive. Here some of the documents which it is sought by the latter affidavit to protect have actually been produced and do contradict the affidavit. Then the terms of the affidavit are insufficient. It is necessary to say that the documents do not tend to prove the Defendant's case or to disprove the Plaintiffs'.

[The LORD JUSTICE JAMES :—There seems to have been a mere blunder, and there ought to be an opportunity of explaining it.]

We submit that further affidavits of that kind would be very dangerous, and there is no precedent for them. If a further affidavit is allowed, it cannot protect the documents unless it states clearly that they contain nothing impeaching the Plaintiff's title. There should be such an affidavit as in *Minet* v. *Morgan* (1).

SIR W. M. JAMES, L.J. :—

We are of opinion that an order for production ought not to be made at present, but that the town clerk must make a further affidavit. *Minet* v. *Morgan* is a very good precedent as to its form.

Solicitors: Mr. *J. H. Lydall;* Messrs. *Walker & Martineau.*

Knight Bruce, when Vice-Chancellor, in *Combe* v. *Corporation of London* (1 Y. & C. Ch. 631), that the documents which they have accidentally had access to, do throw such an extent of doubt upon the accuracy of the representation made in the affidavit itself, that the affidavit cannot be allowed to protect documents when it does appear that the maker of the affidavit has misconceived the effect of the evidence which is in his possession. Therefore the result of that is that I hold, in accordance with all the cases that have been cited, the privilege which is claimed is altogether removed by the circumstances I have referred to, and that, consequently, the documents must be produced generally.

(1) *Ante*, p. 361.

L. JJ.
1873
Aug. 7.

In re DAGENHAM (THAMES) DOCK COMPANY. *Ex parte* HULSE.

Penalty—Forfeiture—Vendor and Purchaser—Company—Ultrà vires.

A company incorporated by Act of Parliament for making a dock agreed with a landowner to purchase a piece of land for £4000, of which £2000 was to be paid at once, and the remaining £2000 on a future day named in the agreement, with a provision that if the whole of the £2000 and interest was not paid off by that day, in which respect time was to be of the essence of the contract, the vendors might re-possess the land as of their former estate, without any obligation to repay any part of the purchase-money :—

Held (affirming the decision of the Master of the Rolls), that this stipulation was in the nature of a penalty, from which the company was entitled to be relieved on payment of the balance of the purchase-money, with interest.

Per James, L.J. :—*Semble*, that if, on the true construction of the agreement, this stipulation had not been merely in the nature of a penalty, it would have been void as *ultrà vires*.

THIS was a motion by Sir *Edward Hulse* and his trustees, by way of appeal from a decision of the Master of the Rolls refusing to order delivery up of certain lands to the applicants.

The *Dagenham* (*Thames*) *Dock Company* was incorporated by statute 18 & 19 Vict. c. clxii., for the purpose of making a dock on the north side of the *Thames*, and the time for the purchase of lands and the completion of the works was extended by 25 & 26 Vict. c. ccxiii. till the expiration of five years from the passing of the latter Act.

On the 14th of August, 1865, an agreement was entered into between Sir *Edward Hulse* (tenant for life of a settled estate), of the first part, *G. E. Eyre* and *F. Eyre* (trustees with a power of sale) of the second part, and the company, of the third part, that the trustees of the power of sale should sell, and the company should purchase, the lands therein described for £4000, of which £2000 was to be paid on the execution of the agreement, whereupon the company was to be let into possession, and the remaining £2000, with interest from the date of the agreement, was to be paid on the 1st of November then next, when the purchase was to be completed. This agreement contained a clause providing that in case the second sum of £2000 and all interest thereon should

not be entirely paid off and discharged by the 7th of August, 1867, in which respect time should be of the essence of the contract, it should be lawful for the trustees to re-enter upon the lands and re-possess and enjoy them as in their former estate, and to eject the company, without any obligation on the part of the trustees to repay to the company any part of the £4000 which might have been previously paid, or any interest thereon, which should be absolutely forfeited to the vendors. And it was provided that, save as expressed by the agreement, the parties should stand in the same position with reference to the *Companies Clauses Consolidation Act*, 1845, the *Lands Clauses Consolidation Act*, 1845, and the *Harbours, Docks, and Piers Clauses Act*, 1847, and the special Act of this company, as if this agreement had not been made.

The first £2000 was paid on the execution of the agreement, and the company was let into possession.

By an agreement of the 6th of August, 1867, indorsed on the above agreement, the time for payment of the remaining £2000 was extended until the 1st of August, 1868.

By agreement, dated the 1st of August, 1868, made between Sir *E. Hulse*, of the first part, *G. E. Eyre* and *H. H. Berens* (the then trustees) of the second part, and the company, of the third part, it was agreed that the time for payment of the £2000, with an arrear of interest, should be further extended till the 1st of November, 1869. And it was further agreed that, if the undertaking should be abandoned, or in case the £2000, with all interest from the date of the agreement of the 14th of August, 1865, to the day of payment, should not be entirely paid off and discharged by the 1st of November, 1869, in all which respects time was to be of the essence of the contract, it should be lawful for the trustees, their heirs or assigns, notwithstanding that the conveyance might have been executed, and notwithstanding any intermediate negotiation or correspondence, to enter into and upon and take possession of the lands and all works thereon, and the same to have again, retain, re-possess, and enjoy as in their former estate, and to eject the company therefrom, without any obligation on the part of the trustees named in the first agreement, or the trustees named in the present agreement, to repay to the company the £2000 already paid, or any part of the balance of the £4000 still remaining due,

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which might have been previously paid, or any interest thereon, which should be absolutely forfeited to the trustees, any conveyance of the land, and anything therein or in the agreements to the contrary notwithstanding; but nothing in the agreement was to prejudice the right of the vendors to take proceedings to enforce completion if the purchase was not completed by the 1st of November, 1869. And it was declared, that in all respects and in every case time should be of the essence of the contract; and that all the powers by the first agreement given to the parties thereto of the first and second parts, their respective heirs, executors, administrators, or assigns, might be exercised by the parties hereto of the first and second parts, their respective heirs, executors, administrators, and assigns. And the company covenanted with the trustees that the company would, on the 1st of November, 1869, pay to the trustees, their heirs, executors, administrators, and assigns, the £2000, the balance of the purchase-money, with interest from the 14th of August, 1865, and the costs therein mentioned.

The money was not paid. On the 7th of August, 1869, a petition was presented to wind up the company; and on the 11th of December, 1869, an order for winding up was made.

On the 25th of May, 1870, the trustees commenced an action of ejectment; and on the 20th of February, 1871, an order was made by consent in the winding-up that the Plaintiffs should be at liberty to sign judgment, they undertaking not to issue execution until further order, and to abide by any order the Court might make as to the property affected by the judgment, and as to the costs in the action, or otherwise.

On the 26th of March, 1873, the Appellants applied for an order that they might be at liberty to issue execution, and that the liquidator and the company might deliver up to the applicants possession of the lands free from all claims by the company. The Master of the Rolls offered to the applicants an order for sale and payment, as in the ordinary case of vendor's lien. This offer being declined, His Lordship refused to make any order.

Mr. *Fry*, Q.C., and Mr. *B. B. Rogers*, for the Appellants, contended that effect was to be given to the contract according to its plain terms.

Mr. *Roxburgh*, Q.C., and Mr. *Speed*, for the liquidator, were not called upon.

SIR W. M. JAMES, L.J.:—

In my opinion this is an extremely clear case of a mere penalty for non-payment of the purchase-money. If the agreement were to be construed as the Appellants contend, I greatly doubt whether it would not be void as being *ultrà vires*. It would be a strong thing to hold that a company authorized to buy land for purposes beneficial to the public could enter into a bargain with a landowner that if ever so small a portion of the purchase-money which the company is to pay him remains unpaid on a particular day, he shall be entitled to take back the land with all the works which have been executed upon it by the company. Such a contract would be a grievous wrong, not only to the shareholders, but to the debenture-holders of the company; and if it were to be held good, I do not see what is to prevent a bargain for forfeiting the whole undertaking from being upheld. I agree with the Master of the Rolls that this is a penalty from which the company are entitled to be relieved on payment of the residue of the purchase-money with interest.

SIR G. MELLISH, L.J.:—

I am of the same opinion. I think that the last agreement makes it more clear than any of the others that this was only a penalty. I have always understood that where there is a stipulation that if, on a certain day, an agreement remains either wholly or in any part unperformed—in which case the real damage may be either very large or very trifling—there is to be a certain forfeiture incurred, that stipulation is to be treated as in the nature of a penalty. Here, when you look at the last agreement, it provides that if the whole £2000 with interest, or any part of it, however small, remains unpaid after a certain day, then the company shall forfeit the land and the portion of the purchase-money which they have paid. It appears to me that this is clearly in the nature of a penalty, from which the Court will relieve.

Solicitors: Messrs. *Wilkins, Blyth, & Marsland;* Messrs. *Lake & Co.*

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Ex parte MORLEY. *In re* WHITE.

Bankruptcy—Joint and Separate Estate—Alteration of Estate by Partnership Deed—Surviving Partner.

By a partnership deed it was stipulated that *A.* and *B.* should be partners in the profits of the business, the capital of which belonged to *A.*; and that on the death of *A.* the partnership should be dissolved, and *B.'s* share of profits should thenceforth belong to *A.'s* representatives, and that his representatives should thenceforth carry on the business, and that *B.* should receive from them his share of the profits up to *A.'s* death. *A.* died during the partnership, having appointed *B.* his executor. *B.* carried on the trade for fourteen months, and then filed a petition for liquidation. Part of the stock-in-trade which existed at *A.'s* death still remained in specie, but the greater part had been disposed of by *B.* in the course of the business, and fresh stock-in-trade bought by him:—

Held (affirming the decision of Mr. Registrar *Pepys*), that the partnership deed had not the effect of converting the stock-in-trade into separate estate of *A.*, but that so much of the present assets as had been in existence at *A.'s* death was applicable as joint estate to pay the joint creditors of the firm, and so much as had been bought since *A.'s* death was applicable as separate estate of *B.*:

Held, also, that the previous decision in this case (1) had concluded the question of the Court in which the joint estate was to be administered, and that it could not be reopened.

THIS was a motion by the trustees of the marriage settlement of the debtor, *William Thompson White*, by way of appeal from an order of Mr. Registrar *Pepys*.

The material facts of the case will be found in a previous report (1); but it is desirable to state more particularly some of the provisions of the partnership articles. By clause 4 it was provided that the capital of the partnership should consist of the value of the premises in which the business was carried on, to which *W. White* was solely entitled, and of the stock-in-trade, book debts, and other assets and effects in the business, according to the value thereof as appearing in the stock-taking of the 31st of December, 1853. Clause 5. That if *W. White* should at any time be of opinion that additional capital was required, or that less capital would be sufficient, he should be at liberty to bring in or withdraw capital. Clause 6. That *W. T. White* &

(1) *Ante*, p. 214.

Collins might, with the consent of *W. White*, from time to time bring into, or leave in, the partnership such sum or sums of money as they might think fit, which should thenceforth be part of the capital. Clause 7. That each partner should, out of the profits of the business, be allowed interest at £5 per cent. per annum on the amount of capital from time to time belonging to him employed in the business. Clause 36. "That in case of the death of the said *W. White* during the said partnership, the said partnership shall immediately thereupon be dissolved and determined, and the shares of the said *W. T. White* and *C. G. Collins* in the profits and gains of the said partnership shall thenceforth belong to his, the said *W. White's*, personal representatives, or the party or parties to whom the said *W. White* shall by his last will and testament have bequeathed such shares, and such business shall, in the last-mentioned case, thenceforth be carried on by the personal representatives of the said *W. White*, or by such person or persons as he may by his said last will and testament, or otherwise, appoint for that purpose; and the said *W. T. White* and *C. G. Collins* shall remain and continue in the said business to assist the representatives, or party or parties appointed as aforesaid, for the term of six calendar months from the day of the decease of the said *W. White;* and each of them, the said *W. White* and *C. G. Collins*, shall be entitled to receive from such representatives, or party or parties as aforesaid, a sum equivalent to his share of profits for six calendar months, according to the profits which may have been made by the said co-partnership for the then last two preceding half years as appearing on the then two last half-yearly stock-takings, and the sum of £500 in addition; and in the event of such death, the personal representatives of the said *W. White*, or other the party or parties appointed as aforesaid, shall, within two calendar months from the day of his decease, pay to the said *W. T. White* and *C. G. Collins* respectively their respective shares of the gains and profits of the said partnership from the then last half yearly stock and account taking up to the day of the decease of the said *W. White*, such shares to be ascertained in manner as hereinbefore provided in case of the death or going out of either of them, the said *W. T. White* and *C. G. Collins;* and shall, within six calendar months from the day of the decease of the said *W. White*, pay to

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the said *W. T. White* and *C. G. Collins* the amount hereinbefore provided to be paid to them for their services, and the sum of £500 in addition, and also the amount of their respective capital of any of them in the said partnership, with interest on such capital from the day of the decease of the said *W. White*."

It now appeared that the firm was insolvent at the death of *W. White*, and that *W. White's* separate estate was also insufficient for payment of his debts. The business having been carried on by *W. Thompson White* until his liquidation, the question now arose how the £48,000 mentioned in the former report (1), and which arose from the conversion of the stock-in-trade, was to be disposed of.

It appeared that of this £48,000, £3207 8*s.* arose from the sale of stock-in-trade existing at the death of *W. White*. Of the remaining £44,792 12*s.*, about £37,000, according to the evidence for the trustee, arose from the sale of stock purchased by *W. T. White* in the course of carrying on the trade since *W. White's* death; but this was disputed. As to the residue, amounting to between £7000 and £8000, there was a deficiency of evidence.

Mr. Registrar *Pepys* made an order declaring that the £48,000 was applicable to the payment of the creditors of *W. Thompson White* and *W. White* as partners, and to the payment of the separate creditors of *W. T. White;* and further declaring that £44,792 12*s.*, part of the £48,000, was applicable to the payment of the separate creditors of *W. T. White*, and £3207 8*s.*, the residue thereof, to the payment of the joint creditors of *W. T. White* and *W. White;* liberty being given to any joint creditor to apply within twenty-one days for an order that a further portion of the £48,000 might be declared applicable to the payment of joint creditors.

The Appellants, who were Plaintiffs, as creditors of *W. White* under a covenant in his marriage settlement, in an administration suit, appealed against this order. One of them was also a creditor of the firm of *W. White* and *W. T. White* at the death of *W. White*, but had not proved as such.

(1) *Ante*, p. 214.

Mr. *Hemming*, and Mr. *Wingfield*, for the Appellants:—

The Court of Bankruptcy has no jurisdiction to administer the joint estate of the late partnership, which must be administered in the suit. By the operation of the partnership deed the son, upon the death of the father, ceased to be a partner and to have that qualified interest in the partnership assets which usually belongs to a surviving partner, the whole being converted into separate estate of the testator. If a partnership deed provided that on a certain future day one partner should go out, and the whole assets belong to the other, and the retiring partner afterwards became bankrupt, what could the Court of Bankruptcy have to do with the partnership without an adjudication against the continuing partner?

[The LORD JUSTICE JAMES:—It would have everything to do with the partnership, unless all the partnership debts had been paid.]

We submit that where a partner dies, and his estate is being administered by a suit in chancery, the Court of Bankruptcy has no jurisdiction to touch it. Here, if we are not allowed to argue as joint creditors for want of proof, there are no joint debts at all, for no one has proved, and the Court of Bankruptcy has no jurisdiction.

[The LORD JUSTICE JAMES:—We have decided that the Court of Bankruptcy is the proper forum. The meaning of our order was, that if the trustee had taken possession of any property to which somebody had a right paramount to that of the trustee, who only represents creditors, the Court of Bankruptcy should adjudicate upon that right, and restore the property; but that the administration of the property between creditors entitled to have it administered, either as joint or separate creditors, should be in bankruptcy.]

The point argued and decided on the former occasion was not that one Court or the other was to administer, but only that the property, having got into the hands of the bankrupt's trustee, could not be taken away without the order of the Court of Bankruptcy; in other words, that the Court of Bankruptcy, being in possession, must decide which Court should have the administration. We are

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now asking to be allowed to argue that very question before the Court of Appeal in Bankruptcy. A comparison of the order asked and the order made, shews clearly that the former decision went no further than we say.

Ellis v. *Silber* (1) is in favour of the jurisdiction being in Chancery. The authorities do not support the view that the Court of Bankruptcy has any power of administering an estate which before the recent Act it had no jurisdiction to administer. Now, *Hankey* v. *Garret* (2), *Brett* v. *Beckwith* (3), and *Lodge* v. *Prichard* (4), shew that according to the law before the Act of 1869, the Court of Bankruptcy would have had no jurisdiction over the joint estate, and sect. 72 of that Act appears only intended to give the Court of Bankruptcy a new power of deciding questions, not a larger area of administration.

[The LORD JUSTICE JAMES:—We consider that point to have been decided against you on the former occasion, and we cannot hear argument upon it now.]

We have much more to urge, and many more authorities to cite, but if the Court declines to hear us on the point, we abstain from pressing it, and do not go into the evidence which, as we say, shews that the Registrar ought to have attributed a much larger sum to the joint estate.

Then, on the terms of the partnership deed, we say that the whole assets of the firm became the separate estate of *W. White* on his death, as in *Ex parte Ruffin* (5) and *Ex parte Williams* (6). Any directions in the will authorizing the executor to carry on the trade are ineffectual, for the rights of the testator's creditors are paramount to the will.

Mr. *De Gex*, Q.C., and Mr. *Winslow*, for the trustee, were not called upon.

SIR W. M. JAMES, L.J.:—

I am of opinion that this appeal, which has been argued at great

(1) *Ante*, p. 83.
(2) 1 Ves. 236; 3 Bro. C. C. 457.
(3) 3 Jur. (N.S.) 31.
(4) 1 D. J. & S. 610.
(5) 6 Ves. 119.
(6) 11 Ves. 3.

length, is without foundation. In the first place, as to whether the administration was to be in Bankruptcy or in Chancery, that is exactly the question which we determined upon the former occasion. It was absolutely necessary, in order to distribute the assets of the bankrupt among the creditors, to ascertain what the claims on those assets were, and it was manifestly a case for the application of the 72nd section, which was intended to enable the Court of Bankruptcy to determine all questions arising on those claims, so as to ascertain what the net assets were which were distributable among the creditors, and also to determine what were joint assets and what were separate assets, and who were the separate creditors and who were the joint creditors, and what their respective rights were. It appears to me that that was precisely what we determined, and it would be a scandal upon the administration of justice, if, after we have stopped the suit in Chancery, and prevented the receiver in Chancery from interfering with the assets, we were then to say, There are a great quantity of assets which we will not administer, but will send them back to be realized and administered in the Court of Chancery, on principles which the Court of Chancery has borrowed from the Court of Bankruptcy.

The only question that seemed to me fairly open to argument is, Has anything occurred which has left any part of those assets now to be distributed as the separate estate of *Wm. White*, the father? It appears that, by another motion made contemporaneously with this summons, or whatever it is called in the Bankruptcy Court, the Registrar has found that there were large portions of the assets that could be traced, and which remained in specie, and were still the separate assets of *Wm. White*, which were not employed in the trade or business which he was carrying on with the son. With regard to the other assets, they stand in this way: the father and the son carried on business together in partnership; the father is said to be the owner of all the capital—if capital there really was in the business, since capital of course means the surplus of assets over the liabilities. He was the only person supposed to be a capitalist, and the son and another person came in as junior partners. There was a provision in the deed that they were to share in the profits, and that upon notice the junior partners were

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to go out, and the father was to remain in possession of the assets; and there was a provision that, in case of his death during the partnership, a certain sum should be paid to the son, and the legal personal representatives of the father should be owners of the business. There was nothing in that deed, if it could have been valid as against the rights of creditors, which professed to say that the son or the other partners going out were not to have their usual legal inherent right to be indemnified against the debts, in the mode in which the Court of Bankruptcy or the Court of Chancery indemnifies a person in respect of debts to which he is liable, but from which he is entitled to be exonerated by some one else. The mode in which that sort of thing is done is this: that if there be two estates, a joint estate and separate estate, the Court takes care that the joint assets are applied in payment of the debts of the joint creditors, before any part of them goes to the separate creditors. The trade assets, beyond all question, were joint assets, so far as they remained in specie. Those, therefore, were to be applied in payment of the joint creditors, so far as there were any joint creditors remaining, and if there was a surplus, that would be applied among the persons entitled to it; but whether there is a surplus, is a question which we have not before us now. But then, with regard to any assets, or anything that was bought by the executor himself, or the son who happened to be the executor, when he was conducting the trade, whether in pursuance of the will or not, everything that he bought and became the sole debtor for was his in point of law. He had bought those assets, and he was the legal owner of them, and if he owed any money to the estate, he was bound to pay that money to his father's estate; but that could not make the assets which he himself bought, and the debts which he had himself incurred, part of the separate assets or debts of the father. In a business that is carried on after the death of the testator, as in this case, the ordinary course is that the stock changes constantly, that the stock of to-day is sold and other stock bought, old debts are paid and new debts are contracted, and therefore we are not surprised to find that the great part of the moveables here are things which were bought by the executor himself, carrying on trade on his own liability and at his own risk.

That being so, it appears to me that there is no pretence for saying that either of those two—either the joint assets which remained in specie as belonging to the joint trade, or any part of the separate assets which were created by the separate trading operations of the son after the decease of the father—can be, in any view of the case, separate assets of the estate of *William White*, who died some years ago. I am of opinion, therefore, that, as to the question of this being part of the separate estate, it is plain that the gentlemen for whom Mr. *Hemming* appears, not having proved either as joint creditors of the firm or as separate creditors of the son, cannot be heard upon any question which affects them as joint creditors, or which affects them as separate creditors of the liquidating debtor. Their only position before us is as creditors of the separate estate of *William White*, the father, just in the same character in which they have obtained an order declaring them to be entitled to a certain portion of the assets. Being of that opinion, I think the appeal must be dismissed with costs.

SIR G. MELLISH, L.J.:—

I think the only question that is properly before us on this appeal is whether the separate creditors of *William White*, the father, are entitled to any part of this £48,000. I think that it is not open to Mr. *Hemming* to represent the joint creditors, since his clients have not proved, and that we cannot determine on this occasion any question between the joint and separate creditors of the son. And I also entirely agree with the Lord Justice that our decision on the motion was a decision that the Court of Bankruptcy was the proper Court to administer this fund.

Now, if we look at the facts independently of the particular provisions in the partnership deed, there is no doubt upon the question. The father and son having carried on business in partnership, and the father having died, there being a large quantity of assets which were the assets of the partnership, the son carried on business with those assets, and then became a liquidating debtor. Under these circumstances it would be quite clear that all the assets of the partnership which remained in specie would be divided among the joint creditors, and that those portions of the assets which had been purchased by the son subsequently to

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the death of his father would be separate assets, to be divided among his own separate creditors.

The only question, then, is, whether the particular provisions of the partnership deed by which it is provided that the capital from the commencement is to be treated entirely as the capital of the father, and that on the death of the father the son is from thenceforth to cease to be entitled to any share of the profits, and is only to be entitled to receive certain sums out of the father's estate, make any difference; and in my opinion they do not. In the first place, it is quite clear that they will not at law take away the legal estate, which would have been vested in the son as surviving partner, in the chattels purchased during the partnership. The deed could not affect the legal estate in these future acquired goods, and the only question is, what is the true effect of this deed in equity? Does it mean to alter the rights of the creditors and vest the entire assets in the father's representative, or does it merely mean to vest them in him subject to the payment of the debts? It appears to me that the fair and reasonable construction of the deed, there being nothing to the contrary in its provisions, is, that it was only intended to vest them in the father's representative, subject to the payment of the debts. It would, in my opinion, be very unjust to the son if, on the death of the father, the firm being largely indebted as it was, he was not to be entitled to apply the partnership assets in payment of partnership debts for which he was liable. There appears to me to be nothing in the deed to compel us to come to that conclusion; and my opinion is that the true effect of the deed is that it does not prevent the assets, which were the joint assets of the two when the father died, continuing to be joint assets; and in the event of the son's bankruptcy, I am of opinion that the joint creditors are entitled to those joint assets. The appeal will be dismissed with costs.

Solicitors: Messrs. *I. H. Tyas & Huntington;* Mr. *W. Bristow.*

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[1866 G. 178.]

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[1870 P. 110.]

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June 25, 26, 27, 28, 30; *July* 1; *Aug.* 5.

Company—Suit by Shareholder on behalf of himself and other Shareholders—Contrivance to procure Settling Day—Ultrà Vires—Illegal Agreement—Colourable Payment—Estoppel—Indemnity.

The *Laffitte Company* was formed to purchase the business of *C. Laffitte & Co.*, of *Paris*. The *Paris* firm would not complete unless 40,000 shares were taken. To satisfy them the *International Company*, which was promoting the *Laffitte Company*, guaranteed a subscription for 40,000 shares, and applied to the *National Bank* to discount their promissory notes for £200,000, which the bank agreed to do upon the guarantee of the *Laffitte Company*, which was signed by *Kitson*, *Gautray* and *Bate*, three of the directors, and sealed by the company, that, until the notes were paid, the *Laffitte Company* would leave in the hands of the bank an amount equal to the sum remaining due on the notes, and that if the notes were not paid the bank might pay them out of such amount. The £200,000 was accordingly carried to the credit of the *International Company*, who provided shareholders and paid the deposit and allotment money of £5 per share out of the £200,000, which thus got to the credit of the *Laffitte Company* at the bank. The bank, in order to enable the *Laffitte Company* to obtain a settling day on the *Stock Exchange*, gave a certificate that there was £200,000 standing to the credit of that company. Afterwards, the promissory-notes not being taken up at maturity, the *National Bank* paid them out of the £200,000. After an order had been made for winding up the *Laffitte Company*, a shareholder in that company filed his bill (*Gray* v. *Lewis*) on behalf of himself and all other the shareholders, except the Defendants, against the directors of the *Laffitte Company* and against the *National Bank*, to recover the £200,000 for the benefit of the *Laffitte Company* as having been applied in breach of trust. *Gautray* was out of the jurisdiction, and the Plaintiff entered an appearance for him, but subsequently dismissed the bill as against him before the hearing. A decree was made by Vice-Chancellor *Malins* against the bank, and *Lewis*, *Henshaw*, *Kitson*, and *Bate*, four of the directors of the *Laffitte Company*, who were privy to the whole of the transactions, for the restoration of the £200,000. The *National Bank* and *Lewis* and *Henshaw* severally appealed, but before the appeal came on the *National Bank* compromised the suit, with the sanction of the Court in the winding up of the *Laffitte Company*, *Lewis* and *Henshaw* being no parties to the compromise.

After this the *National Bank*, by its public officer, filed a bill (*Parker* v. *Lewis*) against *Lewis* and *Henshaw*, who were two of its own directors, and *McKenna*, its managing director, to compel them to make good the loss which

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the bank had sustained through the above transactions, and Vice Chancellor *Malins* made a decree accordingly.

Lewis, *Henshaw*, and *McKenna* appealed against this decree, and at the same time the appeal of *Lewis* and *Henshaw* in *Gray* v. *Lewis* was restored to the paper:—

Held, in *Gray* v. *Lewis*, that the suit ought to have been by the *Laffitte Company*, and that a bill by one shareholder on behalf, &c., could not be sustained.

Whether a decree could be made against the other Defendants after the dismissal of the bill against *Gautray*, *quære*.

Held, further, that the remedy, supposing the *Laffitte Company* to have a right to the £200,000, would have been at law by an action against the bank, for that the guarantee was *ultrà vires*, and known to the bank to be so, and was therefore no answer to the demand of the *Laffitte Company* for the sum which had stood to their credit:

Held, further, that the £200,000 never belonged to the *Laffitte Company* at all, for that the whole transaction was an illegal and fraudulent scheme, out of which no rights could arise as between the parties to it:

Held, therefore, that the bill in *Gray* v. *Lewis* must be dismissed as against *Lewis* and *Henshaw*, and without costs, they not asking for costs; and, *semble*, if they had asked for costs, they would not have been given.

Held, in *Parker* v. *Lewis*, that if the decree in *Gray* v. *Lewis* had been upheld, that in *Parker* v. *Lewis* would have been upheld also; but that, although where *A.* contracts to indemnify *B.* against a claim, and a judgment is obtained against *B.* in an action *bonâ fide* defended by him, and he pays the demand, *A.* cannot be heard to contend that the judgment was erroneous, the case is otherwise where there is no contract to indemnify, but only a claim to indemnity founded on a breach of trust; and that the Defendants were not estopped from saying that the *National Bank* had incurred no liability to pay anything to the *Laffitte Company*; and that as in the judgment of the Court of Appeal the *National Bank* had not incurred any such liability, the bill must be dismissed, but without costs, on account of the objectionable nature of the transaction.

THESE suits both came before the Court on appeal from decisions of Vice-Chancellor *Malins*, and were so closely connected that it is thought most convenient to report them together. The suit of *Gray* v. *Lewis* was instituted on behalf of the shareholders of *Charles Laffitte & Co., Limited*, to make the *National Bank* responsible for a sum of £230,000 alleged to have belonged to *C. Laffitte & Co., Limited*, and to have been improperly dealt with by the *National Bank*. The suit of *Parker* v. *Lewis* was a suit on behalf of the *National Bank* against three of its own officers, to compel them to make good the loss which the bank had sustained through the above claim of *C. Laffitte & Co., Limited*.

The company of *Charles Laffitte & Co., Limited*, was registered under the *Companies Act*, 1862, on the 8th of December, 1865. The objects of the company, as stated in its prospectus and afterwards in the articles of association, were "to extend the business of *Charles Laffitte & Co.*, of *Paris*, to this country and elsewhere, by converting it into a joint stock undertaking on the principle of limited liability." The capital of the company was to consist of three millions of money, in 150,000 shares of £20 each, of which £1 was to be paid as deposit and £4 on allotment. The prospectus stated that an arrangement had been concluded with Messrs. *Charles Laffitte & Co.*, of *Paris*, for the purchase of the goodwill of their business for the sum of £150,000, and that two-thirds of the purchase money was to be taken in shares, on which £10 per share would be credited as paid up. The prospectus then stated that negotiations were pending for incorporating with the company other banking and financial and commercial establishments, for the purpose of extending the sphere of its operations, and of affording to such establishments the opportunity of consolidating their businesses and of reducing the existing liability of their shareholders. The memorandum of association defined the objects of the company to the same effect, and the 4th clause of the articles of association provided that the directors might commence and carry on the business and operations of the company, or any department thereof, on or at any time after the registration of the company, notwithstanding that the whole of the shares might not have been subscribed for or allotted. The first directors of the company were to be Mr. *Charles Laffitte*, who was to be also the first president, Mr. *John Ennis* (now Sir *John Ennis*), Sir *John Gray*, M.P., M. *François Pierre Bayvet*, Mr. *Harvey Lewis*, M.P., Mr. *Frazer Bradshaw Henshaw*, Mr. *Leon Charles Grimoult*, Mr. *George Payne Kitson*, Mr. *Henri Bourlon*, Mr. *George Bate*, and M. *Amédée Gautray*; with power to appoint any further number.

It was further provided, by the 90th section, that the directors might invest any part of the moneys of the company in the purchase or acquisition of shares in any other company or corporation, or in the purchase or acquisition of the assets or business of any such company or corporation, or of any private person or firm, and might enter into, make, and carry out on behalf of the

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company, any deed, contract, or agreement in relation thereto; but that the company should in no case purchase any of its own shares.

One of the establishments alluded to in the prospectus, for the incorporation of which with this company negotiations were pending when the prospectus was issued, was the *Ottoman Financial Association*, of which *Kitson* was the chairman, and the Defendants *Lewis* and *Henshaw* were directors, and before the incorporation of *Charles Laffitte & Co., Limited*, preliminary arrangements had been made between the promoters of that company and the *Ottoman Company* to the effect that the *Ottoman Company* should take 35,000 shares in *Charles Laffitte & Co., Limited*, and hand over all the assets in payment of such shares, and then go into liquidation.

The principal promoters of *Charles Laffitte & Co., Limited*, were *Charles Laffitte, Kitson, Lewis, Henshaw, Bate*, and *Gautray*. *Laffitte*, however, would not agree to sell his business to the projected company until he was assured that 40,000 shares in the company would be subscribed for and taken in *London*. It was arranged that *Charles Laffitte & Co., Limited*, should be brought out in or about December, 1865, but it was found that no assets of the *Ottoman Company* would be forthcoming to enable them to take 35,000 shares, as proposed. The *Ottoman Company* thereupon applied for assistance to another company called the *International Contract Company, Limited*, of which *Kitson* was chairman; and on the 6th of December, 1865, a letter was addressed by the *International Contract Company* to Messrs. *Laffitte & Co.*, of *Paris*, in the following terms:—

"Gentlemen,—We hereby guarantee the subscription of 40,000 shares to *Charles Laffitte & Co., Limited*, as proposed to be established in conformity with the annexed prospectus; and we further guarantee the payment of £5 per share on the said 40,000 shares at the *National Bank* to the credit of the proposed new company. The payments to be made in instalments of £1 per share on application, and £4 per share within fourteen days after the allotment."

The *International Contract Company*, in their turn, took a

guarantee from the *Ottoman Company* to secure a subscription for 35,000 of the 40,000 shares, which was in these terms:—

"In consideration of your mediation in negotiating an amalgamation between this company and the proposed new company, *Charles Laffitte & Co., Limited,* and also in consideration of your providing this company with a credit with the *National Bank* to make the necessary payments, we hereby guarantee the subscription of 35,000 shares, and to pay thereon £1 per share upon application, and to pay £4 per share within fourteen days after the allotment. We engage to repay the advance from the proceeds of the call now due and from the first available assets of the company, and to leave the shares so purchased on deposit with trustees for the due security of the same."

In order to satisfy the requirements of Mr. *Laffitte,* and to place *Charles Laffitte & Co., Limited,* in a position to require a settling day on the *Stock Exchange,* without which the shares of the company would be unmarketable, it was necessary to make it appear that 40,000 shares had been subscribed for, and it was arranged that the *National Bank* should be one of the bankers of the new company *Charles Laffitte & Co., Limited,* that the bank should discount the promissory notes of the *International Contract Corporation* for £200,000, and that *Charles Laffitte & Co., Limited,* should secure the payment of such notes by agreeing not to withdraw the money which should be paid by the *International Contract Company* or their nominees for the 40,000 shares until the notes were duly taken up.

Lewis and *Henshaw* were directors of *Charles Laffitte & Co., Limited,* of the *Ottoman Company,* and of the *National Bank;* but were not connected with the *International Company.* Sir *Joseph McKenna* was managing director of the *National Bank,* with a large salary, but was not connected with either of the other companies.

On the 8th of December, 1865, on which day *Charles Laffitte & Co., Limited,* was registered, the following letter was written on half of that company to the *National Bank,* in pursuance of a lution passed at a meeting at which *Kitson, Lewis, Gautray,* and *Henshaw* were present:—

arles Laffitte & Co. hereby request that you will be good

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enough to discount the promissory notes of the *International Contract Company* to an amount of £200,000. The makers thereof have undertaken, if requested by us so to do, to apply for shares in this company, *Charles Laffitte & Co., Limited,* and to apply the proceeds of the notes for that purpose, and on behalf of parties who will take up the said shares; and *Laffitte & Co., Limited,* hereby undertake that, until the amount of the said notes are replaced to you, there shall stand to the credit of *Laffitte & Co., Limited,* an amount equal to the sum which may remain unpaid on the said notes; and if such notes be not paid at maturity, you shall be at liberty to pay same out of the balance which shall so stand to the credit of *Laffitte & Co., Limited,* without any further order or authority, and to cancel the notes dated the 8th of December, 1865."

This letter was signed by *Kitson,* as chairman, and *Gautray* and *Bates* as directors; sealed on behalf of the company, and countersigned by the secretary.

Upon the delivery of this letter a resolution was passed by a meeting of directors of the *National Bank,* at which *Lewis, Henshaw, McKenna,* and others were present, authorizing their committee of management to discount notes of the *International Company* to an amount not exceeding £200,000. The bank accordingly discounted promissory notes of the *International Company* for sums amounting to £200,000, and placed that amount, less the discount, to the credit of that company.

On the 9th of December the prospectus was issued, which stated that 25,000 shares had been privately subscribed for. The *International Contract Company* and its nominees applied for the 40,000 shares, and the deposits, and the allotment moneys upon them were paid by means of the money obtained by the discounting of the notes, which moneys, however, were drawn out in the ordinary way, by cheques passed through other bankers, and not coming in by way of payment of deposit and allotment moneys; those payments being made in cash or by cheques on other banks. By this circuitous process the £200,000 was transferred from the account of the *International Contract Company* to the account of *Charles Laffitte & Co., Limited,* where it was retained, in accordance with

the arrangement, to meet the promissory notes of the *International Contract Company* as they from time to time became due.

In February, 1866, the *National Bank* discounted further promissory notes of the *International Company* to the amount of £30,000, the proceeds of which were dealt with in the same way as those of the notes for £200,000. On this occasion a letter, dated the 5th of February, 1866, similar to that of the 8th of December, 1865, was given to the bank, signed by *Kitson* and *Bate*, and sealed with the seal of the company.

In the same month of February, 1866, *C. Laffitte & Co., Limited*, applied to the committee of the *Stock Exchange* for a settling day. In support of such an application certificates of the number of shares allotted, and of the amount of the deposits received, were required. The *National Bank* gave on that occasion the following certificates, signed by the sub-manager of the bank:—

"27th January, 1866. To the Committee of the Joint Purposes of the *Stock Exchange*. We hereby certify that application has been made for 79,522 shares in *Charles Laffitte & Co., Limited*, and the deposit of £1 per share, amounting to £79,522, has been paid thereon."

"12th February, 1866. I hereby certify that the balance standing to the credit of *Charles Laffitte & Co., Limited*, amounts to £237,550 4*s.* 5*d.*"

At the time when the latter of these certificates was given the sum therein mentioned was, in fact, standing to the credit of *C. Laffitte & Co., Limited*, but no information was given to the committee of the *Stock Exchange* of the lien which the *National Bank* had upon the fund. None of the promissory notes had at that time become due, and when they became due they were paid out of the moneys standing to the credit of *Charles Laffitte & Co., Limited*, with the *National Bank*, none of them having been taken up by the *International Contract Company*.

On the 3rd of November, 1866, an order was made for winding *C. Laffitte & Co., Limited*, which had never acquired the business *Laffitte & Co.*, of *Paris*. An order had been made on the 9th , 1866, for winding up the *International Contract Company*,

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and in the course of the same year an order was also made for winding up the *Ottoman Company*.

On the the 27th of November, 1866, a bill was filed by *George Gray* on behalf of himself and all other the shareholders in *Charles Lafitte & Co., Limited*, against *Lewis, Henshaw*, and the other directors, and against the company, its official liquidator, and the public registered officer of the *National Bank*, praying that it might be declared that the directors of *C. Laffitte & Co., Limited*, had no power to bind the shareholders by the agreements contained in the letters of the 8th of December, 1865, and the 5th of February, 1866; and that it might be declared that it was a breach of trust on the part of the directors, and also on the part of the *National Bank*, to apply the assets of the company in payment of the debts of the *International Contract Company;* that the *National Bank* and the directors of *Charles Laffitte & Co., Limited*, might be declared liable to make good to the shareholders of that company, with interest, the loss sustained by them in consequence of such breach of trust, and for relief consequent on such declarations. *Gautray*, who was one of the Defendants, was out of the jurisdiction, and the Plaintiff entered an appearance for him, but on the 6th of December, 1867, dismissed the bill as against him.

On the 17th of February, 1869, Vice-Chancellor *Malins* (1) made a decree declaring that the directors of *C. Laffitte & Co., Limited*, had no power to bind the company by the letters of the 8th of December, 1865, and the 5th of February, 1866; and that it was a breach of trust on the part of the directors to apply the moneys standing to the credit of the company with the *National Bank* in payment of the promissory notes of the *International Contract Company;* and that the *National Bank*, having taken part in so applying those moneys, was liable to replace them with interest; and that *Lewis, Henshaw, Kitson*, and *Bate* were also personally liable to make good, with interest, the moneys applied in payment of the notes referred to by the letter of the 8th of December, 1865; and that *Kitson* and *Bate* were liable to make good, with interest, the moneys applied in payment of the notes referred to in the letter of the 5th of February, 1866. An account was directed of the moneys standing to the credit of the company at the *National*

(1) Law Rep. 8 Eq. 526.

Bank, which were applied in payment of the promissory notes mentioned in the letter of the 8th of December, 1865, and a like account of moneys applied in payment of the notes mentioned in the other letter, and it was ordered that what should be found due on the first account should be paid by the *National Bank* and *Lewis, Henshaw, Kitson*, and *Bate*, into Court to the credit of the cause, and that what should be found due on the second account should be paid into Court by the *National Bank* and *Kitson* and *Bate*, and it was ordered that the *National Bank* and the Defendants *Lewis, Henshaw, Kitson*, and *Bate*, should pay the Plaintiff's costs.

Lewis and *Henshaw* and the *National Bank* presented petitions of appeal against this decree, which were set down, but on the 14th of June, 1869, an agreement was entered into between the Plaintiff *Gray*, of the first part, the official liquidator, of the second part, and *Parker*, the public officer of the *National Bank*, of the third part, for a compromise of the suit, upon terms the short effect of which was that the *National Bank* should pay all the debts of *Charles Laffitte & Co., Limited*, and the Plaintiff's costs as between solicitor and client in *Gray* v. *Lewis*. This agreement was confirmed by an order made in the winding-up of *C. Laffitte & Co.* Neither of the Defendants *Lewis* and *Henshaw* was a party to the compromise.

It was alleged that the *National Bank*, under this compromise, paid sums amounting to about £54,000, and remained liable to pay further large sums thereunder. *Lewis, Henshaw*, and *McKenna* had retired from being directors of the bank.

In this state of things the bill in *Parker* v. *Lewis* was filed by *Parker*, as registered public officer of the *National Bank* against *Lewis, McKenna*, and *Henshaw*. The bill, by par. 13, alleged that before *Lewis* and *Henshaw* agreed to become directors of *Charles Laffitte & Co., Limited*, they stipulated that out of a sum of £25,000 which the *International Contract Company* was to receive for promoting the new company, each of them should receive £5000 either in cash or shares, and that this sum was promised to each of them upon the understanding and promise by them that they would warmly support the new company at the board of the *National Bank*, and that at a later period a like sum in cash or shares was pro-

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mised to *McKenna* on a similar understanding and promise on his part. The bill (par. 71) charged that the above transactions in which the Defendants engaged the *National Bank* were not within the legitimate scope of the business of the bank or within the powers of the directors; and that *Lewis* and *Henshaw* used their influence and power as directors of the bank for the improper purpose of advancing their own interests as directors and shareholders in the *Ottoman Association* and *Charles Laffitte & Co., Limited;* and that *McKenna* knew such to be the case, and aided *Lewis* and *Henshaw* in their schemes; and that, under the circumstances aforesaid, the employment by the Defendants of the moneys of the bank in the above transactions was a breach of trust, and that the Defendants were liable to make good to the bank the whole of the moneys so misapplied; but that the bank was willing to give them the benefit of the compromise. And the bill prayed for a declaration that the Defendants were liable to repay to the bank, with interest, all moneys which the bank had been or might be compelled to pay, or had lost, or might lose, by reason of the above transactions; and for an account and payment accordingly.

The Defendants, by their answers, fully and explicitly denied the allegations of par. 13, and the evidence in no way supported those allegations.

Vice-Chancellor *Malins* made a decree according to the prayer of the bill, and the Defendants *Lewis* and *Henshaw*, and the Defendant *McKenna*, severally appealed from it.

Lewis and *Henshaw* also, by leave of the Court, gave notice of motion to restore to the paper their appeal from the decree in *Gray* v. *Lewis*, which appeal had been set down on the 29th of April, 1869, but owing to the compromise of that suit had not been prosecuted.

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June 25, 26, 27, 28, 30; July 1.

Mr. *Fry*, Q.C., Mr. *Henry James*, Q.C., and Mr. *Davey*, for *Lewis* and *Henshaw*, in support of this appeal:—

The discounting promissory notes without taking any security was clearly within the powers of the directors of the *National*

Bank. The *International Contract Company* was at that time in good credit, and the directors of the *National Bank* might well think they were doing a good thing for the bank in entering into this transaction. If the discounting by itself was *intrà vires*, the taking a guarantee by way of security from a company which had no power to give it cannot make the whole transaction *ultrà vires*. Nothing, then, is shewn against these Defendants but an error of judgment, the case of fraud in paragraph 13 being wholly unsupported by evidence. Now, an error of judgment in managing mercantile affairs cannot make a director personally liable: *Overend, Gurney, & Co.* v. *Gibb* (1); *Turquand* v. *Marshall* (2). The evidence does not shew that these Defendants were parties to the giving the certificate by the *National Bank*, and we say, therefore, that even supposing the decision in *Gray* v. *Lewis* (3) as against the *National Bank* to be correct, the Appellants are not liable. But we contest the decision in *Gray* v. *Lewis*, for we contend that the £230,000 never became the money of *C. Laffitte & Co.* The Court of Exchequer in *British and American Telegraph Company* v. *Albion Bank* (4) evidently felt itself unable to follow the decision in *Gray* v. *Lewis*, the distinctions drawn not being substantial. The decision adopts the transaction up to a certain point and repudiates the rest, whereas it must either be accepted as a whole or rejected as a whole. If any persons were misled into taking shares in *C. Laffitte & Co.* by the representation of the *National Bank* that that company had this sum of £230,000 standing to its credit, each of such persons may have a remedy against the *National Bank*, but the company *quâ* company has no claim; it cannot allege that it was misled. It therefore had no such right against the bank as it claimed in *Gray* v. *Lewis*, and the bank cannot have a remedy against us, because it has submitted to a claim which was not well founded. These Defendants could not prudently have prosecuted their appeal in *Gray* v. *Lewis*, for, as the Plaintiff's demand had been satisfied by the bank, the only question left for them to argue was that the bill ought to have been dismissed with costs as against them, and no prudent person would prosecute an appeal in such a

(1) Law Rep. 5 H. L. 480, 486, 501.
(2) Ibid. 4 Ch. 376, 386.
(3) Law Rep. 8 Eq. 526.
(4) Ibid. 7 Ex. 119.

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suit for the purpose of arguing that question. If, however, that decree is in our way, we ask leave to prosecute our appeal against it. This suit, we submit, is wrongly constituted, there being nothing to distinguish the Defendants from the other directors of the *National Bank* who are not made parties, except the charges of personal fraud, which are denied and not proved.

Mr. *Glasse*, Q.C., Sir *J. B. Karslake*, Q.C., and Mr. *Everitt*, for the appeal of *McKenna*:—

There is no case against Sir *Joseph McKenna* but a case which might be made against all the directors of the *National Bank*. It is not shewn that he had anything to do with the certificate given by the bank as to the funds standing to the credit of *C. Laffitte & Co., Limited*, which was given as a matter of form. The funds were there, and it was not the ordinary course of business to enter in the books any notice of the guarantee. The discounting the notes of the *International Contract Company* was an ordinary matter of business had it not been for the guarantee by *C. Laffitte & Co., Limited*, and the taking that guarantee cannot make the whole transaction *ultrà vires*. The *International Contract Company* was believed to be solvent. Sir *J. McKenna* was connected with the bank only, and had no motive for doing anything but what he considered likely to serve its interests. It is not brought home to him that he knew that the money arising from the discount of the notes was to be applied in subscribing for shares in *C. Laffitte & Co.*, nor is he shewn to have had any further knowledge of the transaction than all the other directors had. Then, again, Sir *J. McKenna* is not bound by the decision in *Gray* v. *Lewis*, to which he was no party, and that decision, we submit, is erroneous. If the certificate was a fraud, the only persons who could sue would be those defrauded by it, *i.e.*, those who took shares on the faith of it, and they could not sue together: *Jones* v. *Garcia del Rio* (1); *Croskey* v. *Bank of Wales* (2). The bill in the present case is founded on fraud which is not proved, and the suit, therefore, cannot be supported on any other ground: *Hickson* v. *Lombard* (3). Then the

(1) T. & R. 297.

(2) 4 Giff. 314.

(3) Law Rep. 1 H. L. 324.

suit is defective as to parties: *Perry* v. *Knott* (1); *Lenaghan* v. *Smith* (2); *Fowler* v. *Reynal* (3); *Devaynes* v. *Robinson* (4).

[The LORD JUSTICE JAMES referred to *Fussell* v. *Elwin* (5).]

Then, as to the certificate being a fraud on the public, that gives no right except to members of the public who were deceived by it, and no claim on that ground has been made by any of them.

The *Solicitor-General* (Sir *G. Jessel*), Mr. *Cotton*, Q.C., and Mr. *Graham Hastings*, for the Plaintiff:—

Our case is that certain directors of the bank employed the funds of the bank in starting a new company. This is a misapplication of trust funds for which they are personally liable as trustees: *Imperial Mercantile Credit Association* v. *Coleman* (6); *Joint Stock Discount Company* v. *Brown* (7); *Land Credit Company of Ireland* v. *Lord Fermoy* (8); *In re London, Hamburg, and Continental Bank* (9). This was not an ordinary banking transaction, but a proceeding which was *ultrà vires*, and the directors are jointly and severally liable. Then as to the effect of *Gray* v. *Lewis* (10), we contend that it is conclusive. *A.* is bound to indemnify *B.* against a claim; the claim is brought; *B.* contests it *bonâ fide*, but a judgment is obtained against him, and he pays. *A.* must indemnify *B.*, and cannot be heard to say that the judgment was wrong. *B.* was not bound to appeal. The case would be different if *A.* said to *B.*, "Do not pay, I will take the risk of an appeal." So here the case would be different if the Appellants had given notice to the bank not to compromise; but they knew of the compromise, and did not object to it: *Duffield* v. *Scott* (11); *Jones* v. *Williams* (12); *Smith* v. *Compton* (13); *Lampleigh* v. *Braithwaite* (14). But apart from the judgment, we contend that the *National Bank* were liable, as declared in *Gray* v. *Lewis*.

[The LORD JUSTICE JAMES referred to the question as to parties.]

(1) 5 Beav. 293.
(2) 2 Ph. 301.
(3) 2 De G. & Sm. 749.
(4) 24 Beav. 86. 3 Jur. N.S. 707
(5) 7 Hare, 29.
(6) Law Rep. 6 Ch. 558, 571; Ibid. 6 H. L. 189.
(7) Ibid. 8 Eq. 381.
(8) Law Rep. 8 Eq. 7.
(9) Ibid. 5 Ch. 444.
(10) Ibid. 8 Eq. 526.
(11) 3 T. R. 374.
(12) 7 M. & W. 493.
(13) 3 B. & Ad. 407.
(14) 1 Sm. L. C 4th Ed. p. 118.

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The suit is perfectly constituted as to that: *Perry* v. *Knott* (1); *Kellaway* v. *Johnson* (2); *Attorney-General* v. *Corporation of Leicester* (3); *Attorney-General* v. *Pearson* (4). The decision in *Fussell* v. *Elwin* (5) goes on the fact of the trustee having originally been made a party. *Perry* v. *Knott* was disapproved of in *Lenaghan* v. *Smith* (6) on another point, but not on this. *Attorney-General* v. *Wilson* (7) is clear as to its not being necessary to have all the trustees here. The object of the order was to enable a Plaintiff to sue some of the parties jointly and severally liable, leaving them to get contribution as they can.

[The LORD JUSTICE JAMES:—I think that a suit may proceed in that form, but that if the Court sees that it is necessary for the purposes of justice that the other parties liable should be before the Court, it will require them to be brought here.]

The present three Defendants are properly selected. *Lewis* and *Henshaw* were the only directors who were also directors of *C. Laffitte & Co.*, and *McKenna* was managing director with a large salary. As to the bill being founded on fraud, the test is neatly put in *London Chartered Bank of Australia* v. *Lempriere* (8). If, striking out the charges of fraud, there is still sufficient equity alleged and proved, and the fraud is alleged only as a subsidiary answer to a counter case, it is a matter only affecting costs, and the suit does not fail though the charges of fraud be not established.

Mr. *Fry*, in reply, on the appeal of *Lewis* and *Henshaw*.

Mr. *Glasse*, in reply, on *McKenna's* appeal.

After the conclusion of the argument, the motion to restore the appeal in *Gray* v. *Lewis* was heard, and their Lordships made an order for restoring it, and reserved judgment in *Parker* v. *Lewis* till the appeal in *Gray* v. *Lewis* had been heard.

(1) 5 Beav. 293.
(2) Ibid. 319.
(3) 7 Beav. 176.
(4) 2 Coll. 581.
(5) 7 Hare, 29.
(6) 2 Ph. 301.
(7) Cr. & Ph. 1.
(8) Law Rep. 4 P. C. 572.

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July 16, 17. The appeal in *Gray* v. *Lewis* now came on to be heard.

Mr. *Fry*, Q.C., Mr. *Lindley*, Q.C., and Mr. *Horace Davey*, for the Appellants:—

C. Laffitte & Co. could not have any claim against the *National Bank* for the £230,000. The company cannot both approbate and reprobate. The moneys, according to the Plaintiffs' own shewing, only came to the credit of *Charles Laffitte & Co.* by virtue of the arrangements mentioned in the bill, and the company can only claim the moneys subject to the terms of those arrangements, and therefore to the lien of the *National Bank*. The money really never became the money of *Charles Laffitte & Co.* at all. The Court of Exchequer in *British and American Telegraph Company* v. *Albion Bank* (1) virtually overruled the decision of the Vice-Chancellor in this case. *Gautray* was equally liable with the other Defendants, but the Plaintiffs dismissed their bill against him, and therefore cannot have relief against the other Defendants: *Fussell* v. *Elwin* (2); *London Gas Light Company* v. *Spottiswoode* (3); *Attorney-General* v. *Dew* (4). The bill ought to have been by the company, not by one shareholder on behalf of himself and the others: *Foss* v. *Harbottle* (5); *Mozley* v. *Alston* (6). The case of *Atwool* v. *Merryweather* (7), on which the Vice-Chancellor relied, turns on special circumstances which do not exist here. Leave ought to have been obtained in the winding-up to file the bill in the name of the company.

Mr. *Cotton*, Q.C., and Mr. *Graham Hastings*, for the Plaintiff; and

Mr. *Fischer*, Q.C., and Mr. *Armstrong*, for the liquidators of *C. Laffitte & Co.*:—

The bank was answerable for this sum on the principle of *Wilson* v. *Moore* (8); *Hardy* v. *Metropolitan Land and Finance Company* (9).

(1) Law Rep. 7 Ex. 119.
(2) 7 Hare, 29.
(3) 14 Beav. 264.
(4) 3 De G. & Sm. 488.
(5) 2 Hare, 461.
(6) 1 Ph. 790.
(7) Law Rep. 5 Eq. 464, n.
(8) 4 My. & K. 126, 337.
(9) Law Rep. 7 Ch. 427.

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As to the dismissal of the bill against *Gautray*, nothing has been done to release him; a fresh bill could be filed against him, and it is not alleged that the other Defendants are prejudiced by his absence. In *Bryson* v. *Warwick and Birmingham Canal Company* (1), after a winding-up order, a bill in the present form was allowed. *Ernest* v. *Weiss* (2) also applies.

[The LORD JUSTICE JAMES:—Have you any authority for a suit in this form in the case of an incorporated company?]

Clinch v. *Financial Corporation* (3) is an express authority in favour of such a suit. The Court of Exchequer considered the case distinguishable from that before it in *British and American Telegraph Company* v. *Albion Bank* (4).

Mr. *Robinson*, for Sir *John Gray*.

SIR W. M. JAMES, L.J.:—

I am of opinion that the Appellants, Mr. *Lewis* and Mr. *Henshaw*, are entitled to be relieved from the decree which has been pronounced against them in the case of *Gray* v. *Lewis*. They are the only persons who appear before us as Appellants, the other parties against whom the decree was made, including the *National Bank*, being content to remain as they are.

I am of opinion that this bill was demurrable upon almost every ground on which a bill can be demurrable. I am of opinion that there is a wrong Plaintiff, that there is a wrong forum, and that there is no cause of suit by a right Plaintiff in a right forum. The bill should not have been filed by a shareholder on behalf of himself and all other the shareholders. It is very important, in order to avoid oppressive litigation, to adhere to the rule laid down in *Mozley* v. *Alston* (5) and *Foss* v. *Harbottle* (6), which cases have always been considered as settling the law of this Court, that where there is a corporate body capable of filing a bill for itself to recover property either from its directors or officers, or from any other person, that corporate body is the proper Plaintiff, and the

(1) 4 D. M. & G. 711.
(2) 2 Dr. & Sm. 561.
(3) Law Rep. 5 Eq. 450; Ibid. 4 Ch. 117.
(4) Law Rep. 7 Ex. 119.
(5) 1 Ph. 790.
(6) 2 Hare, 461.

only proper Plaintiff. One object of incorporating bodies of this kind was, in my opinion, to avoid the multiplicity of suits which might have arisen where one shareholder was allowed to file a bill on behalf of himself and a great number of other shareholders. The shareholder who first filed a bill might dismiss it, and if he was a poor man the Defendant would be unable to obtain his costs, then another shareholder might file a bill, and so on. It was also stated to us in the course of the argument that even after the Plaintiff had dismissed his bill against a particular Defendant a fresh bill might be filed against the Defendant so dismissed. Therefore there might be as many bills as there are shareholders multiplied into the number of the Defendants. The result would be fearful, and I think the Defendant has a right to have the case made against him by the real body who are entitled to complain of what he has done.

Now in this case I am of opinion that the only person—if you may call it a person—having a right to complain was the incorporated society called *Charles Laffitte & Co.* In its corporate character it was liable to be sued, and was entitled to sue; and if the company sued in its corporate character, the Defendant might allege a release or a compromise by the company in its corporate character—a defence which would not be open in a suit where a Plaintiff is suing on behalf of himself and other shareholders. I think it is of the utmost importance to maintain the rule laid down in *Mozley* v. *Alston* (1) and *Foss* v. *Harbottle* (2), to which, as I understand, the only exception is where the corporate body has got into the hands of directors and of the majority, which directors and majority are using their power for the purpose of doing something fraudulent against the minority, who are overwhelmed by them, as in *Atwool* v. *Merryweather* (3), where Vice-Chancellor *Wood,* under those circumstances, sustained a bill by a shareholder on behalf of himself and others, and there it was after an attempt had been made to obtain a proper authority from the corporate body itself in public meeting assembled.

I think it is not necessary to go into the objection to the frame of the suit arising from the dismissal of the bill against

(1) 1 Ph. 790. (2) 2 Hare, 461.

(3) Law Rep. 5 Eq. 464, n.

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Gautray. It is not necessary to consider whether this is one of those cases in which a bill can be filed against some of several persons jointly and severally liable without making the others parties, and it is not necessary, I think, to consider how far, where a man has been made a party, being out of the jurisdiction, and an appearance is entered for him, the case comes within the authority of the cases before the Vice-Chancellor *Wigram* and the Master of the Rolls, where a Defendant, who was sued as one of several, became bankrupt or died. The objection is in the highest degree technical, and one would rather not give an opinion upon a highly technical point where the case does not require it. We therefore leave the objection as to *Gautray* undisposed of.

Then, supposing the bill to be looked upon as a bill filed by *Charles Laffitte & Co.*, is it possible to sustain it? The case by the company against the bank is this: they say, "You, the bank, have got moneys in your hands, moneys paid into your bank to our account, and for which, therefore, you are liable to us; they are moneys had and received by you to our use, and you are our debtors to that amount. True it is, you say that you have in your own books discharged yourself of £230,000 of those moneys which you have so received by applying them in payment of certain bills of exchange under an authority signed by some of our directors; but that authority is perfectly idle. It was entirely *ultrà vires* and you knew it to be so." That is a case for a simple action at law by the company against their bankers, like that in *British and American Telegraph Company* v. *Albion Bank* (1), which was brought for moneys paid in much the same way as in this case. Therefore it appears to me that the proper remedy is an action at law, and that there is no reason why the forum should be changed.

But beyond that, it appears to me with regard to the substance of the case, that is to say, with regard to the transaction connected with the £230,000, that no liability arose between these companies either at law or in equity. It was a transaction between the three companies, through their directors, the *International*, the *National Bank*, and *Charles Laffitte & Co.* The *National Bank*, through their directors, were no more answerable than *Charles Laffitte &*

(1) Law Rep. 7 Ex. 119.

Co. were liable through their directors, or the *International Company* through their directors. The whole thing was a trilateral contrivance between the directors of these three companies for the purpose alleged in the bill, for the purpose of deceiving the committee of the *Stock Exchange* by making it appear that *Charles Laffitte & Co.* had moneys which they had not. That the object from the first was illegal and *ultrà vires* appears from the documents themselves. Everybody connected with the transaction must have been fully aware that the whole thing was a sham from the beginning to the end, and from a sham no action or suit arises either at law or in equity. That being so, I am of opinion that this bill cannot be sustained, and must be dismissed as against the Appellants. They do not ask for costs. On the ground that the Plaintiff had no right to interfere, I probably should have been disposed to dismiss it with costs, but having regard to the sham, I should not have been disposed to give anybody connected with the transaction any costs whatever.

SIR G. MELLISH, L.J.:—

I am of the same opinion, and I only wish to add a few observations relating to what may be called the merits of the case. In the first place, What is the true legal effect of the alleged agreement which was contained in the letter of the 8th of December, 1865? It is to be observed that at that time *Charles Laffitte & Co.* were registered, having been registered on that same day. They had not commenced business, and I entirely agree with what has been said that it would be quite absurd to suppose that this was an ordinary transaction in the way of their business under their articles of association. They did not attempt to commence business until months after the time when this letter was written.

What, then, is the agreement? The agreement is that the bank shall discount bills of the *International Contract Company* to the amount of £200,000; that the *International Company* shall pay the same £200,000 back again into the bank in payment of £5 per share on 40,000 shares in *Charles Laffitte & Co.*, to be allotted to the nominees of the *International Contract Company;* that that sum so paid in shall remain to the credit of *Charles*

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Laffitte & Co. nominally in the books of the bank until the promissory notes should become due, and when the promissory notes should become due, then it should be applied in payment of the notes. That being the agreement, the transaction appears to me, as it does to the Lord Justice, to be an entire sham. There is, under the pretence of dealing with these large sums of money, no real advance to anybody. Nobody is put in funds. The *International Contract Company* get no money which they can deal with; *Charles Laffitte & Co.* get no money which they can deal with; the bank make no advance to any one except for the mere nominal period during which it is paid out and taken back again. There is no real monetary transaction at all. All that is done is, that there is a representation made that 40,000 shares have been allotted, but in my opinion they cannot be considered to have been allotted at all, because by the articles of association of *Charles Laffitte & Co.*, which all these parties were aware of, they had no right to allot shares unless they received £1 deposit and £4 on allotment, and when the money is borrowed to pay that £5 upon the credit of *Charles Laffitte & Co.* itself, and borrowed in such a way that those who profess to lend it do not lend at all, and are enabled to apply the same moneys as they come back in discharge of the liability, it is quite obvious that nothing whatever had been advanced or paid over at all. Though the Defendants say that they thought this was all right, and did not, until a late period, discover that it was wrong, I cannot help thinking that gentlemen of business and of extensive experience in joint stock companies could hardly help being aware, at least if they took the trouble to consider what the nature of the transaction was, that such a transaction could not be an honest transaction. It was a transaction on the face of it for the purpose of making it appear that 40,000 shares had been allotted and paid for, whereas, in reality, no shares had been allotted and paid for.

That being the nature of the transaction, what is its legal effect? I apprehend the first effect of it is, that everybody who was deceived by the transaction—everybody who was induced to subscribe for shares, or to buy shares by reason of being led to believe that those 40,000 shares had been honestly subscribed for and paid for—is entitled to a remedy both at law and in equity

against those persons who deceived him, but it must obviously be a personal remedy by each person who has been so deceived. The persons deceived cannot join in a class, one suing for himself and all the rest, because each person must enter into the circumstances of his own particular case to shew how and in what way he was deceived. But can the transaction have any further effect? Is one of the companies entitled to recover from the other companies any large sum of money? It appears to me extremely difficult to see how that can be so. I entirely agree with the judgment in *British and American Telegraph Company* v. *Albion Bank* (1), and in my opinion it applies to this case. The money paid in never was, in my judgment, the money of *Charles Laffitte & Co.* They never had the control over it; they never could draw cheques upon it, and they knew that they never could draw cheques upon it. In such a case the maxim applies, "*In pari delictu potior est conditio defendentis.*" The law will leave the parties where it finds them. I think that no action could have been brought on those notes by the bank against the *International Contract Company.* I think that the consideration for the notes was tainted with illegality, and that the law would not have interfered between the parties at all if the *International Company* had refused to pay back the money, because the transaction was so tainted with illegality that the law would not have assisted either party. If, indeed, there were any moneys of *Charles Laffitte & Co.* which *bonâ fide* shareholders paid into the bank, then, in my judgment, *Charles Laffitte & Co.* would be entitled at law to recover that sum. But that is not the case before us, and I cannot help thinking the decision we are coming to meets the real justice of the case. The practical effect of the judgment of the Vice-Chancellor is, that the very person *Kitson*, and the allies of *Kitson*, who were the concoctors of these frauds, are the persons who get the benefit of the whole of this money. I cannot but think that persons in the position of the Plaintiff, who have subscribed at *Kitson's* request, and who are mere nominees of his, must look for an indemnity from the *International Contract Company*, or from *Kitson*, or from whoever employed them, but in this Court they must be treated as having been parties to, and having had notice

(1) Law Rep. 7 Ex. 119.

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of, these illegal transactions. If a person allows himself to be the mere nominee of, and acts for another person, he must be bound by the notice which that other person for whom he acts has of the nature of the transaction. I agree, therefore, that the bill must be dismissed as against the Appellants.

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Aug. 5. SIR W. M. JAMES, L.J., after stating the nature of the case made by the bill, continued:—

If we had agreed with the judgment of the Vice-Chancellor that *Charles Laffitte & Co.* were entitled to withdraw these moneys from the *National Bank*—if we had agreed with the *ratio decidendi* of the Vice-Chancellor, that in truth the moneys which went out went out as moneys of the bank and had come in as moneys of *Charles Laffitte & Co.* under the arrangement with them—we should have agreed with the Vice-Chancellor that the decision in *Parker* v. *Lewis* was a necessary corollary and consequence of the decision in *Gray* v. *Lewis* (1); but as, upon the rehearing of the case of *Gray* v. *Lewis*, we did not concur in the view of the Vice-Chancellor, but thought that the bill in *Gray* v. *Lewis* was not sustainable—that in truth there was no *res acta* at all, but a mere *fabula acta* between these parties—that the whole thing was a fiction and a sham, out of which no right or liability could accrue or be imposed upon any of the companies which, through their directors, were parties to that transaction—the ground of the decision in *Parker* v. *Lewis* is entirely cut away, and the consequence follows that the bill in *Parker* v. *Lewis* must fail.

It was strongly contended before us by the counsel for the several Defendants that the bill was entirely based on a charge of fraud, and that the case of fraud having failed the bill ought to be dismissed with costs independently of any question upon the merits. I have read the bill very carefully, and I agree with the counsel for the Defendants that the case is substantially, essentially, and exclusively based upon fraud against these parties. I have, therefore, had some doubt whether the rule ought not to be applied by

(1) Law Rep. 8 Eq. 526.

dismissing the bill with costs. I think, however, that we ought to dispose of the bill, not merely upon the ground that the case of fraud had been alleged and not proved, but upon the merits; making a final end, so far as we are concerned, of the litigation. Now, beyond all question, the transaction was one utterly indefensible on the part of the Defendants—the very ground of our decision in *Gray* v. *Lewis* being that it was a sham calculated and intended to deceive, first, the *Stock Exchange*, and then all the persons who might be induced by means of that to take shares in *Charles Laffitte & Co.* As that sham, to which the directors so indefensibly made themselves parties, has led their own company, the *National Bank*, into great litigation, great expense, and great loss, and as there were reasons why these three Defendants might reasonably be selected as Defendants, out of the twelve directors who were more or less mixed up with the transaction, for the purpose of enforcing liability against them—*Lewis* and *Henshaw* having themselves been directors in *Laffitte & Co.* and in the *Ottoman Company*, in connection with which the whole transaction was entered into, and *McKenna*, though not interested in either of those companies, having been a man in whom the greatest trust and confidence was reposed by the bank, and who received a very high salary from the bank, in return for which the bank had a right to expect from him the greatest care, prudence, and caution in any matter of this kind—I think that we are not compelled to dismiss the bill with costs as against them, and that the justice of the case is fully met by giving the Defendants, as the Vice-Chancellor has done, the costs occasioned by the charges of personal fraud contained in the 13th paragraph of the bill, and dismissing the rest of the bill without costs.

It was said—and very strongly contended before us—that it was not open to these parties to go into the merits of the case at all, but that the bank, having defended the suit in *Gray* v. *Lewis*, and having had a decree made against them, were at liberty to compromise it on the best terms they could, and that it was not open to the Defendants to shew that they could have obtained better terms. I think there is no foundation for this. It would seem to be a very strong proposition to say that the bank having had the decree against them for £230,000, in the absence of any

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one of the directors in that character, might have compromised it for £200,000, or for any other sum less than the £230,000, or any sum they thought fit, and that every one of those twelve directors would have been personally answerable, jointly and severally, for the whole amount so decreed against them, and so compromised by them without having an opportunity of being heard in this Court to say that there was no foundation for the decree at all. I cannot conceive that that can be the law, and I have heard no authority adduced to satisfy me that there is any foundation for it.

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I am of the same opinion, but I wish to add a few observations as to the last point to which the Lord Justice referred, and which is a question of common law, as to whether the judgment of the Vice-Chancellor is conclusive. Mr. *Cotton* cited several cases at common law in support of that proposition, and the foundation of it appears to be a *dictum* at the end of a judgment of Mr. Justice *Buller* in the case of *Duffield* v. *Scott* (1). That was the case of an action on a bond, which bond had been given to indemnify a husband in connection with a deed of separation against the debts incurred by his wife. Then an action was brought against the husband for a debt incurred by the wife. He defended the action, and the verdict was for the Plaintiff, and judgment was obtained for him. There was no dispute at all that the Defendant was liable for the debt, but he denied his liability to the costs of the action, on the ground that notice, as he said, ought to have been given him, and that he ought to have had liberty either to defend the action or to pay without defending it. Mr. Justice *Buller*, at the end of his judgment, with reference to that, says: "The purpose of giving notice is not in order to give a ground of action, but if a demand be made which the person indemnifying is bound to pay, and notice be given to him, and he refuse to defend the action, in consequence of which the person to be indemnified is obliged to pay the demand, that is equivalent to a judgment, and estops the other party from saying that the

(1) 3 T. R. 374. 377.

Defendant in the first action was not bound to pay the money." Now the portion of the judgment which is relied upon is where Mr. Justice *Buller* says, "that is equivalent to a judgment;" and that, it is said, shews that if there was a judgment at common law, that judgment would be conclusive. Now that *dictum*, no doubt, is cited with approbation in the cases referred to by Mr. *Cotton* of *Jones* v. *Williams* (1) and *Smith* v. *Compton* (2); but those cases are all cases of actions on express contracts of indemnity, and I think that the law with reference to express contracts of indemnity is, that if a person has agreed to indemnify another against a particular claim or a particular demand, and an action is brought on that demand, he may then give notice to the person who has agreed to indemnify him to come in and defend the action, and if he does not come in, and refuses to come in, he may then compromise at once on the best terms he can, and then bring an action on the contract of indemnity. On the other hand, if he does not choose to trust the other person with the defence to the action, he may, if he pleases, go on and defend it, and then, if the verdict is obtained against him, and judgment signed upon it, I agree that at law that judgment, in the case of express contract of indemnity is conclusive. But I apprehend it is conclusive on account of what the law considers the true meaning of such a contract of indemnity to be. It is obvious that when a person has entered into a bond, or bought land, or altered his position in any way on the faith of a contract of indemnity, and an action is brought against him for the matter against which he was indemnified, and a verdict of a jury obtained against him, it would be very hard, indeed, if, when he came to claim the indemnity, the person against whom he claimed it could fight the question over again, and run the chance of whether a second jury would take a different view and give an opposite verdict to the first. Therefore, by reason of that contract of indemnity, the judgment is conclusive; but in my opinion it is conclusive because that is the meaning of the contract between the parties, for it unquestionably is not the general rule of law that a judgment obtained by *A.* against *B.* is conclusive in an action by *B.* against *C.* On the contrary, the rule of law is otherwise. It is

(1) 7 M. & W. 493. (2) 2 B. & Ad. 407.

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quite plain that the ordinary rule of law is, that a judgment *in rem* is conclusive, but a judgment *inter partes* is conclusive only between the parties and the persons claiming under them.

Now in the present case the suit is not brought on any contract of indemnity, but for a breach of trust alleged to have been committed by the three Defendants. It appears to me they must be entitled to prove, first, that they have not been guilty of any breach of trust; and, secondly, that if they have been guilty of any breach of trust, no damage has accrued to the Plaintiff by reason of their breach of trust. The Vice-Chancellor's judgment in this case is to be considered—and, in fact, Mr. *Cotton* so put it—exactly as if the bank, after the judgment of the Vice-Chancellor, had chosen to go and pay the whole £230,000, and then at once sue the Defendants. Surely the Defendants would say, "You are suing us for a breach of trust with reference to £230,000, but £230,000 was never paid by us to the *International Contract Company*." Indeed, when one examines the evidence, no doubt sums went out and sums came in, but it was always so managed that there never was more than a very small sum out at one time; and these small sums all came back again to the very person who had paid them out; and therefore, although the paying them out might have been a breach of trust—and in my opinion if the *International Contract Company* had not returned them, then, inasmuch as, for the reasons I gave in my judgment in *Gray* v. *Lewis*, the bank would have had no remedy against the *International Contract Company*—I think that, to the extent of the money which did not come back, the Defendants would have been liable. But I think they are entitled to shew that the whole did come back, and I cannot see that they are estopped from saying, according to the authority of the *British and American Telegraph Company* v. *Albion Bank* (1), that this money, when it did come back, was not the money of *Charles Laffitte & Co.*, but was the money of the bank itself, and that, therefore, there was no damage. Indeed the only real doubt that I have entertained during the course of this case, after fully considering it, is whether the whole £230,000 which stood to the credit of *Charles Laffitte & Co.* at the time when the notes became due, and which was applied towards

(1) Law Rep. 7 Ex. 119.

payment of the notes, consisted of the moneys of the *National Bank;* because, if any portion of the sum consisted of moneys which had been paid in by *bonâ fide* shareholders to the *National Bank*, or by any other persons who *bonâ fide* paid in money to the account of *Charles Lafitte & Co.*, in my opinion *Charles Lafitte & Co.* would have been entitled to recover such sums in an action at law at any rate. Whether they would be entitled to recover them in a Court of Equity, it is not necessary for me to consider, but they would have been entitled to recover such sums in an action at law against the bank; and then, I think, there would have been damage arising from the breach of trust of which the Defendants had been guilty. But, on going through the bill, and on examining the evidence, although it is true it is alleged that £40,000 of the moneys paid in came from *bonâ fide* shareholders, yet I think the true result of the allegations in the bill and of the evidence is, that the whole sums which were paid to the *International Contract Company* did in fact come back again to the bank, and were placed to the account of *Charles Lafitte & Co.;* and that there is no allegation in the bill, and it is not shewn by the evidence, that any part of the £40,000 remained so as to form part of the £230,000 at the time when the notes were paid; and it is quite consistent with the whole of the bill, and the whole of the evidence, as far as I can understand it, that the whole of that £40,000 had been paid out to *Charles Lafitte & Co.*

It was, indeed, said that some portion of the money necessarily must have consisted of other sums than the sums paid back to the *International Contract Company* because of the discount. It was said that the whole £230,000 was not paid out to the *International Contract Company*, but £230,000 minus the discount; and therefore some portion, viz., to the extent of the discount, must have been other moneys. I think the answer to that really is that the bank are not entitled, as against the Defendants, to claim the profit on this transaction; for if they paid out money, and all the money they paid out came back again, I think they are not entitled as against the Defendants to any alleged profit with reference to the discount. Besides that, the bill makes no such case.

There are just one or two observations I wish further to make.

L. JJ. 1873 PARKER v. LEWIS.

In reading through the judgment of the Court of Exchequer in the *British and American Telegraph Company* v. *Albion Bank* (1), there are two grounds on which the Court of Exchequer distinguish the case before them from the case of *Gray* v. *Lewis* (2). It is obvious that the Court of Exchequer wished to avoid saying that the judgment of the Vice-Chancellor was wrong, and being pressed very strongly with that judgment as an authority in the case before them, they stated the best grounds they could for distinguishing it; but in my opinion those grounds which are stated as possible distinctions—and I do not think the judgment of the Court of Exchequer goes beyond that—do not really make a distinction. The first ground on which they relied was the fact of the promissory notes being given, and that during the currency of the notes there may have been a real transaction; but in my opinion there was not, because the charge which *Charles Laffitte & Co.* made existed during the whole time that the notes were current. If *Charles Laffitte & Co.* had had a power to draw on the balance during the time that the notes were running, that might have made a difference, but *Charles Laffitte & Co.* had no power to draw on the balance during the time the notes were running. From the very moment the money came in it was pledged, and was to be held for the notes, and if they had drawn cheques against so much of it as was necessary to cover the notes, there is no doubt the bank would have refused to honour them. Therefore it appears to me that this forms no ground for saying there was any contract on the part of the bank to pay these moneys to *Charles Laffitte & Co.* The second ground which they put, which is supposed to be an equitable ground, on which they thought the Vice-Chancellor might rely, was this, that in the case before the Court of Exchequer the fraud was discovered before the *Stock Exchange* gave a day, and the plan was never carried out; whereas in the case before us the *Stock Exchange* were deceived, a day was given, and numerous transactions took place, possibly in consequence of it. Then they suggest that that may make a difference, and may be a reason why, in this Court, the bank ought to be held bound by the representation they had made that there was this sum to the credit of *Charles Laffitte & Co.* But although the bank were unquestionably bound

(1) Law Rep. 7 Ex. 119. (2) Law Rep. 8 Eq. 526.

as between themselves and the persons to whom they made the representation, and who were deceived by it, if any such persons had made claims against them—which it does not appear was the case—I apprehend they were not bound as between themselves and *Charles Laffitte & Co.*, who perfectly knew, through their directors, that the representation was untrue, and who not only knew it was untrue, but in reality were the persons fraudulently making the representation, not only as much as, but a great deal more than the bank were. The bank may have done enough to make itself liable, but *Charles Laffitte & Co.* were the principals in that false representation. In my opinion, therefore, that is not to be relied on as a ground for distinction.

Therefore, upon the whole, on the same grounds which I gave in *Gray* v. *Lewis*, I am of opinion that the £230,000 never became the money of *Charles Laffitte & Co.*, and that there was, therefore, no breach of trust except so far as any moneys were paid out to the *International Contract Company;* and by that breach of trust no damage was sustained, because all the moneys were returned, and became the property of the bank.

I entirely agree as to the costs.

Solicitors: Messrs. *Tatham, Curling, Walls, & Pym;* Mr. *C. M. Roche;* Messrs. *William Tatham & Son;* Messrs. *Combe & Wainwright.*

L. JJ.
1873
July 12.

STEVENS *v.* MID-HANTS RAILWAY COMPANY.

[1871 S. 117.]

LONDON FINANCIAL ASSOCIATION *v.* STEVENS.

[1871 L. 19.]

Railway Company Scheme—Judgment Creditor—Priority.

S. recovered judgment against a railway company, sued out an elegit, and delivered it to the sheriff, who found that the company were possessed of the railway, which was in the occupation of another company under a working agreement. The writ was duly registered. After this a scheme of arrangement was confirmed by the Court, which scheme authorized the company to create certain amounts of debenture A stock and debenture B stock. Debenture A stock was to be applied, first, in payment of the mortgage debentures of the company, and certain costs; the stock applied to those purposes having priority in payment of interest over the residue of that stock, which residue was to be applied in paying unpaid vendors of land. Debenture B stock was to be applied in paying off debentures which were not mortgages on the undertaking, and other debts. The income of the company was to be applied—(1) In paying rent-charges granted to vendors of land. (2) In payment of the interest on preferred debenture A stock. (3) In payment of the interest on the residue of that stock. (4) In payment of interest on debenture B stock. (5) In payment of dividends to shareholders:—

Held, by the Master of the Rolls, that *S.* was entitled to take debenture B stock in satisfaction of his judgment, but had no higher right. *S.* appealed, contending that he was not bound by the scheme, and had a charge on the income in priority to the A and B stocks, by whomsoever held; for that the priority of those unpaid vendors and mortgagees who had accepted payments in those stocks had been lost by extinguishment of their former securities:

Held, on appeal, that *S.* was not bound by the scheme, but that as it did not lessen his rights, neither did it increase them; that he therefore was not entitled to such priority as he claimed; but that, subject to the rights of unpaid vendors, the income must, in the first place, to an amount equal to that of the principal, interest, and costs due to vendors of land who had accepted payment in A debenture stock, and of the principal, interest, and costs due to holders of debenture mortgages issued before the filing of the sheriff's return, be applied according to the scheme.

THIS was an appeal by *Stevens*, an elegit creditor of the company, from a decision of the Master of the Rolls.

The company was incorporated by an Act passed in 1861, with a share capital of £150,000, and powers of borrowing on mortgage up to £50,000. By the *Mid-Hants Act*, 1864, its name was changed,

and powers were given to it for making another line, which, however, never was made. The lines authorized by the former Act were opened in 1865.

On the 16th of January, 1867, *Stevens* entered up judgment against the company in two actions, for £1045 and costs, and £1075 and costs. These judgments were registered on the 31st of January, 1867. Writs of elegit, dated the 19th of January, 1867, were lodged in the hands of the sheriff of *Hants*. The sheriff made his return, dated the 30th of January, that the company were possessed of the railway which was in the occupation of the *London and South-Western Railway Company*, and that he had delivered it to the Plaintiff. This return was filed on or before the 7th of February, on which day the writs of execution were registered under 23 & 24 Vict. c. 38.

The *London and South-Western Railway Company* had, under a working agreement made in 1865 and duly approved by the Board of Trade, been in occupation of the railway ever since it had been opened. On the 20th of February, 1867, *Stevens* gave notice to the *London and South-Western Railway Company* to pay to him the sums which became payable under their agreement, which they refused to do.

In 1868 the *Mid-Hants Company*, being unable to meet its engagements, filed a scheme of arrangement. This scheme authorized the company to create and issue, first, debenture A stock to an amount not exceeding £100,000; and secondly, debenture B stock to an amount not exceeding £125,000, bearing such interest as therein mentioned—Provided: 1. That the debenture A stock applied in satisfaction of the mortgages, costs, charges, and expenses, and purchase-moneys, interest, and costs thereinafter directed to be satisfied thereout (for which it was estimated a sum not exceeding £85,000 would be required) should be preferred in payment of interest over the residue of such stock. 2. That the interest on debenture B stock should be payable only out of the profits of the year. The holders of mortgages of the undertaking were to receive debenture A stock of a nominal amount equal to the principal and interest due on their mortgages up to the 31st of December, 1868; and as from the 1st of January, 1869, all rights under the mortgages, whether actually exchanged for debenture

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A stock or not, were absolutely to cease and determine. The residue of the debenture A stock was to be applied—(1) In payment of the costs of the scheme; costs incident to the purchase of lands, the purchase of which had not been completed; and the expenses of constructing a station and some other works. (2) In payment to the unpaid vendors of land sold to the company in respect of their purchase-moneys and interest and such costs as the company was bound to pay to them; which payments were estimated to require £20,000. (3) In payment of any sums not exceeding, on the whole, £12,000, which had been advanced to the company for payment of interest on mortgages and for payment of purchase-moneys of lands and expenses connected with such purchases. (4) In payment to the engineer, parliamentary agent, and solicitor of their charges. Debenture B stock was to be applied, in payment of what was due on bonds of the company (for which it was estimated that £40,000 was required), and in payment of the amount due from the company for the erection of signals, stations, and other works (estimated at £5,000), and in payment of the other debts and liabilities of the company. The annual income received from the *London and South Western Company* was to be applied—(1) In payment of expenses not exceeding £250 in any year. (2) In payment of rent-charges granted to vendors of land. (3) In payment of the interest on preferred debenture A stock. (4) In payment of interest on the remainder of the debenture A stock. (5) In payment of interest on debenture B stock. (6) In payment of interest on preference shares. (7) In payment of dividend on the ordinary shares.

This scheme was confirmed in April, 1869, and inrolled on the 11th of May.

The company issued under the scheme £73,503 preferred debenture A stock, £15,000 deferred debenture A stock, and £114,862 debenture B stock. The preferred debenture A stock was applied in manner directed by the scheme. The whole of the company's mortgages were then paid off, and a considerable part of the unpaid purchase-moneys for lands taken by the company. The deferred debenture A stock and the B stock were also applied according to the scheme, many of the creditors of the company accepting payment in B stock.

In May, 1871, *Stevens* filed his bill against the company, insisting

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that he was not bound by the scheme, and praying for a declaration that he was entitled to a charge on the undertaking, and for payment and a receiver.

In February, 1873, the *London Financial Association, Limited,* filed their bill on behalf of themselves and all other the holders of debenture stock against *Stevens,* against some other elegit creditors of the company, against three persons who were holders of the largest of the rent-charges granted by the company, and against the company, praying that the holders of the debenture stock of the company might be declared entitled to a charge upon the undertaking, and that such charge might be declared prior to any charge of the elegit creditors—that the persons having charges might be ascertained and their priorities determined—that *Stevens* might be restrained from proceeding further in his suit, and that a receiver might be appointed.

On the 11th of March, 1873, the Master of the Rolls made a decree in both suits, declaring priorities as follows:—1. That the vendors of land were entitled to a charge on the lands sold by them respectively, by way of security for their unpaid purchase-moneys and interest, in priority to all persons. 2. That the holders of rent-charges were entitled to charges on the lands out of which they respectively issued, and also to charges on the undertaking, in priority to all persons, except as above declared with respect to unpaid vendors. 3. That the holders of debenture A stock issued or to be issued under the scheme were entitled to a charge on the undertaking next after the holders of the rent-charges. 4. That the holders of debenture B stock issued or to be issued under the scheme were entitled to a charge on the undertaking next after the holders of debenture A stock, and that *Stevens* and all other judgment creditors were entitled to take B stock under the scheme in satisfaction of their judgments. A receiver was appointed of the moneys payable by the *South-Western Company,* and he was directed to apply them, first, in payment of office expenses not exceeding £250 a year; secondly, in payment of interest on unpaid purchase moneys; and thirdly, in keeping down the annual charges on the undertaking according to the priorities above declared; and the parties were to be at liberty to apply in Chambers as to the distribution of any surplus.(1)

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(1) See W N (1873) 58

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The income, it appeared, after payment of rent-charges and office expenses, would at present do little or nothing beyond paying the interest on debenture A stock.

Stevens appealed from this decree.

Sir *R. Baggallay*, Q.C., and Mr. *Bagshawe*, for the Appellant:—

It is clear that the Appellant is not bound by the scheme: *In re Cambrian Railways Company's Scheme* (1). In *Potteries, Shrewsbury, &c., Railway Company* v. *Minor* (2) this is taken as settled law. Our security is perfect without actual possession, the delivery of actual manual possession not being possible: *Champneys* v. *Burland* (3); *Guest* v. *Cowbridge Railway Company* (4). The mortgage debentures are merged, and cannot be set up against us: *Mocatta* v. *Murgatroyd* (5); *Toulmin* v. *Steere* (6); *Parry* v. *Wright* (7).

Mr. *Fry*, Q.C., and Mr. *Kekewich*, for the *London Financial Association*, were asked by the Court whether they contended that the scheme in any way abridged the rights of *Stevens*, and whether they objected to an order to the effect of the minutes set out below, and on their stating that they did not, they were not further called upon.

Mr. *Roxburgh*, Q.C., and Mr. *Ferrers*, for the *Mid-Hants Railway Company*.

Mr. *Southgate*, Q.C., and Mr. *Nalder* and Mr. *De Courcy Atkins*, for holders of rent-charges.

Mr. *Morgan*, Q.C., and Mr. *Speed*, for judgment creditors.

SIR W. M. JAMES, L.J.:—

Mr. *Stevens* has filed his bill and has presented this appeal for the purpose of getting an advantage which, if he is entitled to it at all, has, *per incuriam*, resulted to him from a scheme by which he says himself that he is not bound.

(1) Law Rep. 3 Ch. 278.
(2) Ibid. 6 Ch. 621.
(3) 19 W. R. 148.
(4) Law Rep. 6 Eq. 619.
(5) 1 P. Wms. 393.
(6) 3 Mer. 210.
(7) 1 S. & S. 369; 5 Russ. 142.

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It has been established that, according to the true construction of the Act of Parliament, an outside creditor is in no way bound by the scheme. If he is not in any way bound by the scheme, he ought not to be entitled to any benefit from that scheme. He is in the position of a person who, according to my view, is not entitled to read the scheme at all for any purpose. He says, "I have nothing to do with the scheme." If he has nothing to do with the scheme, he cannot claim a benefit from it. He is entitled to say, "I shall insist upon my rights as if no such scheme had been made." His utmost right, if no such scheme had been made, would have been to have said, "When the mortgagees prior to me have been satisfied, I have a right to be satisfied." And he has now no other right unless it is given him by the scheme.

Now, how has it been given him by the scheme? The mortgagees take under it, in place of their original securities for principal and interest, perpetual rent-charges, which are legal rent-charges enforceable by certain legal proceedings, independent of a bill in this Court. I am of opinion in this case that, if the Appellant says, "I am not bound by that," the answer is, "Very well; then we will not allow anything more to be given to them than would have been given to them under the former arrangement." But he has no right to insist on having the legal rent-charges which had been given to the mortgagees in satisfaction of their legal demand postponed to him for the purpose of giving him a priority to which he was not entitled at the time when the arrangement was made between the company and their creditors. The Appellant relied on the cases in which, where a third mortgagee has paid off the first mortgagee, he has let in the second mortgagee simply by the neglect and carelessness of his conveyancer so as not to be entitled to retain the benefit of the first security which he has paid off, because he has, being the third incumbrancer, paid it off and let in a man who had an intermediate incumbrance. Such were the cases of *Mocatta* v. *Murgatroyd* (1), *Toulmin* v. *Steere* (2), and *Parry* v. *Wright* (3). Those cases perhaps some day will have to be reconsidered, but it is quite clear that their principle is not to be extended. Probably they are rendered innocuous by this, that conveyancers exclude their application by

(1) 1 P. Wms. 393. (2) 3 Mer. 210.
(3) 1 S. & S. 369; 5 Russ. 142.

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putting in three or four lines saying that the original debt is to be considered as subsisting for the benefit of the person who has paid it off. But taking the simple case of a first mortgagee converting his first mortgage into a rent-charge for ever, with power of distress and entry, I am of opinion that the cases of *Mocatta* v. *Murgatroyd* (1), *Toulmin* v. *Steere* (2), and *Parry* v. *Wright* (3), ought not to be extended so as to deprive that first mortgagee of the legal rent-charge which he has taken instead of his conveyance in fee, so as to let in an intermediate incumbrancer and give that intermediate incumbrancer a benefit to which he was not before entitled. Of course it is quite right that an intermediate incumbrancer should not be prejudiced by any dealings between his debtor and another incumbrancer. At the same time it is not for this Court to find some recondite technical reason for giving a man a benefit at the expense of another man who was under no liability whatever to pay him.

We propose to make an order which will leave Mr. *Stevens* in possession of all the rights he had when the scheme was made, and that that is all he is entitled to.

SIR G. MELLISH, L.J.:—

I am of the same opinion. I think it is quite clear that MR. *Stevens* has not, by virtue of his writ of elegit, any legal right over the property of the railway company. It does not appear that there were any superfluous lands, and I think it is clear that he cannot, by virtue of a writ of elegit, bring ejectment to recover the railway itself, both because the land of the railway is devoted by Act of Parliament to a particular purpose, and also because there is a valid agreement with the *London and South-Western Company* under which that company is in possession of it. Neither is Mr. *Stevens* entitled at law to the rents and profits which are earned by the railway company, because at the time his writ of elegit was returned there were a variety of debenture holders who had in law the first charge on the rents and profits, and could have got a receiver appointed by magistrates to obtain those rents and profits. It may be true that those debentures have been put an end to; but then there has been created in lieu of them debenture stock, the holders of which have also a legal right to get a receiver, and so have a legal priority.

(1) 1 P. Wms. 393. (2) 3 Mer. 210. (3) 1 S. & S. 369; 5 Russ. 142.

Then the whole question comes to this, What equitable rights has Mr. *Stevens* in this Court to prevail over those legal rights which those mortgagees have got? And I entirely agree with what the Lord Justice has said—that we ought not to hold that he has any greater equitable rights than he had previous to the scheme. We ought to take care that his interests are not prejudiced by the scheme; but, on the other hand, it would be very wrong to hold that he has acquired by it a priority over every one else.

MINUTES OF ORDER:—Vary the decree of 11 March, 1873, by omitting so much as declares the order and priorities of the charges on the property and undertaking of the company, and as declares the right of *Stevens* and the judgment creditors to take B stock in satisfaction of their judgments; and so much as directs the receiver to apply the moneys to come to his hands, thirdly, in keeping down the annual charges on the undertaking of the company in the order and according to the priorities thereinbefore declared.

Order that, without prejudice to the rights of the unpaid vendors of any land taken by the company who have not accepted rent-charges nor debentures or debenture stock in satisfaction of their purchase-money, the receiver do, out of the residue of such moneys, after providing for the costs, office expenses, and the interest on the unpaid purchase-moneys, as directed by the said decree, pay all moneys due for the rent-charges to the vendors of land who have accepted rent-charges in satisfaction of their purchase-money, and subject thereto, do apply the residue of such moneys for the purposes of the scheme of arrangement to an amount equal to the total of the following amounts: that is to say, first, the amounts which would be due for principal, interest, costs, and otherwise, to the vendors of land who were paid off by debenture A stock, in case they had not been so paid off; and, secondly, the amounts which would be due for principal, interest, and costs to the holders of debentures issued prior to the filing of the sheriff's return to *Stevens'* elegit, who were paid off by the said debenture A stock in case they had not been so paid off.

Direct the following inquiries:

1. An inquiry what amounts would be due for principal, interest, costs, and otherwise, to the several vendors of land who were paid off by the debenture A stock, in case the same had not been so paid off.

2. An inquiry what amounts would be due to the several holders of debentures issued prior to the filing of the sheriff's return to *Stevens'* elegit, who were paid off by the debenture A stock in case the same had not been so paid off.

Costs of all parties, except *Stevens*, of the appeal, to be taxed, and to be paid by the receiver, together with the costs directed to be taxed and paid by the decree, out of the first moneys to come to his hands as receiver. *Stevens* neither to pay nor receive costs of the appeal.

Adjourn further consideration. Liberty to apply.

Solicitors: Messrs. *W. & J. Flower & Nussey;* Messrs. *Markby, Tarry, & Stewart;* Mr. *J. Keily;* Messrs. *Senior, Attree, & Johnson;* Messrs. *Stocken & Jupp.*

L. JJ.
1873
July 25.

Ex parte DAGLISH. *In re* WILDE.

Bill of Sale—Registration—Trade Fixtures—Bills of Sale Act (17 & 18 *Vict. c.* 36).

W., a lessee for years, demised by way of mortgage a cotton mill and all the steam-engines, mill gear, and fixed and moveable machinery to *B.*, to hold, as to the mill and such machinery as was of the nature of fixtures, for the residue of the term except the last two days, and as to the moveable machinery and other articles absolutely. The deed contained a power of sale by the mortgagee of the mill and machinery, and as to the machinery fixed and moveable either with the mill or separately:—

Held, that the deed, so far as it operated as a mortgage of trade fixtures, required registration under the *Bills of Sale Act*; and that the fact of the building and the trade fixtures being included in the same demise made no difference.

Begbie v. *Fenwick* (1) and *Hawtry* v. *Butlin* (2) followed.

Boyd v. *Shorrock* (3) dissented from.

THIS was an appeal from a decision of Mr. Registrar *Pepys*, sitting as Chief Judge in Bankruptcy. The liquidating debtor, Mr. *E. E. Wilde*, was a cotton spinner at *Highfield Mills, Lancashire*. The petition for liquidation by arrangement was filed on the 22nd of October, 1872, and a trustee of his property was appointed.

The mills were held under a lease for 999 years, granted by Mr. *H. P. H. Blundell*, the freeholder, to Messrs. *Wilde Brothers*, of which firm *E. E. Wilde* was the surviving partner, by an indenture dated the 31st of December, 1857. By this deed the lessor demised the piece of land therein described, together with the building thereon erected, which was intended to be converted into and used as a mill for spinning and manufacturing cotton, woollen and other textile fabrics, to *E. E. Wilde* and *J. Wilde* for 999 years at the rents therein reserved. The indenture contained a covenant by the lessees that they would, at their own expense, erect and fix up all such steam and other engines, boilers, mill gearing, shafting, machinery, going gear, tackle, and other appliances as might be

(1) *Post*, p. 1075, n. (2) Law Rep. 8 Q. B. 290.
(3) Law Rep. 5 Eq. 72.

usually or properly employed in the spinning and manufacture of cotton and other textile fabrics, and would keep the premises, and the steam and other engines, boilers, mill gearing, shafting, going gear, tackle, and other appliances, and all soughs, pipes, and drains erected, made, or fixed on the demised premises, or from time to time to be substituted in place of the same during the term, in good repair; and would, at the expiration of the term, yield up the said demised building and all walls, buildings, soughs, drains, pipes, and other works so to be erected, built, and made or fixed as aforesaid, with the appurtenances, in good order and repair.

By an indenture dated the 20th of October, 1871, *E. E. Wilde* and *J. Wilde* demised and assigned to *G. H. Daglish* the piece of land, mill, buildings, and premises comprised in the indenture of lease of the 31st of December, 1857, and also all and singular the steam engines, boilers, mill gearing, millwright work, fixed and moveable machinery, implements, and utensils then or thereafter to be fixed or placed upon or used in or about the mill, buildings, and premises, to hold the pieces of land, mill buildings, steam-engines and boilers, and all such part or parts of the said mill gear, millwright work, machinery, and premises thereinbefore demised as were of the nature of fixtures, unto the said *G. H. Daglish*, his administrators, and assigns, for the residue of the term of 999 years except the last day thereof, subject to the rents, covenants, and conditions in the said indenture of lease reserved and contained, and subject to the proviso for redemption thereinafter contained, and to hold all such and such parts of the said mill gear, millwright work, machinery, and premises thereinbefore expressed to be demised and assigned as were not in the nature of fixtures, unto the said *G. H. Daglish*, his executors, administrators, and assigns, subject to the proviso for redemption thereinafter contained. And the said indenture contained a proviso for the redemption and reassignment of the whole of the said premises on payment of the sum of £2000 advanced by *G. H. Daglish*, with interest. The indenture contained covenants by the mortgagors that they would not pull down or remove the mill, buildings, steam-engines, &c., fixed and moveable machinery, implements, utensils, and premises, without the mortgagee's permission, and a power to the mortgagee, without any

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further consent on the part of the mortgagors, to sell the premises subject to the security, or any part thereof, either together or in parcels, and as to the steam-engines, boilers, &c., fixed and moveable machinery, and other premises of like nature, either together with the buildings and land or separately and detached therefrom, and to make any stipulations as to the removal of any property sold separately from the buildings, and with a declaration that on any sale the mortgagors should stand possessed of the last day of the term of 999 years in trust for the purchaser.

This mortgage was not registered under the *Bills of Sale Act* (17 & 18 Vict. c. 36), nor was possession taken by the mortgagee before the commencement of the liquidation.

Under these circumstances the Registrar held that such of the machinery and other articles on the premises as were tenant's fixtures became the property of the trustee, as part of the debtor's estate; and from this decision *G. H. Daglish* appealed.

Mr. *Joshua Williams*, Q.C., and Mr. *Horton Smith*, for the Appellant:—

The property which we claim is such parts of the machinery and mill gear as are trade fixtures belonging to the tenant. These articles pass under an assignment of the mill as attached to the building, although the tenant may remove them during the term. The intention of the parties was clearly to treat them as attached to the mill, as they were included in the demise, and distinguished from the mere moveable articles. The *Bills of Sale Act* was intended to prevent "secret bills of sale of personal chattels," and applies to separate bills of sale of chattels, including fixtures, and does not apply to such a case as this, where they were included in the same demise with the building: *Mather* v. *Fraser* (1); *Climie* v. *Wood* (2); *Longbotham* v. *Berry* (3); *Holland* v. *Hodgson* (4); *Metropolitan Counties Asylum* v. *Brown* (5); *Ex parte Barclay* (6); *Waterfall* v. *Penistone* (7); *Ex parte Astbury* (8); *Boyd* v. *Shorrock* (9). It is

(1) 2 K. & J. 536.
(2) Law Rep. 4 Ex. 328.
(3) Ibid. 5 Q. B. 123.
(4) Ibid. 7 C. P. 328.
(5) 26 Beav. 454.
(6) 5 D. M. & G. 403.
(7) 6 E. & B. 876.
(8) Law Rep. 4 Ch. 630.
(9) Law Rep. 5 Eq. 72.

true that Vice-Chancellor *Malins*, in *Begbie* v. *Fenwick* (1), and the Court of Queen's Bench in *Hawtry* v. *Butlin* (2), held that an

(1) V.-C. M. 1871, Jan. 17, 18. BEGBIE *v.* FENWICK. [1865 B. 275.] FENWICK *v.* BEGBIE. [1866 F. 114.]

THIS was a summons, adjourned into Court, and taken out for the purpose of determining certain questions of principle which arose in taking the accounts under an ordinary redemption decree, made in two suits for redemption instituted by successive incumbrancers, under the following circumstances:—The mortgage to *Begbie*, the Plaintiff in the first suit, was by an indenture dated the 20th of January, 1865, between *John Stewart*, a shipbuilder at *Millwall*, of the first part, *James Ash* of the second part, and *Begbie* of the third part, by which, after reciting amongst other things the title of *John Stewart* to the leasehold premises thereby mortgaged, and reciting certain mortgages of the leasehold and copyhold premises comprised therein as to part thereof by indenture of mortgage of the 28th of December, 1858, and a further security of the 29th of December, 1858, and some further charges, it was witnessed that *John Stewart* thereby demised certain messuages, with the manufactory, foundry, stable, and premises adjoining, situate in *Russell Street*, *Blackwall*, and certain pieces of land situate in the *Isle of Dogs*, and all and singular the premises comprised in and demised by certain indentures of lease therein specified, or then held under the same indentures respectively, with their respective appurtenances, to *Begbie*, his executors, administrators, and assigns, for the unexpired residue of the terms of thirty years, sixty years, and sixty years, granted therein by the same several indentures of lease respectively, except the last ten days of the same several terms respectively, subject to the prior incumbrances; and by a second operative part it was also witnessed that *Stewart* thereby assigned all steam-engines, boilers, machinery, plant and fixtures, erections, implements, tools, and utensils, then or at any time thereafter fixed, placed, or being in, upon, or about the premises thereinbefore expressed to be demised, and not being of the nature of landlord's fixtures, to *Begbie*, his executors, administrators, and assigns, subject to the proviso for redemption therein contained.

The proviso for redemption applied to the property comprised in both operative parts.

By an indenture of the 1st of March, 1865, the same property was by the same description mortgaged to *Fenwick*, the Defendant in the first suit, to secure an advance by him. *Fenwick* also obtained a transfer of the earlier incumbrances, which, however, did not include the trade fixtures.

Begbie's security was not registered as a bill of sale, but *Fenwick* soon after obtaining his registered it as such.

The question now argued was, whether the trade fixtures passed to *Begbie* as part of the freehold under his mortgage without registration, or passed to *Fenwick* under his registered bill of sale.

Mr. *Glasse*, Q.C., and Mr. *Marten*, for *Begbie*:—

The present question is, whether the

(2) Law Rep. 8 Q. B. 290.

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assignment of trade fixtures ought to be registered, but in both those cases the building and the fixtures were conveyed by two

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trade fixtures, which, as between landland and tenant, might have been removed by the tenant before the expiration of his term, are within the *Bills of Sale Act*. This was considered in *Mather* v. *Fraser* (2 K. & J. 536), and the common law principle, that whatever is affixed to the freehold goes with the soil, was held to apply, and it was determined that trade fixtures did not require registration; and *Boyd* v. *Shorrock* (Law Rep. 5 Eq. 72) applied this principle in a case identical with the present. *Mather* v. *Fraser* followed *Ex parte Barclay* (5 D. M. & G. 403), which decided a like point in the analogous case between a mortgagee and an assignee in bankruptcy. Where the words of description are sufficient to carry fixtures as part of the freehold, they pass at once to the mortgagee: *Metropolitan Counties, &c., Society* v. *Brown* (26 Beav. 454), even when they are affixed after the date of the mortgage: *Cullwick* v. *Swindell* (Law Rep. 3 Eq. 249); *Climie* v. *Wood* (Law Rep. 3 Ex. 257). Considerations as to rights as between landlord and tenant are wholly beside the present question: *Ex parte Astbury* (Law Rep. 4 Ch. 630).

Mr. *Cotton*, Q.C., and Mr. *Waller*, for *Fenwick*:—

In principle the *Bills of Sale Act* includes fixtures which may be removed by a tenant before the expiration of his term.

Boyd v. *Shorrock* only goes to the point that where parties intend to deal with fixtures as part of the freehold, it is not necessary to register as a bill of sale a mortgage comprising them. *Ex parte Barclay* was simply a question of order and disposition under the Bankruptcy Acts. But in these mortgages the fixtures are dealt with as chattels in a separate operative part distinct from the soil. The form of the deed has an important bearing on the question: *Waterfall* v. *Penistone* (6 E. & B. 876).

Mr. *Glasse*, in reply, referred to *Haley* v. *Hammersley* (3 D. F. & J. 587).

SIR R. MALINS, V.C., after some general remarks as to the question raised upon the summons, continued:—

The first question which arises is a very important one. Suppose a person seised in fee of a manufactory or entitled to it, as in the present case, for a term of years. He mortgages the leasehold property comprised in such a lease, and all its appurtenances, for the residue of the term. Does a mortgage in that form include the trade fixtures? It is said that some of the cases have decided that it does. *Climie* v. *Wood* (Law Rep. 3 Ex. 257) is appealed to, and certainly, as far as I can collect from the report, it would seem that the Court of Exchequer so decided. But at the same time the form of the deed is not stated, and it may turn out, for aught I can see, that there were words in that deed having reference to the fixtures. [His Honour then referred to the facts of that case, and continued:—]

The Court says (p. 260): "The term 'fixture' is an ambiguous one. It has been defined to be such an annexation as can be removed from land by the party annexing it adversely to the owner, but in its more general sense it means any annexation or addition which has been affixed to or planted in the soil of

separate witnessing parts of the mortgage deed. Here they are included in the same demise.

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the land. The rule of the law is, *Quicquid plantatur solo, solo cedit*, and in several of the old books the word '*fixatur*' is used as synonymous with '*plantatur*.'" Now this was a very peculiar case; it was a steam-engine fixed in brickwork, and I cannot say whether, upon looking at the deed, there were not some words which would have regard to the fixtures.

The other case mainly relied upon to prove that point was the case of *Cullwick* v. *Swindell* (Law Rep. 3 Eq. 249), before the Master of the Rolls. [His Honour then read the head-note in that case, and continued :—] The form of the deed is not stated, but as far as the report goes, I think it must be admitted that this appears to be a decision of the Master of the Rolls, that by a mortgage of a mill or any building used for the purposes of trade without particular words, the trade fixtures do pass to the mortgagee.

Another case which was relied upon was the case of *Boyd* v. *Shorrock* (Law Rep. 5 Eq. 72), where, on looking to the report, it is very plain that not only the property was conveyed, but "all and singular the looms and other machinery whether fixed or moveable then standing and being, or which at any time thereafter during the continuance of the security might be in or about the mill."

Therefore, these are two cases in which there was an assignment of machinery. But for the purpose of my decision I am bound to say that, considering the enormous value of machinery for the purposes of trade, as, for instance, in a cotton mill, I entertain very considerable doubt whether a mere conveyance of the land, or an assignment of the building for the residue of the term, with the appurtenances, (nothing being said about the fixtures) would be sufficient to pass the fixtures. My impression is that the fixtures would not pass. But as other Judges have come to a different conclusion, it is not my intention to go contrary to what they have said. I do not think it is necessary for my decision to come to any conclusion upon the subject. With regard to the case of *Ex parte Barclay* (5 D. M. & G. 403), where there was a written memorandum executed by a publican of the lease of his public house, with all fixtures, I think there is considerable doubt whether, if it had been a mere deposit of the lease without any written memorandum, the fixtures would have passed. But perhaps that case is not so clear on this point, because the only question there was of order and disposition. The argument took place after the passing of the *Bills of Sale Act*, for it was argued in 1855, the statute having been passed in 1854, but nothing turned upon that, and the statute was not in any way referred to. The word "fixture" was included in the written memorandum, and the decision is that the brewers, as mortgagees, were entitled to the trade fixtures as against the assignees in bankruptcy.

However, in the view which I take of this case, it is not necessary for me to come to any positive conclusion one way or other on that subject. The mortgagor here carried on a very considerable trade as a ship-builder or ship-repairer. Now, assuming the decisions to which I have referred to be good, and to determine that if a

7 H.L. 485 (4 & C. Jur. N.S. 1145.

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Mr. *De Gex*, Q.C., and Mr. *Winslow*, for the trustee, were not called on.

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man assigns his mill or manufactory, and all its appurtenances, the fixtures do pass, it is also clear that the deed may express that they shall not pass. Words may be inserted of any description to exclude them, or they may be the subject of distinct contract, and if the Court sees plainly that by a conveyance of freehold property, or an assignment of leasehold property, as it may be, it was not intended to include the fixtures, then I have the authority of the Court of Queen's Bench in *Waterfall* v. *Penistone* (6 E. & B. 876) for saying that freehold or leasehold property may be the subject of one contract and the fixtures the subject of another. [His Honour then referred to the facts of the case, and, after observing that if the deed had contained only the first operative part the case might have been different, continued :—]

Now I apprehend that the fixtures did not pass by the first witnessing part. The mortgagee does not get them because they are annexed to the freehold and cannot be severed without his consent, but by an entirely separate contract and assignment. So that he acquires two things—the leasehold property first, and secondly, all the machinery of every description. Where they pass by one witnessing part, that is, where they are all put together as being annexed, the case of *Boyd* v. *Shorrock* will apply. There the Vice-Chancellor *Wood*—although I must confess I do not understand the ground of his decision—decided not only that they would pass, but that the assignment of them is good against the assignees in bankruptcy, although the deed is not registered under the 17 & 18 Vict. c. 36.

Now let us consider the policy and object of this Act, and particularly the recital. We know very well that in bankruptcy, trade fixtures, where there is no question of right in the mortgagee, will pass to the assignees, as, for instance, in the case of a large mill with cotton looms to an enormous amount. Many cases may be suggested in which a trader obtains credit not merely because he is in the occupation of a building of which he may well be assumed to be the tenant. That may or may not enable him to obtain credit. But when he is in possession of a large amount of machinery, and by the apparent ownership, which continues unless the public is informed by registration under this Act that it has ceased, he obtains credit.

[His Honour then referred to the preamble and 7th section of the Act, and continued :—]

Now some of the cases relied upon by the learned counsel for Mr. *Begbie* arose between two successive mortgagees, and merely decide, what there can be no doubt whatever about, that if a man mortgages his mill and fixtures first to *A.* and then to *B.*, *B.* can have no priority over *A.* But, now, can it be right with regard to moveable chattels (which appear to me to fall within the object of this statute, which is to take away that apparent ownership and to give the public who are giving credit to traders, information who have and who have not parted with their moveable property) to hold that all the machinery and fixtures not forming part of the freehold, but merely affixed to it for the purposes of trade, and commonly called trade fixtures, may be assigned by way of mortgage, and a good title thereby given to a mortgagee against the assignees in

(4 SC 3 Jur NS. 15.

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SIR W. M. JAMES, L.J.:—

I am of opinion that this case is substantially decided by the case before the Vice-Chancellor *Malins*, *Begbie* v. *Fenwick*, and the subsequent case before the Court of Queen's Bench, *Hawtry* v.

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bankruptcy, without registration under this Act? I confess the point appears to me to be one admitting of the greatest possible doubt. If I were unfettered by authority I should unhesitatingly come to the conclusion that all moveable property, and all trade fixtures, whether moveable or immoveable, unless they have absolutely and unqualifiedly become part of the freehold, are within the Act. Everything which is fixed to a building, whether by bolts, screws, or nails, or in any way whatever, merely for the purposes of trade, ought, in my opinion, to be considered within the Act; and although the assignment of them is accompanied by an assignment of the property to which they are affixed, my opinion is that the assignment ought to be registered, in order to take them out of the order and disposition of the trader, so as to pass to his assignees.

However, it is not my decision, because *Waterfall* v. *Penistone* has expressly decided this point; and although observations have been made upon that case, I do not find that there is any case in which disapprobation has been expressed with it, and certainly there is no case which has overruled it.

That case appears to me all but identical with the present. [His Honour then referred to the facts of that case, and continued:—] But for the *Bills of Sale Act*, the Defendant, as mortgagee, would undoubtedly have had a good title, because the things were assigned to him, and would not have been in the order and disposition of the bankrupt. It would have fallen within the decision in *Ex parte Barclay*, and a perfectly good title would have been acquired. But the decision was that the Defendant had acquired no title. It is a decision of a Judge of great eminence—Mr. Justice *Erle*. I do not think it is for me, finding that no Judge who has preceded me has expressed any disapprobation of that case, to question it. I think it is binding upon me, and, moreover, it appears to me to be right. [His Honour then read part of the judgment in that case, and continued:—] The Court of Queen's Bench, therefore, took precisely the view which I have expressed—that, whether they were affixed to the freehold for the purposes of trade or not, they were chattels within the meaning of the statute. This case, therefore, is, in my opinion, in complete opposition to the decision of Vice-Chancellor *Wood*, which has been referred to, in the case of *Boyd* v. *Shorrock*. I cannot think that the Vice-Chancellor *Wood* would have come to the conclusion he did, if he had adverted to this case, unless he was prepared to overrule it, because the question there was precisely like the one now before me as to trade machinery affixed to the freehold for the purposes of trade. [His Honour then read portions of the judgment in that case, and continued:—] It is remarkable that the very ground stated by Vice-Chancellor *Wood* for the non-registration of the deed is that the mortgagor said it would injure his credit—that is, compliance with the law by registering the assignment of mere personal chattels would injure his credit, when the very object of the

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Butlin (1). The decisions in both those cases seem to me to be consistent with the plain policy of the law, and the intent and meaning of the Act of Parliament, and it is a matter that would require a great deal of consideration, at all events, before we should differ from two such authorities and overrule decisions which really are plainly for the furtherance of and in accordance with the policy of the Legislature.

Independently of that, I am prepared to express my own opinion that if the question stood for the first time for decision here I should come to the same conclusion. I do not at all mean to question the propriety of the decisions as to the effect of a mortgage by a freeholder of property to which there is attached that which is *de facto* a fixture; but those cases seem to me, when carefully considered, to have very little bearing on the present case, because the word "fixtures," as I understand it in the *Bills of Sale Act*, means that thing which in contemplation of law has a distinct existence as a fixture. In the case of a freeholder the freeholder has exactly the same interest in everything attached to the freehold as he has in the bricks and mortar themselves which make up the walls of the freehold. But that is not the case with respect to a tenant who has a limited interest—it does not signify what that limited interest is—in the soil and the buildings, and who has besides an absolute interest, a complete and unqualified property

7 Ex Ca 486

Act is to prevent persons who have done so obtaining false credit upon that which has been actually assigned. I observe that in *Waterfall* v. *Penistone* the learned Judges say they agree with the Vice-Chancellor in *Mather* v. *Fraser* that an assignment of the property with the fixtures is not a bill of sale. To that extent the decision is contrary to my impression. However, I do not decide the question upon that point, although I think it open to very grave doubt; but the decision there is that where the freehold or leasehold property is made the subject of one contract, and the fixtures are the subject of another, it is then a bill of sale within the Act, and must be registered. In my opinion, in the present case the deeds most distinctly shew that the leasehold property was one subject of security and the machinery another; and being, therefore, a mere bill of sale with regard to the machinery, it did require registration, and, as it was not registered, Mr. *Begbie* did not, under his deed, acquire any title to the affixed machinery. Therefore the result is that machinery, which for the purposes of trade merely was fixed, is in the same position as that which was entirely loose.

Solicitors: Messrs. *Thomas & Hollams*; Messrs. *Hillyer & Fenwick*.

(1) Law Rep. 8 Q. B. 290.

(unqualified except as to this, that he must remove it before the end of that term) in the fixtures as distinct from the interest in the land. This interest is a thing which he can part with, a thing which his creditors can seize, and a thing which is liable to execution as against him, just as much as the chairs and tables in his house. When you once arrive at the fact that a person has the property in fixtures as distinct from their connection with and adhesion to the freehold, then they are in my opinion the very class of things which were intended to be provided for by the *Bills of Sale Act*. If the tenant is precluded from making a mortgage of his fixtures to one of his creditors by a bill of sale, it would be, in my opinion, a very narrow construction of the Act. It would not be to further the policy of the law, but would enable ingenious conveyancers to defeat it, if we were to say that a man who could not sell the chattels, who could not give a security upon the chattels themselves, by a bill of sale, could do it by demising the property, which might be held on a tenancy from year to year, to an under-tenant for the whole of his term, and then demising or assigning with it the fixtures, with a power of entering at any time and seizing and selling those fixtures as distinct property. Such a construction would really make the Act of Parliament almost a plaything. In my judgment it would be very mischievous if we were to attempt to distinguish this case from the cases before Vice-Chancellor *Malins* and the Queen's Bench. I am of opinion that the decision of the Registrar was right, and that this appeal must be dismissed.

SIR G. MELLISH, L.J.:—

I am of the same opinion. I will first consider the case on the principle of the true construction of the Act before I say a few words respecting the authorities. The *Bills of Sale Act* says, in, sect. 7, that the expression "bill of sale," shall include bills of sale assignments, transfers, declarations of trust without transfer, and other assurances of personal chattels, and also powers of attorney, authorities, or licences to take possession of personal chattels as security for any debt; and then it says that the expression "personal chattels" shall include fixtures. Therefore it says this, that if there is an assurance of fixtures in whatever form, and if there is

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a power to take possession of fixtures as a security for a debt, any instrument that gives that is to come within the definition of a "bill of sale." The object of the Act is stated in the title to be, "to prevent frauds upon creditors by secret bills of sale of personal chattels." Of course the words "personal chattels," in the title of the Act as well as elsewhere, include fixtures, and therefore one of the objects of the Act is to prevent frauds upon creditors by secret bills of sale of fixtures, that is to say, by secret instruments by which power is given to take fixtures and apply them as a security for money lent. The mortgage in the present case very clearly gives a power to the mortgagee to take possession of these fixtures for the purpose of the security of the debt, and therefore it appears to me that, according to the plain construction of the Act of Parliament, and according to what is the apparent intention of the Legislature in passing it, we ought to hold that the instrument giving that power is a bill of sale within the Act.

Now, with reference to the authorities, can this be distinguished from the case of *Hawtry* v. *Butlin* (1)? No doubt there is a distinction in the form of the two instruments. In the one instrument there was a demise of the premises for a term of years, that is to say, for the original term wanting a few days, not including the fixtures, and then by a second operative part there was an absolute assignment of the fixtures. In the present case no doubt the conveyancer has thought, although I suppose it was executed long before the decision of that case, that that was a dangerous form of conveyance, and he has endeavoured with considerable skill to give the mortgagee precisely the same power, but using a different form of words. For that purpose he includes the fixtures *nominatim* in the demise for the term, and then afterwards gives a power to sell them separately from the term; but is not the mortgagee precisely in the same position as the mortgagee was in the case of *Hawtry* v. *Butlin* (1)? In both cases the mortgagee, on default being made, or on demand, has power to take possession of the premises and the fixtures upon them, and having taken possession of the premises and fixtures upon them, has power to sell them together, or has power to sever the fixtures and sell them separately. There is not, as far as I can see, the slightest difference between the power

(1) Law Rep. 8 Q. B. 290.

which the mortgagee has in the one case, and the power which he has in the other.

That being the case, in my opinion we ought not to allow any different result to ensue because a different form of words is used. I cannot think that we ought to hold it to make any real difference whether there are two testatums, or whether there is only one. I am at a loss to find anything that can make any difference in the legal effect of the deed; nor do I think it ought to make any difference that there is a nominal demise of the fixtures included in the conveyance. What the mortgagee has a right to do is precisely the same in both cases, and therefore if the one case comes within the principle and intention of the *Bills of Sale Act*, the other must do so too. The only authority at all against this construction is the case of *Boyd* v. *Shorrock* (1). That case has been dissented from by Vice-Chancellor *Malins* in *Begbie* v. *Fenwick* (2), and also in substance by Mr. Justice *Blackburn* and Mr. Justice *Mellor*, in the case of *Hawtry* v. *Butlin*, and I agree with the dissent so expressed. I cannot help thinking that Vice-Chancellor *Wood* did not really consider the terms of the *Bills of Sale Act*. In my opinion, the true construction of that Act is, that if a person is in possession of fixtures, then he cannot pledge those fixtures so as to give a title to the mortgagee, except by an instrument which is to be registered as a bill of sale. The cases where the mortgagors have been freeholders are plainly distinguishable, because a freeholder cannot be said to be in possession of fixtures which he has put up, although the same things, if put up by a lessee, would be trade fixtures; for in point of law the machinery affixed to the premises is just as much part of the premises as the bricks. That does not come within the words of the Act. In my opinion the present case does come within the words of the Act, and therefore the mortgagee has lost his security on the fixtures from not having registered his mortgage as a bill of sale.

5 Ch D 573

I do not think this reasoning applies to what may be called the power machinery, because in my opinion the true construction of the lease is to make the power machinery practically the landlord's property. The lease was in the nature of a building lease, and it being the ordinary practice in *Lancashire* to demise mills with

(1) Law Rep. 5 Eq. 72. (2) *Ante*, p. 1075, n.

L. JJ. 1873 *Ex parte* DAGLISH. *In re* WILDE.

power machinery in them, I think the lease is purposely so worded as to make the power machinery practically the property of the landlord. It is true that in the covenant to give up possession at the end of 999 years that is not included. But that makes no practical difference, for the lessee is not entitled to remove them the day before, and after it has expired he cannot remove them. Of course he could change the power machinery; the lease specially provides for that, but not so as to substantially decrease the value, but it is practically made part of the building, and is not within the meaning of the word "fixtures" in the Act, which only refers to tenant's fixtures, which the tenant is entitled to remove.

SIR W. M. JAMES, L.J.:—

As to what are called the landlord's fixtures, I desire to express my entire concurrence with what the Lord Justice says about the construction of the Act.

Solicitors for the Appellant: Messrs. *Lewis, Munns, & Longden.*
Solicitors for the Respondent: Messrs. *Gregory, Rowcliffes, & Rawle,* Agents for Messrs. *Scott & Co., Wigan.*

L. JJ. 1873 *Aug.* 2, 4.

WESTON *v.* ARNOLD.

[1872 W. 229.]

Party Wall—Wall extending above adjoining Building—Ancient Lights—Bristol Improvement Acts, 1840 *and* 1847*—Ex parte Injunction—Suppression of Material Fact—Costs.*

4 Ch D. 202
11 Ch D 414-5,
4 Ch D 193

A wall may be a party wall to such height as it belongs in common to two buildings, and cease to be a party wall for the rest of its height.

The *Bristol Improvement Act,* 1840, enacts that no opening shall be made in any party wall except for communication from one building to another.

The Plaintiff had a house, one wall of which was to the height of the first story a party wall between the Plaintiff's house and a building belonging to the Defendants, but above that height had ancient windows opening to the external air. The Plaintiff pulled down his house, and proposed to rebuild it with windows in the same position as before. Before doing this, he gave notice to the Defendants, under the Act, that the wall, which he described as a party wall, was out of repair, and a certificate of two surveyors was given directing the party wall to be rebuilt at the joint expense of the Plaintiff and

Defendants. The Defendants afterwards proceeded to erect a building which would obstruct the light coming to the ancient windows of the Plaintiff:—

Held (affirming the decision of *Malins*, V.C.), that the wall above the Defendants' building was not a party wall, and that the Plaintiff was not precluded from making windows in it; and an injunction was granted, restraining the Defendants from obstructing his ancient lights.

The Plaintiff obtained an *ex parte* injunction upon the filing of the bill; but no mention was made in the bill, or in the affidavit in support of the motion, of the notice to pull down the wall, or the certificate of the surveyors:—

Held, that inasmuch as these facts were only important as raising a point of law, based on an unreasonable construction of the Act, they were not material facts, and the Plaintiff was justified in omitting them.

THE bill in this case was filed by *J. D. Weston*, the owner of a house used as an inn, called the *White Lion*, in *Bristol*, against *George Arnold* and others, the owners of some adjoining premises, to restrain the Defendants from interfering with the light and air coming to the windows in the south wall of the Plaintiff's house.

The south side of the Plaintiff's house overlooked a courtyard and outbuildings belonging to the Defendants, which outbuildings were built up against the Plaintiff's house, so that to the height of the first story the wall of Plaintiff's house was a party wall between the two buildings. The Plaintiff's house consisted of a ground floor, used as a kitchen, and two stories above it, and there were twelve windows in the south wall, all of which opened on the external air over the outbuildings. The Defendants' building now complained of was a warehouse just beyond the outbuildings.

The Plaintiff had pulled down the greater part of the *White Lion* with the intention of rebuilding it; the south wall was left standing, but the Plaintiff had sold the materials, and was preparing to pull it down also.

The Defendants admitted that if the old *White Lion Inn* had still remained standing the new buildings would obstruct the windows in the south wall, but they contended that the south wall was a "party wall" within the meaning of the *Bristol* Improvement Acts, and that, when the wall was rebuilt, it would not be allowed to have any windows at all in it. The sections of the Acts particularly referred to were as follows:—

The *Bristol Improvement Act*, 1840 (3 Vict. c. lxxvii.), s. 23, laid

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down rules for the building of the "external walls" of any building of any of the classes specified in the schedule to the Act.

Sect. 24 enacted that "every party wall, party fence wall, and separate side wall" should be constructed of the materials and in the manner therein mentioned.

Sect. 25 enacted that no opening should be cut or made in any party wall, party fence wall, or separate side wall for any purpose whatever, except for communication from one building to another, and that no recess or opening should be cut or made in any such party wall, fence wall, or separate side wall, except for chimneys or flues, so as to reduce such party wall, party fence wall, or separate side wall in any part thereof under the thickness by this Act required, except in the cases therein mentioned.

Sect. 26 provided that, for the purposes of the Act, every party wall, party arch, party wall or partition between separate houses, buildings, or other premises, should be deemed to be respectively a party wall, party arch, party fence wall, or partition belonging to such houses, buildings, or other premises respectively, and that if a party wall were defective, one owner might give notice to the other, requiring an arbitration of two surveyors in manner therein directed.

The *Bristol Improvement Act*, 1847 (10 & 11 Vict. c. cxxix.), in which the *Lands Clauses Act*, 1845, was incorporated, repealed the 26th and some other sections of the *Bristol Improvement Act*, 1840 and enacted:—

By sect. 24: That for the purposes of this and the said recited Act, every wall, arch, fence wall, or partition between separate houses, warehouses, or other buildings, should be deemed to be respectively a party wall, party arch, party fence wall, or partition, belonging to such houses, warehouses, or other buildings.

By sect. 26: That separate houses, buildings, or premises should be defined to be such as are in separate occupations, and have separate entrances and separate staircases.

By sect. 27: That if any owner or part owner of any houses, warehouses, or other buildings, or of any adjoining property, should apprehend that any party wall, party arch, party fence wall, or partition between any such houses, warehouses, or other buildings, is insufficient in thickness, or that the house, or such house, ware-

house, or other building was defective, or so far out of repair or insufficient in thickness as to render it necessary to have it taken down, or that the same or some part thereof should be rebuilt, &c., it should be lawful for such owner or part owner to give notice in writing to the part owner of the same or the adjoining property in manner therein mentioned, requiring an arbitration by two surveyors for the purpose of having the wall taken down.

In pursuance of the 27th section of the last-mentioned Act, the Plaintiff, on the 28th of June, 1872, gave notice to the Defendants that he apprehended that the wall in question, which he described in his notice as "a party wall or partition," was out of repair, and ought to be taken down. Two surveyors were accordingly appointed, who certified that the said party wall was out of repair and of insufficient thickness, and ought to be rebuilt; that the new party wall should be built upon the centre line of the present old wall, and that the new party wall should be built by the Plaintiff, and that half the expense of the building should be paid by the Defendants to the Plaintiff.

With respect to the title to the premises, it appeared that the *White Lion Inn* and the premises of the Defendants were from 1713 to 1869 held under one title, and that in 1869 one moiety was vested in the Defendants in fee, and the other moiety in other persons for a long term of years. On the 4th of February, 1869, the Defendants conveyed their moiety of the *White Lion*, and the termors of the other moiety conveyed their interest, to the *Bristol* Local Board for the purposes of their Act, from whom the Plaintiff purchased the property.

Under these circumstances the Plaintiff obtained an *ex parte* injunction against the Defendants in the terms of the prayer.

The notice given by the Plaintiff on the 28th of June, 1872, and the certificate of the surveyors, were not mentioned in the bill or in the affidavits in support of the motion for an injunction.

The Defendants then moved before the Vice-Chancellor to dissolve the injunction, but his Honour refused the motion, being of opinion that the wall, so far as it extended above the buildings of the Defendants, was not a party wall within the meaning of the *Bristol* Improvement Acts. From this decision the Defendants appealed. On the appeal motion coming on to be heard their

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Lordships thought it better that the case should be turned into a motion for decree and heard before their Lordships, and the cause now came on for hearing.

Mr. *Higgins*, Q.C., and Mr. *W. Barber*, for the Plaintiff:—

This would be an undefended cause were it not for the contention of the Defendants that this is a party wall within the meaning of the *Bristol* Improvement Acts. *Titterton* v. *Conyers* (1) and *Crofts* v. *Haldane* (2), under similar Acts, shew that the Court will not construe such Acts so as to destroy established easements. On comparing the various sections of the *Bristol* Improvement Acts of 1840 and 1847, it is clear that in these Acts a "party wall" means a wall between buildings. So much of the wall as is between our building and the building of the Defendants is a party wall; but so much as is above his building is not, and the provisions respecting party walls do not apply to it.

Mr. *Glasse*, Q.C., and Mr. *Ingle Joyce*, for the Defendants:—

The wall in question in this case is a party wall from top to bottom. A party wall means a wall between the property of two part owners. It need not have a building on both sides. There was no definition of a "party wall" in the *Bristol Improvement Act* of 1840; but in the Act of 1847, sect. 24, it was enacted that "any wall, arch, fence wall, or partition between separate houses, warehouses, and other buildings shall be deemed to be a party wall," &c. Here it is clear that a "house" includes a courtyard, otherwise the words "fence walls" would not be used: *Dalglish* v. *Jarvie* (3). But assuming that there must be a building on both sides, that is so in the present case to the height of the Defendants' outbuildings; and if it is a party wall at the bottom, it must continue so to the top. The Plaintiff has himself admitted that it is a party wall in the notice which he gave under the Act that the wall was out of repair and ought to be pulled down.

We are, at all events, according to the ordinary rule of the Court, entitled to the costs of the motion for injunction, because the Plaintiff, in obtaining the *ex parte* injunction, did not state

(1) 5 Taunt. 465. (2) Law Rep. 2 Q. B. 194.
(3) 2 Mac. & G. 231.

facts which bore materially on the dispute respecting the meaning of the words "party wall," which is the most important point at issue: *Harbottle* v. *Pooley* (1); *Phillips* v. *Pritchard* (2).

SIR W. M. JAMES, L.J.:—

This is a very plain case. The Plaintiff is the owner of a house in which there are some ancient windows. He bought the house from the Local Board of *Bristol*, who purchased it from the then owners, among whom were the Defendants. The house was conveyed to the board, and afterwards to the Plaintiff, as a house with windows in it. In consequence of the alterations made in that neighbourhood, it was determined to pull down the house, with a view of rebuilding it, and rebuilding it in such a way as to have windows exactly in the same position as before. Thereupon the Plaintiff's neighbour, on whose behalf apparently some *Bristol* surveyor has been exercising very perverse ingenuity in misreading the Act of Parliament, is advised that the right to the windows is gone. The *Bristol* Local Acts contain some provisions about party walls, and it is contended by the Defendants that as this was a party wall at one time the Plaintiff cannot have any openings at all in it. Now, a party wall is a thing which belongs to two persons as part owners, or divides two buildings one from another. It is beyond even the power of the Legislature to make that a party wall which is not a party wall. No doubt they might have made provisions to the effect that that which is not a party wall shall, for the purposes of a particular Act of Parliament, be deemed to be a party wall; but they cannot make what is not a party wall a party wall, any more than they can make a square a circle.

In the present case there was a part of a wall which divided the property of one person from the property of another. Apparently they were joint owners of that part, or jointly entitled to it. It was, therefore, a party wall in one sense, and was probably a party wall in another. I do not know how that may be, but it only divided the two houses for a few feet in height, and above the few feet there was a wall which, beyond all question, was the separate and undisputed property of the Plaintiff. Unless there is some-

(1) 20 L. T. (N.S.) 436. (2) 1 Jur. (N.S.) 750.

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thing in the Act of Parliament which shews a clear intention to the contrary, it appears to me that a wall may be in part of its length a party wall, and in part of its length an external wall, and there is no distinction between height and length. A wall may be a party wall up to part of its height, and may be an external wall for the rest of its height. We have known in this Court cases in which house property in *London* is intermixed in such a way that one man's basement and cellar extend under another man's shop, and again, the first floor of one house is over the shop of the next house. In such a case there would be a party wall between the two buildings below which above would be only a private partition between two rooms in the same house. There is nothing in fact or in law to make it impossible or improbable that a wall should be a party wall up to a certain height, and above that height be the separate property of one of the owners. It is clear in this case that there was a party wall, and there was a separate wall, and that the windows were in the separate wall. The owner of that wall has acquired a right to those windows, and there is nothing in the Acts of Parliament that can deprive him of his right for the benefit of his neighbour, or that has given his neighbour a right to raise his building so as to darken those windows. There is nothing in the words or spirit of the Acts which can justify such transfer of a valuable property from one person to another, without any reference to the public good, in the city of *Bristol*, or in any other place.

That being so, I am of opinion that the Plaintiff has clearly made out his case, and that he is entitled to the injunction he obtained from the Vice-Chancellor. Then it is said that, at all events, he is to pay some of the costs because he applied for the injunction *ex parte* without stating the facts which have raised the contention before us. In my opinion those facts are so very irrelevant to any real question between the parties, that I think the Plaintiff was quite justified and right in not introducing them at all, and that it would only have been incumbering the bill with matter which had no bearing on the case. It never had been the question in dispute between the parties. They had communications about the arrangement to be made for rebuilding the wall, but no communication was ever made by the surveyor, who seems

to have found out this notable point, or anybody else, to the Plaintiff that he had lost his rights by reason of this construction which is attempted to be put on the *Bristol* Acts. I think the rule in question would be extravagantly extended if it were extended to a case in which the Plaintiff omits to state something which is supposed to raise some point of law having no foundation in the words or spirit of the Act of Parliament relied on.

SIR G. MELLISH, L.J.:—

I am of the same opinion. It is quite clear in this case that the Plaintiff has, independently of a question under the *Bristol* Acts, a right to the lights. He has a right to the lights as against the immediately adjoining owner by prescription, the lights having existed a much longer period than twenty years; in fact, for 100 years. As against the Defendants as the owners, not of the next immediate building, but of the warehouse beyond, he has, in my opinion, also a right, by the terms of the conveyance from the owners of the *White Lion Inn* to the *Bristol* Improvement Commissioners, who sold to the Plaintiff. That right is of this nature: A part of the wall in which the windows are separates the building of the Plaintiff from the adjoining building, but a large part of it, namely, the upper part in which the windows are, does not separate the one building from the other. It is obviously impossible that a wall in which there are windows opening to the external air can separate one building from another. The simple question to be determined is whether that is a party wall. The Act of 1840 mentions external walls, party walls, party fence walls, and separate side walls, and, having regard to the 23rd, 24th, and 25th sections of that Act, I think there can be no doubt that party walls, party fence walls, and separate side walls are the different descriptions of walls which separate one building from another, and that an external wall is a wall which does not separate one building from another, and that an external wall may have windows in it; whereas, of course, party walls, party fence walls, and separate side walls cannot have windows which open to the external air and admit light and air.

The only real question to be decided is, whether, if there is a wall which in part is unquestionably a party wall because it sepa-

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rates one building from another, and in part is an external wall because it does not separate one building from another, the whole of that wall is to be considered a party wall; or whether only that part which separates one building from another is to be considered a party wall, and that which does not separate one building from another is to be considered an external wall. We only have to decide that with reference to a case where a right to light has been gained, because I think it is unnecessary to say what the case would be if a person who is the owner of a house which is separated by a party wall from an adjoining house raises the party wall, which under one section of the Act he may do, for the purpose of making his house a story higher than the house of his neighbour. It is obvious that when he does that his neighbour has the same right, whenever he pleases, to raise his house to the same height as the first owner; and then, whether it was so or not before, it would become a party wall. How far the Act would apply to such a wall when the first owner first begins to raise his house, I do not think it necessary to consider; but in a case where lights have been gained, the man who owns the adjoining house has no right to raise his wall, and therefore the wall which is above that part which separates the one building from the other not only is not a party wall, but can never become a party wall without the consent of both parties. I am unable to see that such a case comes within the principle of the 25th section of the Act of 1840, which says that no opening shall be cut through any party wall, party fence wall, or separate side wall, for any purpose whatever except for communication from one building to another. How can that possibly apply to a case where there are windows in the wall which is above the other house, and where the person who owns the adjoining house has no right to raise his wall so as to block them up? It appears to me that the words of that section, if there were no other, plainly shew that "party wall, party fence wall, and separate side wall," are all used in the sense of walls which do actually separate one building from another. It is perfectly plain that that provision is intended to prevent fire spreading from one building to another, and has nothing to do with the case of one building overtopping the other. Then the 26th section, which is the only section of the first Act which gives a definition of "party wall," is

quite consistent with this. It enacts that for the purposes of this Act every party wall, party arch, party fence wall, or partition between separate houses, buildings, or other premises, shall be deemed to be respectively a party wall, party arch, party fence wall, or partition belonging to such houses, buildings, or other premises respectively. That simply enacts nothing but what I should have thought would be the law if it had not been enacted. It is little more than saying that a party wall shall be a party wall. Then the 24th section in the Act of 1847, as it appears to me, is equally consistent with the natural construction, namely, that for the purposes of that Act and the recited Act every wall between separate houses shall be deemed to be a party wall. The wall in this case is not a wall between separate houses. What is wanted in order that the Defendants may make out their construction is a section which says that where any party wall continues in height after it ceases to separate two buildings, then the whole of that wall shall be a party wall. There are no such words in these Acts, and when the contention is that the private rights of an individual have been taken away from him and given to another by a public Act of Parliament, and that without compensation—for the compensation clause here clearly does not apply to this case—the intention of the Legislature ought to appear in perfectly clear and plain terms. Here it does not so appear; on the contrary, the construction of the Acts supports the Plaintiff's case, and not the Defendants'. The injunction must, therefore, be made perpetual against the Defendants.

Solicitors: Messrs. *T. White & Sons*, agents for Messrs. *Brittan & Sons, Bristol;* Messrs. *Meredith, Roberts, & Mills*, agents for Mr. *T. Hamlin, Bristol.*

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ADVANCEMENT — *Portions — Satisfaction—Advances in Lifetime—Gift by Will—Words, "Advance or Pay"—Benefit under Family Settlement.*] A testator devised real estates upon trust for his daughter, *E. C.*, for life, with remainder to her husband, *W. C.*, for life, with remainder to trustees for 1000 years to raise £30,000 for portions for younger children, with remainder to *E. C.'s* eldest son for life, with remainders over. And he directed that if *E. C.* or *W. C.*, or either of them, should at any time during their joint lives or the life of the survivor of them advance or pay any sum or sums of money for the use or benefit of any younger child or children for whom portions were provided, then and in such case, unless the contrary should be directed by *E. C.* and *W. C.*, or the survivor of them, by deed or writing to be sealed and delivered in the presence of one or more witnesses, the sum or sums so advanced should be taken in satisfaction *pro tanto* of the portion or portions of such child or children.—*E. C.* had several children, one of whom, *J.*, was of weak mind; and while she was still under age *W. C.* and *E. C.*, and their eldest and second sons, executed a deed whereby they covenanted that if the share of *J.* devolved upon them, or any of them, they would divide it among the other younger children. *J.* attained twenty-one, and died, and her share thus devolved on her father, *W. C.*, and became subject to his covenant.—*W. C.*, having survived his wife, made a will whereby he gave legacies to his younger children, and gave the residue of his personal estate for the benefit of two of them:—*Held* (reversing the decision of the Master of the Rolls), that none of the gifts under *W. C.'s* will were to be taken towards satisfaction of the portions of the younger children:—*Held*, also (affirming the decision of the Master of the Rolls), that the division of the share of *J.* was not to be taken towards satisfaction of the portions of the younger children.—*Twisden* v. *Twisden* (9 Ves. 413), *Leake* v. *Leake* (10 Ves. 477), *Onslow* v. *Michell* (18 Ves. 490), and *Golding* v. *Haverfield* (13 Price, 593) commented on. COOPER *v.* COOPER - - - - 813

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AGREEMENT TO PLACE SHARES—*Company—Winding-up — Contributory — Conditional Agreement to take Shares.*] An agreement to place shares in a company is not equivalent to an agreement to take shares, and the person making it is not liable to be placed on the register as a member, although he may be liable to an action for damages if he fails to perform his contract.—*G.* agreed with the directors of a company that he would place 1000 shares in consideration of his being appointed their agent at *Hamburg*. The directors placed his name on the register of shareholders for 1000 shares; but did not inform him of it, and sent him no letter of allotment. It was afterwards proposed that there should be a second issue of shares, and in October, 1869, *G.* wrote a letter to the manager promising to keep for himself the 1000 shares which he had undertaken to place, and to pay for them out of his commission on the second issue. The second issue of shares was never made, by reason of the failing credit of the company. In February, 1870, *G.* was called upon by the directors to pay the calls on 1000 shares, and in reply he repudiated the shares on the ground that no second issue had been made, but took no measures to have his name removed from the register. About a month afterwards the company was wound up:—*Held* (reversing the decision of *Malins*, V.C.), first, that *G.* could not be put on the list of contributories in respect of his undertaking to place the 1000 shares:—Secondly: That his subsequent agreement to keep the shares for himself was conditional on the second issue of shares being made, and that as the condition failed through no fault of his, he was not bound to take the shares:—Thirdly: That he was guilty of no laches in not applying to have his name removed from the register before the company was wound up. *In re* Monarch Insurance Company. Gorrissen's Case - 507

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AMALGAMATION OF COMPANIES — *Power to sell Business — Ultrà Vires — Personal Dealings by Shareholders in the Selling Company with the Purchasing Company.*] The *S. Insurance Company*, which was a Scotch company, was empowered by its articles of association to sell and dispose of its business to any other company; but the articles contained no express power to amalgamate with another company. By an agreement between the *S. Company* and the *E. Company*, the *S. Company* agreed to transfer its business to the *E. Company* on the terms that the shareholders in the *S. Company* should receive shares in the *E. Company* in exchange for their shares in the *S. Company*. The agreement was approved by the shareholders of the *S. Company* at a general meeting, and a deed of transfer was executed by the company and sent to the *E. Company*, but before its execution by the *E. Company* had been completed according to the formalities of the Scotch law a petition was presented under which the *E. Company* was wound up.—*D.*, a shareholder and director of the *S. Company*, sent in his share certificates to the secretary of his company to be exchanged, and certificates of shares in the *E. Company* were forwarded to him in exchange, but he did not answer the letter or sign the receipt for the shares; and after the petition for winding up the *E. Company* had been presented he returned the certificates and refused to accept the shares:—*Held* (affirming the decision of *Wickens*, V.C.), first, that the amalgamation was *ultrà vires*, not being a sale within the powers of the *S. Company*. Secondly: That if it had been *intrà vires*, it was never completed. Thirdly: That although *D.* had taken a prominent part in the negotiations, his sending in his certificates was conditional on the amalgamation being valid and finally completed; and that, having entered into no personal negotiation with the *E. Company*, he was not bound to be a shareholder in that company. His name, therefore, was removed from the list of contributories.—*Alabaster's Case* (Law Rep. 7 Eq. 273) approved. *In re* Empire Assurance Corporation. Dougan's Case - 540

2. —— *Void Amalgamation — Variance between two parts of Indenture—Variance between Application for Shares and Letter of Allotment—Laches—Acquiescence—Contributory.*] An amalgamation was agreed on between the *P. Company, Limited*, and the *U. Company*, which was an unlimited insurance company, under which the paid-up shareholders in the *P. Company* were to have paid-up shares in the *U. Company* to the like amount, and the other shareholders in the *P. Company* were to have corresponding shares in the *U. Company*. It was also agreed that the *P. Company* should assign all their assets to the *U. Company*, and that the *U. Company* should indemnify them against all liabilities. An indenture in two parts, embodying these terms, was drawn up and executed by the two companies; but the covenant of indemnity in the part executed by the *U. Company* differed materially from the covenant in the part executed by the *P. Company*.—

AMALGAMATION OF COMPANIES—*continued.*
W. was a paid-up shareholder in the *P. Company*, in pursuance of the amalgamation, for paid-up shares of the same value as his former shares. He received a letter of allotment, signed by a person professing to be the managing director of the *U. Company*, giving him notice that the directors had allotted him the number of shares applied for, on which he was to be credited with with an amount proportionate to the assets of the *P. Company*. There was no evidence on what authority this letter was written, but *W.'s* name was placed on the register as an ordinary shareholder. *W.* received the letter at the end of August, while he was on a yachting cruise, and on his return to *London*, early in October, applied personally to the chairman and solicitor of the company for an explanation of the letter, and objected to take the shares, but was informed by them that his name was not on the register. On the 15th of October he wrote to the secretary, formally repudiating the shares. On the 9th of November the *U. Company* was wound up on a petition presented on the 7th of October:—*Held*, first, that the variation in the two parts of the indenture rendered the indenture void, and that the amalgamation was incomplete: Secondly, that there was no contract between *W.* and the company to take shares: Thirdly, that, under the circumstances, *W.* was not bound by acquiescence to take shares in the company; and his name was therefore removed from the list of contributories.—Decision of *Bacon*, V.C., reversed. *In re* United Ports and General Insurance Company. Wynne's Case - - - 1002

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APPORTIONMENT OF DIVIDENDS—*Will—Apportionment Act*, 1870.] A testator bequeathed the dividends and income of his share and interest in the *L. Iron Company* to *A.* for life, and after his death he gave the said share and interest to his daughter absolutely. The testator died in October, 1870.—The *L. Iron Company* was a private trading partnership regulated by a deed of partnership, under which the accounts were made up in the January in each year, and the profits of the previous year ascertained, which account was settled and signed by all the partners. The managing partner then decided what dividend should be paid to the partners, and the dividend was paid by instalments in the next few months:—*Held* (affirming the decision of the Master of the Rolls), that the dividend in respect of the profits realized during the year 1870, which was declared in January, 1871, was not a "dividend" or a "periodical payment" within the 2nd section of the *Apportionment Act*, 1870, and was not apportionable; and that the whole belonged to *A.*—*Quære*, whether the Act can affect the construction of a will previously made. Jones *v.* Ogle [192

ARBITRATION—Agreement to refer 473, 476, n.
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—— Building contract—Certificate of engineer *See* Building Contract [597

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ARTICLES OF ASSOCIATION—Contract for paid-up shares - - - - 956
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ASSETS—Employed in trade—Executor [309, 323, n.
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—— Power of executor to pledge—Administration decree - - - - 747
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ASSETS EMPLOYED IN TRADE—*Executors and Trustees—Profits—Partners—Unauthorized Expenditure in Improving the Estate—Just Allowances.*] A testator was partner in a well-established and prosperous business under articles by which, on the death of any partner, his share was to be taken by the surviving partners at a price to be ascertained from the last stocktaking, and to be paid by instalments extending over two years, with interest at £5 per cent. per annum from his death. He appointed three executors, one of whom was one of his partners in the business, and another, some years after his death, became a partner; the third never was concerned in the business. The value of the testator's share was ascertained but not paid, the amount being allowed

ASSETS EMPLOYED IN TRADE—*continued.*
for some years to remain in the hands of the firm, who treated it in their books as a debt, and allowed interest on it at £5 per cent. per annum, with yearly rests. One of the testator's residuary legatees, upon becoming entitled to payment of her share, refused to accept payment on the above footing, and filed her bill against the executors claiming to be entitled to a share in the profits of the business arising from the use of the testator's capital. The money had been left in the hands of the firm with the knowledge of the testator's family, and all his residuary legatees, with the exception of the Plaintiff, approved of what had been done:—*Held* (reversing the decision of *Bacon*, V.C.), that the Plaintiff was not entitled to any account of profits, the mere delay by executors in calling in a debt due to the testator from a firm of which some of the executors are members not giving his estate any right to share in the profits of the business.—The testator devised his real estate upon the common trusts for sale, making his real and personal estate a mixed fund. His trustees and executors were advised that a few acres of freehold land which belonged to him might be advantageously sold in lots for building purposes, and that to develop their value it was desirable to build a villa upon part of them. They accordingly built one at a cost of £1600 out of the testator's personal estate. This villa had ever since been let at £80 a year, most of the other land had been sold, and the evidence tended to shew that the outlay had benefited the estate. Vice-Chancellor *Bacon* having declared that the £1600 must be disallowed the trustees in passing their accounts:—*Held*, on appeal, that as the trustees had in the *bonâ fide* exercise of their judgment, expended this sum as the best means of improving the estate, they could, at most, only be disallowed the amount of loss (if any) occasioned to the estate by the expenditure. Vyse *v.* Foster - - 309

2. —— *Executor—Liability of Partners—Account of Profits.*] An executrix who held the residue of the testator's estate in trust for herself for life, and after her death for the testator's children, entered into a fresh partnership with two other persons and brought in the testator's assets as part of the capital of the firm; the other partners having notice of the trusts of the testator's will:—*Held*, by the Lords Justices (affirming the decision of *Stuart*, V.C.), that the executrix and the other partners were bound to make good to the children the assets of the testator employed in trade, together with all profits, or else with interest at £5 per cent. at the option of the children. Flockton *v.* Dunning - - 323, n.

ATTENDANCE IN LUNACY — *Legatees under Will of Lunatic—Liberty to attend.*] *S.* died, leaving a will by which he gave all his property to his widow, requesting her to bequeath certain parts of it to *A.* if living. The widow, immediately after her husband's death, made a will in conformity with this request, and shortly afterwards became lunatic. *T.* and wife (the wife being heiress-at-law and sole next of kin of the lunatic) were appointed committees of the person, and their eldest son committee of the estate. Letters of administration of the estate of *S.* were granted to Mrs. *T.* for the use and benefit of the lunatic, and during the lunacy. After a few months a new committee of the estate was appointed, and Mr. and Mrs. *T.'s* eldest son filed a bill against Mr. and Mrs. *T.*, the lunatic and the committee of the estate, seeking to make *T.* and the estate of *S.* liable for very large sums alleged to have been improperly received by Mrs. *T.* and the lunatic and their husbands in excess of what they were entitled to as tenants for life under the will of the lunatic's father. *A.* then presented a petition for leave to attend proceedings under the lunacy, alleging that none of the parties were substantially interested in defending the suit:—*Held*, that a precedent ought not to be made for allowing persons named in the wills of lunatics to attend the proceedings in Lunacy, and application refused accordingly.—*In re Webb* (2 Ph. 532) distinguished. *In re* Scarlett - - 739

AUCTION—Condition of sale—Production at time of sale—Misleading particulars of sale *See* Conditions of Sale. 1. [118

AVOIDING SERVICE—County Court district 690 *See* County Court Jurisdiction.

BANKERS' ACCOUNT — *Separate Accounts—Deposit of Securities—Lien for General Balance.*] The *O. Bank* kept three accounts at the *A. Bank*, namely, a loan account, a discount account, and a general account. They from time to time received advances from the *A. Bank*, which were entered in the loan account, and to meet which they deposited securities with the *A. Bank*. In the course of the transactions the *O. Bank* deposited three bills of exchange with the *A. Bank*, accompanied by a letter stating that they proposed to draw upon them for £10,500, but that as their credit would not afford a margin to that extent, they sent these bills as a collateral security. The *O. Bank* became insolvent and was wound up:—*Held* (affirming the decision of *Malins*, V.C.), that there was nothing in the course of dealing or in the terms of the letter to exclude the general rule that a banker has a lien on the securities deposited by a customer for the customer's general balance, and that the balance of the loan account being satisfied, the *A. Bank* might retain the bills for the balance of the general account. *In re* European Bank. Agra Bank Claim - 41

2. —— *Husband and Wife—Separate Estate—Chose in Action.*] A wife being executrix of her father paid money she received as such into a bank to an account in her own name as executrix. Her husband paid money of his own to this account, and the wife had drawn cheques upon the account for payment of debts due by the husband and for payment of household expenses. The husband died:—*Held*, upon the facts of the case, that the wife was merely the agent of the husband, and that the money remaining in the bank belonged to his estate and not to the wife's.—Decision of *Malins*, V.C., reversed. Lloyd *v.* Pughe - 88

BANKRUPT ALIEN—*Jurisdiction—Act of Bankruptcy—Defeating and Delaying Creditors—Bankruptcy Act*, 1869, *s.* 6.] An alien non-trader domiciled abroad, who contracts debts in *England*, is liable to be made a bankrupt under the *Bankruptcy Act*, 1869, if he commits an act of bank-

BANKRUPT ALIEN—*continued.*

ruptcy in *England*, although he may have left *England* before the petition for adjudication is presented. But he cannot be made a bankrupt upon an alleged act of bankruptcy committed abroad.—A non-trader, a subject of, and domiciled in, *Portugal*, contracted a debt in *England*, where he was temporarily resident. The creditor served him while in *England* with a writ issuing out of the Court of Exchequer. The alien entered an appearance to the writ, and left *England* for *Portugal* the next day, alleging as his reason for doing so that he had been disappointed of some money which he expected, and could not pay his way in *England*. He afterwards said that he had left *England* in consequence of being served with the writ:—*Held*, that there was no sufficient evidence that he left *England* in order to defeat and delay his creditors, and that no act of bankruptcy had been committed.—Although, in the case of a domiciled Englishman, the fact of his leaving *England* after service of a writ and so escaping a debtor's summons would afford a strong presumption that he intended to defeat and delay his creditors, yet the same presumption does not apply to a foreigner who is returning to his own country. *Ex parte* Crispin. *In re* Crispin - - - 374

BANKRUPTCY—Act of—Alien non-trader 374
See Bankrupt Alien.

—— Act of—Fraudulent preference 283, 614
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—— Act of—Seizure without sale - - 667
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—— Appeal—Order for prosecution under Debtors Act - - - - 676
See Prosecution under Debtors Act, 1869.

—— Avoiding service—County Court district
See County Court Jurisdiction. [690

—— Composition by arrangement—Proof 682
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—— Covenant for future settlement—When void
See Covenant to settle. [718

—— Creditors' deed — Personal liability of trustees - - - - 711
See Trustee of Creditors' Deed.

—— Creditor's right to vote - - 997
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—— Debtor summons - - 204, 234
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—— Filing and registration of resolution of creditors - - - - 722
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—— Jurisdiction of—Bill in Chancery by trustees
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—— Liquidation by arrangement — Debts incurred after discharge - - 962
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—— Liquidation by arrangement—Proof 997
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—— Order and disposition 48, 51, 144, 149, 520
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—— Proof—Bills of exchange—Accommodation bills - - - - - 535
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—— Proof—Debt payable at request of stranger - - - - - 914
See Proof for Joint and Several Contracts.

—— Proof—Debt in which debtor has beneficial interest - - - - 914
See Proof for Joint and Several Contracts.

—— Proof — *Ex parte Waring*, (19 Ves. 345), doctrine of - - - 220, 965
See Securities for Bills of Exchange. 1, 2.

—— Proof—Joint and separate estate - 441
See Joint and Separate Estate. 1.

—— Proof—Joint and several contracts - 914
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—— Proof—Loan to partnership—Share of profits - - - - - 569
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—— Proof — Unliquidated damages — Debt capable of being fairly estimated 562
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—— Proof—Untaxed costs - - 682, 997
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—— Securities for bills of exchange 220, 965
See Securities for Bills of Exchange. 1, 2.

BANKRUPTCY JURISDICTION—*Trustees—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 65, 66, 72, 130.] Where a suit would, but for the fact of a bankruptcy, be fit to be entertained by the Court of Chancery, the jurisdiction is not taken away by the *Bankruptcy Act*, 1869. Therefore when a trustee in bankruptcy has, in respect of the bankrupt's estate, a claim against a third person, that claim may be prosecuted at law or in equity, and is not subject to the jurisdiction of the Court of Bankruptcy.—Decision of the Master of the Rolls reversed.—*Ex parte Anderson* (Law Rep. 5 Ch. 473) distinguished. Ellis *v.* Silber - - - - - - 83

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See Conditional Gift.

BILL OF EXCHANGE—Attached to bill of lading —Indorsement by inadvertence - 16
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—— Proof in bankruptcy—Accommodation bills *See* CROSS-ACCEPTANCES. [535

—— Securities for—Doctrine of *Ex parte Waring* (19 Ves. 345) - - - 220, 965
See SECURITIES FOR BILLS OF EXCHANGE. 1, 2.

BILL OF LADING—Attached to bill of exchange —Indorsement by inadvertence - 16
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BILL OF SALE—Agreement for—Registration *See* FRAUD ON BANKRUPTCY LAWS. [643

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BONDED GOODS—Bankruptcy—Order and disposition - - - 144, 520
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BUILDING CONTRACT—*Contract under Seal—Verbal Promises—Erroneous Statement—Certificate conclusive—Arbitration—Jurisdiction—Right of one Cestui que Trust to sue—Allegations of Fraud.*] The engineer of a railway company prepared a specification of the works on a proposed railway, and certain contractors fixed prices to the several items in the specification, and offered to construct the railway for the sum total of the prices affixed to the items. A contract under seal was thereupon made between the contractors and the company, by which the contractors agreed to construct and deliver the railway completed by a certain day at a sum equal to the sum total above mentioned. If the contractors failed to proceed with the works the company might take possession and proceed with them; in which case a valuation should be made by the engineer or, if either party required it, by arbitration. The contract contained provisions making the certificate of the engineer conclusive between the parties; and it was provided that all accounts relating to the contract should be submitted to and settled by the engineer, and that his certificate for the ultimate balance should be final and conclusive; it was further provided that all questions, except such as were to be determined by the engineer, were to be referred to arbitration.—The railway was completed and the engineer gave his final certificate as to the balance due to the contractor.—The contractors had assigned their interest in the contract to trustees on trust for their creditors and for themselves, in certain proportions.—The contractors filed a bill against the company, making claims on several grounds, and praying an account and payment:—*Held*, that the contractors could not, on mere verbal promises by the engineer, maintain against the company a claim to be paid sums beyond the sums specified in the contract under

BUILDING CONTRACT—*continued.*

seal:—*Held*, that, although the amount of the works to be executed might have been understated in the engineer's specification, the contractors could not under the circumstances maintain any claim against the company on that ground:—*Held*, that, in the absence of fraud on the part of the engineer, and where his certificate has been made a condition precedent to payment, his certificate must be conclusive between the parties:—*Held*, that one of several *cestuis que trust* could not, on an allegation that the trustees refused to take proceedings, maintain a suit against a debtor to the trust estate.—Where a contract has provided that the certificate of the engineer or of an arbitrator shall be a condition precedent to payment, the Court does not obtain jurisdiction because of the power to refer to arbitration.—*Per* Lord *Romilly*, M.R.:—Mere allegations of fraud without facts from which fraud will be inferred are not sufficient to avoid a demurrer. —Order of the Master of the Rolls affirmed. SHARPE *v.* SAN PAULO RAILWAY COMPANY - 597

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—— *Adams* v. *Adams* (Law Rep. 14 Eq. 246) distinguished - - - 751
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—— *Alabaster's Case* (Law Rep. 7 Eq. 273) affirmed - - - - 540
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—— *Anderson, Ex parte* (Law Rep. 5 Ch. 473) distinguished - - - 83
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—— *Bainbridge* v. *Bainbridge* (9 Sim. 16) distinguished - - - - 401
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—— *Begbie* v. *Fenwick* (Law Rep. 8 Ch. 1075, n.) followed - - - - 1072
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—— *Bolton* v. *Corporation of Liverpool* (1 My. & K. 88) considered - - - 361
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—— *Hawtry* v. *Butlin* (Law Rep. 5 Eq. 72) dissented from - - - - 1072
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—— *Minet* v. *Morgan* (Law Rep. 8 Ch. 361) followed - - - - - 1017
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—— *Noble* v. *Phelps* (Law Rep. 2 P. & M. 276) considered - - - - - 778
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—— *Onslow* v. *Michell* (18 Ves. 490) considered
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—— *Pilling* v. *Pilling* (3 D. J. & S. 162) questioned - - - - - 1
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—— *Potter's Trust, In re* (Law Rep. 8 Eq. 52) distinguished - - - - 751
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—— *Sinnett* v. *Herbert* (Law Rep. 7 Ch. 232) followed - - - - - 206
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—— *Walker, Ex parte* (4 Ves. 373) distinguished
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CHANCERY FUNDS ACT — *Practice*—(35 & 36 *Vict. c.* 44)—*Transfer of Stock in Public Company —Form of Transfer.*] When a sum of stock in a public company is transferred into Court under the *Court of Chancery* (*Funds*) *Act*, 1872 (35 & 36 Vict. c. 44), the deed should express the transfer to be made to the account of the Paymaster-General, and not to the Paymaster-General. *In re* STEPHENS - - - - - - 465

CHARGE OF DEBTS AND LEGACIES—*Vendor and Purchaser—Estate subject to Charge—Power of Devisee to sell or mortgage—Misappropriation of Mortgage-money—Notice.*] Where a testator directs all his debts to be paid, and afterwards devises real estate to devisee specially charged with debts and legacies, the devise supersedes the power of sale in the executors, and the devisee can give a good title to the estate and a good discharge to a mortgagee, who has no notice of a breach of trust, without the executors joining. Decision of the Master of the Rolls reversed. CORSER *v.* CARTWRIGHT - - - - 971

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CHILD IN VENTRE SA MÈRE—*Will.*] A testator gave a fund to his wife for life, then to his daughter (a married woman) for life, and after her death to her children who being sons should attain the age of twenty-one, or being daughters attain that age or marry, and if none, then to certain persons by name. By a codicil he directed that if his daughter should be living at the expiration of five years from the death of his wife, and should not then have had any child or children, the fund should be at once divided between the ulterior takers, as if his daughter were dead without children. The daughter's first child was born five years and six months after the death of the testator's widow:—*Held* (affirming the decision of *Wickens*, V.C.), that as the daughter had a child *in ventre sa mère* within five years after the death of the widow the gift over had not taken effect. PEARCE *v.* CARRINGTON - 969

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COLLATERAL AGREEMENT—*Statute of Frauds —Agreement to destroy Game—Parol Variation of Lease—Damage from Game.*] A farmer being in treaty for a lease of a farm, declined to take it on account of the quantity of game. The lessor promised that he would kill down the game, and would not let the shooting, but refused to allow the promise to be inserted in the lease. The tenant accordingly executed a lease prepared by the lessor's solicitor, in which the right to kill game was reserved to the lessor, his friends and servants. The lessor afterwards let the shooting, and did not kill down the game:—*Held*, that there was a binding collateral agreement to kill down the game, and that the tenant was entitled to compensation for damage done by the game. Decision of the Master of the Rolls reversed. ERSKINE *v.* ADEANE - - - - 756

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COMMITTAL UNDER DEBTORS ACT, 1869—*Bankruptcy—Power of Imprisonment for Debt—Money received by way of Fraudulent Preference—Fiduciary Capacity—Debtors Act*, 1869, *ss.* 4, 9.] A creditor who has received money from a bankrupt by way of fraudulent preference, and has been ordered to repay it to the trustee of the bankrupt's estate, is not a person holding money in a fiduciary capacity under the 4th section of the *Debtors Act*, 1869 (32 & 33 Vict. c. 62), and cannot, therefore, be committed to prison under that section.—The 9th section of the *Debtors Act*, 1869, does not preserve to the Court of Bankruptcy any powers of imprisonment for debt which have been taken away from other Courts by the Act.—Decision of *Bacon*, C.J., affirmed. *Ex parte* Hooson. *In re* Chapman & Shaw - - - - 231

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See Deposit of Deeds. 2. [932
—— Limitation of peerage - - - 982
See Shifting Clause.

CONDITIONAL GIFT—*Will—Construction—Condition rendered impossible by Testator—Bequest to found a Professorship according to certain Rules.*] A testator gave certain personal estate to a college for founding a professorship of archæology, for the regulation of which professorship he purposed preparing a code of rules and regulations; and he directed that his executors should, as soon as they conveniently could after his death, communicate the bequest, together with a copy of the rules and regulations, to the college, and that, within twelve months after the bequest had been so communicated to them, the college should signify their acceptance of the rules and regulations; and in case the college should decline to accept them, the bequest should be void, and the property should sink into his residuary estate.—The testator died without preparing any rules and regulations for the professorship:—*Held* (reversing the decision of *Bacon*, V.C.), first, that the reference to the proposed rules could not be read as a description of the professorship intended to be founded, but merely as a condition attached to the bequest;

CONDITIONAL GIFT—*continued.*
and, secondly, that as the condition had become impossible by the act of the testator, the bequest took effect absolutely. YATES *v.* UNIVERSITY COLLEGE, LONDON - - - - - 454

CONDITIONS OF SALE—*Vendor and Purchaser—Sale by Auction—Misleading Particulars of Sale—Conditions of Sale read but not printed.*] Certain property was put up for sale by auction, and in the particulars which were advertised was described as an immediate absolute reversion of a freehold estate falling into possession on the death of a lady in her 70th year. By the conditions of sale, which were read in the auction-room just previously to the sale, but were not printed or circulated among those present, the property was stated to be subject to three mortgages. The property was bought by the Plaintiff, who stated that he was deaf and did not understand that he was buying an equity of redemption:—*Held*, on a bill filed by the Plaintiff to have the contract for sale rescinded, that the description of the property in the particulars of sale was misleading, that the *onus* was therefore on the vendor to shew that the purchaser was not actually misled, and that as he had failed to do so the Plaintiff was entitled to have the contract rescinded and his deposit returned.—The decision of *Malins*, V.C., affirmed.—There is no general rule that actual fraud is necessary to induce a Court of Equity to rescind a contract for sale. The Court acts on the same principle in rescinding contracts for sale as in setting aside other contracts and dealings which it considers unconscientious. TORRANCE *v.* BOLTON - 118

2. —— *Depreciatory Condition—Trustee—Purchaser—Infant Plaintiff—Interest of Plaintiff—Injunction.*] By a deed of the year 1858, lands were conveyed to trustees on the usual trusts for sale. The trustees were unable to find a deed of 1819, through which the conveying parties to the deed of 1858 derived their title; and put up the lands for sale by auction under a condition that the title should commence with the deed of 1858, and that no earlier title should be called for except at the purchaser's expense. The lands were sold at the auction, the object of the condition being explained in the auction room. A suit to restrain completion was instituted by one of the *cestuis que trust* against the trustees and the purchaser. Some time after the institution of the suit, the deed of 1819 was found:—*Held* (affirming the decision of *Malins*, V.C.), that this condition was calculated to depreciate the property at the auction, and was inserted without any reasonable ground:—*Held*, that the Court would, at the suit of a *cestui que trust*, restrain the purchaser from completing the sale:—*Held* (reversing the decision of *Malins*, V.C.), that the smallness of the interest of the Plaintiff, and the fact that she was an infant, and that the suit might have been instituted on other motives, were not reasons against granting an injunction to restrain completion. DANCE *v.* GOLDINGHAM - 902

CONDONATION—Fraud—Undue influence 881
See UNDUE INFLUENCE.

CONSENT OF TRUE OWNER—Order and disposition - - 48, 51, 144, 149, 520
See ORDER AND DISPOSITION. 1—5.

CONTEMPT, PROCESS OF—*Practice—Waiver of Contempt—Acceptance of Answer.*] A Defendant who was in contempt for non-payment of costs filed his answer and left a copy at the office of the Plaintiff's solicitor. The Plaintiff's solicitor did not return the copy nor move to take the answer off the file, but kept it without reading it till after the time for deeming it sufficient had elapsed:—*Held* (affirming the decision of *Malins*, V.C.), that the Plaintiff had waived the contempt, and that the Defendant was in a position to move to dismiss the bill for want of prosecution, if the Plaintiff did not proceed in proper time. ROBERTS *v.* ALBERT BRIDGE COMPANY - - - - 753

CONTEMPT, PROCESS OF—*continued.*

CONTRACT—Building—Certificate of engineer
See BUILDING CONTRACT. [597
—— Divisible—Specific performance of part 96
See DIVISIBLE CONTRACT.
—— Foreign—Specific performance - 860
See FOREIGN CONTRACT. 1.
—— Foreign—Service out of jurisdiction 862, n.
See FOREIGN CONTRACT. 2.
—— Paid-up shares—Companies Act, 1867, s. 25
See CONTRACT FOR PAID-UP SHARES. [956

CONTRACT FOR PAID-UP SHARES—*Contributory—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.] By the articles of association of a mining company it was provided that the company should, immediately after incorporation, enter into an agreement with the vendor of the mine for the purchase of the mine; the price to be £2000 in cash, and 3200 fully paid-up shares to be allotted to the vendor or his nominees. The articles were signed by the vendor and six other persons, and were duly registered. The directors allotted the 3200 shares to the vendor or his nominees, and for a short time worked the mine, but no further agreement was made with the vendor. The company was then ordered to be wound up. A firm to whom ten of the vendor's shares were allotted had requested that they might be registered in the name of one of the members of the firm, which was done; and he was afterwards placed on the list as a contributory in respect of ten shares not fully paid up:—*Held* (affirming the decision of *Wickens*, V.C.), that the articles of association did not constitute a contract in writing between the vendor and the company within the 27th section of the *Companies Act*, 1867, and that the ten shares could not be considered as fully paid up. *In re* TAVARONE MINING COMPANY. PRITCHARD'S CASE - - - - - - 956

CONTRIBUTORY—Agreement to place shares 507
See AGREEMENT TO PLACE SHARES.
—— Amalgamation - - - 540, 1002
See AMALGAMATION OF COMPANIES. 1, 2.
—— Director—Qualification - 548, 768
See QUALIFICATION OF DIRECTORS. 1, 2.
—— Infant—Transfer to - - - 266
See INFANT TRANSFEREE.
—— Paid-up shares—Companies Act, 1867, s. 25
See CONTRACT FOR PAID-UP SHARES. [956
—— Past member - - - - 800
See PAST MEMBER.
—— Set-off—Calls against debts - - 254
See SET-OFF IN WINDING-UP.
—— Subscriber of memorandum 270, 407, 768
See SUBSCRIBER OF MEMORANDUM. 1—3.

CONTRIBUTORY—*continued.*

—— Transfer of shares—Infant - - 266
See Infant Transferee.

—— Transfer of shares—Registration 446, 831
See Transfer of Shares. 1, 2.

CONTRIVANCE TO PROCURE SETTLING DAY—*Company—Suit by Shareholder on behalf of himself and other Shareholders—Ultrà Vires—Illegal Agreement—Colourable Payment—Estoppel—Indemnity.*] The *Laffitte Company* was formed to purchase the business of *C. Laffitte & Co.*, of *Paris*. The *Paris* firm would not complete unless 40,000 shares were taken. To satisfy them the *International Company*, which was promoting the *Laffitte Company*, guaranteed a subscription for 40,000 shares, and applied to the *National Bank* to discount their promissory notes for £200,000, which the bank agreed to do upon the guarantee of the *Laffitte Company*, which was signed by *Kitson*, *Gautray* and *Bate*, three of the directors, and sealed by the company, that, until the notes were paid, the *Laffitte Company* would leave in the hands of the bank an amount equal to the sum remaining due on the notes, and that if the notes were not paid the bank might pay them out of such amount. The £200,000 was accordingly carried to the credit of the *International Company*, who provided shareholders and paid the deposit and allotment money of £5 per share out of the £200,000, which thus got to the credit of the *Laffitte Company* at the bank. The bank, in order to enable the *Laffitte Company* to obtain a settling day on the *Stock Exchange*, gave a certificate that there was £200,000 standing to the credit of that company. Afterwards, the promissory notes not being taken up at maturity, the *National Bank* paid them out of the £200,000. After an order had been made for winding up the *Laffitte Company*, a shareholder in that company filed his bill (*Gray* v. *Lewis*) on behalf of himself and all other the shareholders, except the Defendants, against the directors of the *Laffitte Company* and against the *National Bank*, to recover the £200,000 for the benefit of the *Laffitte Company* as having been applied in breach of trust. *Gautray* was out of the jurisdiction, and the Plaintiff entered an appearance for him, but subsequently dismissed the bill as against him before the hearing. A decree was made by Vice-Chancellor *Malins* against the bank, and *Lewis*, *Henshaw*, *Kitson*, and *Bate*, four of the directors of the *Laffitte Company*, who were privy to the whole of the transactions, for the restoration of the £200,000. The *National Bank* and *Lewis* and *Henshaw* severally appealed, but before the appeal came on the *National Bank* compromised the suit, with the sanction of the Court in the winding-up of the *Laffitte Company*, *Lewis* and *Henshaw* being no parties to the compromise.—After this the *National Bank*, by its public officer, filed a bill (*Parker* v. *Lewis*) against *Lewis* and *Henshaw*, who were two of its own directors, and *McKenna*, its managing director, to compel them to make good the loss which the bank had sustained through the above transactions, and Vice-Chancellor *Malins* made a decree accordingly.—*Lewis*, *Henshaw*, and *McKenna* appealed against this decree, and at the same time the appeal of *Lewis* and *Henshaw* in *Gray* v. *Lewis* was restored to the paper:—

CONTRIVANCE TO PROCURE SETTLING DAY—*continued.*

Held, in *Gray* v. *Lewis*, that the suit ought to have been by the *Laffitte Company*, and that a bill by one shareholder on behalf, &c., could not be sustained.—Whether a decree could be made against the other Defendants after the dismissal of the bill against *Gautray*, *quære*.—*Held*, further, that the remedy, supposing the *Laffitte Company* to have a right to the £200,000, would have been at law by an action against the bank, for that the guarantee was *ultrà vires*, and known to the bank to be so, and was therefore no answer to the demand of the *Laffitte Company* for the sum which had stood to their credit:—*Held*, further, that the £200,000 never belonged to the *Laffitte Company* at all, for that the whole transaction was an illegal and fraudulent scheme, out of which no rights could arise as between the parties to it:—*Held*, therefore, that the bill in *Gray* v. *Lewis* must be dismissed as against *Lewis* and *Henshaw*, and without costs, they not asking for costs; and, *semble*, if they had asked for costs, they would not have been given:—*Held*, in *Parker* v. *Lewis*, that if the decree in *Gray* v. *Lewis* had been upheld, that in *Parker* v. *Lewis* would have been upheld also; but that, although where *A.* contracts to indemnify *B.* against a claim, and a judgment is obtained against *B.* in an action *bonâ fide* defended by him, and he pays the demand, *A.* cannot be heard to contend that the judgment was erroneous, the case is otherwise where there is no contract to indemnify, but only a claim to indemnity founded on a breach of trust; and that the Defendants were not estopped from saying that the *National Bank* had incurred no liability to pay anything to the *Laffitte Company*; and that as in the judgment of the Court of Appeal the *National Bank* had not incurred any such liability, the bill must be dismissed, but without costs, on account of the objectionable nature of the transaction. Gray *v.* Lewis. Parker *v.* Lewis - 1035

CONVERSION — *Power of Appointment over Realty.*] Husband and wife had a joint power of appointment over real estate among the children of the marriage for such estates and interests, and in such manner as they should think fit. In default of and subject to such appointment the estate was to be held, subject to the parents' life interest, in trust for all the children to whom no share had been appointed, to vest in them at twenty-one or marriage. The settlement contained a power of sale and exchange, but no trust for absolute sale. The husband and wife appointed two-fourths to *H.* and another of their children, the appointment to *H.* being in the same terms as that of the personalty, and declared that the shares of any person interested in the capital arising from any sale under the settlement should be of the quality of personal estate:—*Held*, that the appointors had power to convert the real into personal estate, and that *H.* took an absolute interest in his share subject to the same contingency as in the case of the personalty.—Order of *Bacon*, V.C., varied. Webb *v.* Sadler 419

COSTS — Administration — Scotch descended estates - - - - - 342
See Marshalling.

COSTS—*continued.*
—— Appeal for—Bankruptcy - - 711
See TRUSTEE OF CREDITORS' DEED.
—— Appeal for—Mortgage suit - - 295
See COSTS IN MORTGAGE SUIT.
—— Mortgagee—Appeal - - - 76
See SALE OF COMMISSION.
—— Mortgagee—Oppressive conduct - 295
See COSTS IN MORTGAGE SUIT.
—— Non-payment of - - - 753
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—— Staying proceedings pending appeal - 205
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—— Suppression of material fact - - 1084
See PARTY-WALL.
—— Taxation of - - - - 65
See TAXATION OF COSTS.
—— Untaxed — Proof under composition deed [682, 997
See PROOF FOR UNTAXED COSTS. 1, 2.

COSTS IN MORTGAGE SUIT—*Mistake in Amount—Oppressive Conduct—Right to Costs—Appeal for Costs—Costs of Appeal.*] A mortgagee will not be deprived of his costs in a redemption suit because he has over-stated the amount due to him.—The directors of a building society, in answer to one of their members and mortgagors, stated that £736 was due to the society on the mortgage, the society having been for some years in possession. Soon afterwards the directors informed the mortgagor that they intended to sell the mortgaged property, they having power under the mortgage deed so to do. The mortgagor thereupon filed a bill to restrain the sale, and for redemption. The directors informed the mortgagor that they had no intention to press a sale. The mortgagors then proposed that a decree for the usual accounts should be taken, and a decree for an account was accordingly taken. The mortgagor carried in surcharges to the amount of £1227, principally for fines and commission, which he claimed to have disallowed, but which were allowed to the mortgagees; the mortgagees were, however, charged for certain occupation rents, and were disallowed charges for repairs, so that the amount due at the filing of the bill was found to be £517 instead of £736:—*Held* (reversing the decision of *Malins*, V.C.), that there was nothing in the conduct of the mortgagees which would deprive them of the right to add their costs of the suit to their security:—*Held*, that in such a case an appeal as to costs might be maintained; and that the costs of the appeal might be included in the costs of the suit. COTTERELL *v.* STRATTON - - 295

COUNTY COURT APPEAL—Bankruptcy—Order for prosecution under Debtors Act 676
See PROSECUTION UNDER DEBTORS ACT, 1869.

COUNTY COURT JURISDICTION—*Bankruptcy—County Court District—Avoiding Service—Notice by Delivery—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 59—*Bankruptcy Rules*, 1870, *r.* 61.] A debtor left the County Court district in which he had carried on business; he afterwards returned, and was then served with a notice requiring him to pay a debt. He again left the district, and could not be found, remaining away in order to avoid service.—An order was made for service on him of a debtor's summons by delivery at a house in the district, and he was afterwards adjudicated bankrupt by the County Court of that district:—*Held* (affirming the decisions of the County Court Judge and of the Chief Judge), that the debtor, by leaving the district for the purpose of avoiding service, did not deprive the County Court of jurisdiction; and that, though the evidence on which the order for service by delivery was obtained was not satisfactory, yet, as the debtor was staying away in order to avoid service, the bankruptcy would not on that ground be annulled. *In re* WILLIAMS - - - 690

COVENANT—For future settlement, when void in bankruptcy - - - - 718
See COVENANT TO SETTLE.
—— Implied—Sale of business - - 658
See SALE OF BUSINESS.

COVENANT TO SETTLE—*Bankruptcy—Avoidance of Marriage Settlement—Right of Trustees to prove—Bankruptcy Act*, 1869, *s.* 91.] A trader by his marriage settlement covenanted that he would pay £6000 to the trustees on or before a given day, to be held by them on the trusts of the settlement. Before the money was payable he filed a petition for liquidation by arrangement:—*Held* (affirming the decision of *Bacon*, C.J.), that a covenant for payment of a sum of money not specifically earmarked was not within the 91st section of the *Bankruptcy Act*, 1869, as a covenant for the future settlement of money or property in which the trader had no interest at the date of his marriage, and that the trustees were entitled to prove against his estate for the £6000, less the value of the settlor's life interest, which they were entitled to retain. *Ex parte* BISHOP. *In re* TONNIES. - - - - 718

CREDITOR—Advances to debtor after death of guarantor - - - - 866
See DEATH OF GUARANTOR.
—— Execution - - - - 667
See EXECUTION CREDITOR.
—— Injunction against—Bankruptcy 595, 743
See INJUNCTION IN BANKRUPTCY. 3, 4.
—— Judgment—Railway company - 1064
See SCHEME OF ARRANGEMENT.
—— Meeting—Fresh first meeting - - 727
See MAJORITY OF CREDITORS. 2.
—— Meeting—Right to vote - - 997
See PROOF FOR UNTAXED COSTS. 2.
—— Preliminary meeting - - - 614
See FRAUDULENT PREFERENCE. 2.
—— Resolution for composition—*Bona fides* 727
See MAJORITY OF CREDITORS. 2.
—— Resolution for liquidation—Signing after meeting - - - - 722
See MAJORITY OF CREDITORS. 1.

CROSS-ACCEPTANCES — *Bankruptcy — Double Proof—Bankruptcy Act*, 1869, *s.* 39—*Outstanding Bills.*] The bankrupts had large mercantile dealings with *P.*, and at the time of the bankruptcy they owed him a cash balance of £11,000. Bills had, however, been accepted by the bankrupts and negotiated by *P.* in part payment of the balance, and these bills had been proved by the holders

CROSS-ACCEPTANCES—*continued.*
against the bankrupts' estate. There was evidence that bills had been accepted by *P.* in favour of the bankrupts for an independent consideration which had failed, and these bills also had been discounted. *P.'s* estate was also in liquidation, and his trustee claimed to prove in the bankruptcy for the whole amount of the cash balance:—*Held* (affirming the decision of *Bacon*, C.J.), that *P.'s* trustee could only prove for the difference between the cash balance and the amount of the bills given in part payment thereof.—*Ex parte Walker* (4 Ves. 373) distinguished. *Ex parte* MACREDIE. *In re* CHARLES - - - 535

CROWN—Power of—Patent of peerage—Conditional limitation - - - 982
See SHIFTING CLAUSE.

CUSTOM OF STOCK EXCHANGE—*Principal and Agent—Stockbroker—Insolvency of Principal—Sale by Agent to recoup himself.*] Stockbrokers who have with their own money purchased stock for a principal are, in the event of the death, bankruptcy, or insolvency of the principal, justified in immediately selling the stock. Under such circumstances the stockbrokers have a claim against the estate of the principal for the balance due to them on the account, which balance is subject to deduction for any loss which may have been incurred by selling before the next settling day.—Decision of Lord *Romilly*, M.R., affirmed. LACEY *v.* HILL. SCRIMGEOUR'S CLAIM - 921

2. —— *Transfer to Infant—Vendor Trustee for Real Purchaser—Release and Indemnity.*] The Plaintiff sold on the *Stock Exchange* fifteen shares in a limited company. They were bought by a broker as agent for a firm of Scotch brokers, whose names appeared as purchasers in the bought and sold notes. The broker furnished the name of *W. K.* as transferee, a transfer was executed to *W. K.*, and he was registered as owner. About two years afterwards an order was made to wind up the company, and it being found that *W. K.* was an infant, the Plaintiff's name was restored to the register. The Plaintiff thereupon filed this bill against the Scotch brokers for indemnity. The brokers shewed by their answer that the shares had been purchased along with seventy-five others, in consequence of separate instructions from *D.*, *J.*, and *S.* respectively, to purchase for them respectively thirty shares, and that all the ninety shares had been transferred to *W. K.*, and had not been appropriated between the purchasers. The bill having been amended by making the purchasers parties, *Bacon*, V.C., made a decree against *D.*, *J.*, and *S.* for them to indemnify the Plaintiff from all liability upon the fifteen shares which he had sold, thus making them jointly and severally liable to the Plaintiff's whole demand:—*Held*, on appeal by *D.*, that the Plaintiff was entitled to indemnity, but that the decree ought to be varied so as to make *D.*, *J.*, and *S.* only liable severally, each for one-third of the liability on the Plaintiff's shares. BROWN *v.* BLACK 939

CUSTOM OF TRADE—Bonded goods - 520
See ORDER AND DISPOSITION. 5.

CY-PRÈS—*Charitable Gift—Perpetuity—Conditional Gift to Charity.*] A testatrix, after stating to the effect that as she could not feel confidence

CY-PRÉS—*continued.*
that any of her relatives would spend her money in the way she would approve, she felt she was doing right in giving it in charity, bequeathed her residuary personal estate, consisting of pure personalty, to trustees upon trust to invest it in consols, and to make out of the dividends certain fixed annual payments for charitable purposes. She further directed that when and so soon as land should at any time be given for the purpose as thereinafter mentioned, almshouses should be built in three specified places. And she further directed that the surplus remaining, after building the almshouses, should be appropriated to making allowances to the inmates:—*Held* (reversing the decision of the Master of the Rolls), that the residue was well given in charity, for that the gift to charity was not conditional and contingent, but there was an absolute immediate gift to charity, the mode of execution only being made dependent on future events, and an inquiry directed as in *Sinnett* v. *Herbert* (Law Rep. 7 Ch. 232). CHAMBERLAYNE *v.* BROCKETT - 206

DAMAGE—Tenant—Game - - - 756
See COLLATERAL AGREEMENT.

—— Tenant—Noxious plants - - 756
See IMPLIED WARRANTY.

DAMAGES—Unliquidated—Proof—Bankruptcy [562
See PROOF FOR UNLIQUIDATED DAMAGES.

DEATH BEFORE DATE OF WILL—"Legatee" [751
See GIFT, ORIGINAL OR SUBSTITUTIONAL.

DEATH OF GUARANTOR—*Notice—Executor.*] A guarantee was determinable by six months' notice. The guarantor died, leaving as his executor the debtor on whose behalf the guarantee was given. The creditors to whom the guarantee was given continued to make advances to the debtor, knowing that there was no personal estate to answer the guarantee:—*Held*, that, under the circumstances, the creditors were not entitled to the benefit of the guarantee for their advances subsequent to the death.—*Per Mellish*, L.J.:—The death alone did not determine the guarantee.—Decision of Lord *Romilly*, M.R., affirmed. HARRISS *v.* FAWCETT - - - - 866

DEBTS SUBSEQUENT TO DISCHARGE—*Liquidation by Arrangement—Discharge—Business carried on by Debtor with old Stock-in-Trade—Lien of Creditors for Debts incurred subsequent to Discharge.*] The creditors of a liquidating debtor resolved that, on the debtor's entering into a bond to pay the trustee £5000, by half-yearly instalments, the trustee should allow him to carry on his business, he accounting to the trustee for the stock-in-trade as it was disposed of; and that, on the execution of the bond and the registration of the resolution, the debtor should have his discharge. The debtor executed the bond and obtained his discharge, and carried on the business for two years, and then the creditors resolved that the business should be sold to a purchaser for £3000, which was done, and the purchase-money received by the trustee:—*Held*, that a creditor who had advanced money to the debtor after he had resumed business had no lien upon any part of the £3000. *Ex parte* ROBERTSON. *In re* MAGNUS 962

DEBTOR SUMMONS — *Bankruptcy — Practice — Debt due to Registered Company—Bankruptcy Act*, 1869, *s.* 7.] A debtor summons was taken out in the name of the secretary of a company, limited, for a debt due to the company:—*Held*, that the summons was irregular. *In re* Hodges - 204

2. —— *Bankruptcy—Affidavit to prove Service—Bankruptcy Act*, 1869, *s.* 6, *cl.* 6—*Bankruptcy Rules* 1870, *r.* 63—*Date of Affidavit.*] A non-trader was adjudicated bankrupt, the act of bankruptcy being his failure to comply with the requisitions of a debtor summons. When the copies of the petition for adjudication were sealed by the Registrar, an affidavit of service of the debtor summons was shewn to him, but it had not been filed, as required by the Rule 63 of the *Bankruptcy Rules*, 1870. The affidavit was filed a few days afterwards, and the adjudication was then made:—*Held*, that although the Registrar ought to have refused to seal the copies of the petition till the affidavit had been filed; yet the Rules being merely directory, the adjudication was not invalidated by his omission to do so.—The affidavit stated that the service was made on the "19th August instant," but it was not sworn till September:—*Held*, that the affidavit was sufficient. *Ex parte* Hunt. *In re* Hunt - 234

DEEDS—Deposit of—Priority—Negligence 155, *See* Deposit of Deeds. 1, 2. [932

DEFAULT OF APPOINTMENT—Limitations after invalid appointment - - 419
See Excessive Appointment.

DEFEATING AND DELAYING CREDITORS—Drawing out balance at bankers - 283
See Fraudulent Preference. 1.

—— Alien non-trader - - - 374
See Bankrupt Alien.

DEFECTIVE EXECUTION — *Power.*] A lady having a power of appointment by deed or will over certain leasehold property, which in default of appointment was vested absolutely in her, wrote and signed an unattested paper, by which, after referring to the property in terms sufficient to identify it, she proceeded: "If I die suddenly I wish my eldest son to have it. My intention is to make it over to him legally if my life is spared." She died within three months, leaving this memorandum among her papers, and without having otherwise exercised her power:—*Held* (affirming the decision of the Master of the Rolls), that the memorandum was a defective execution of the power, and that equity would relieve against the defect in favour of the eldest son. Kennard *v.* Kennard - - - - - 227

DELAY—Nuisance—Trifling annoyance - 8
See Trifling Nuisance.

—— Priority of patent—Date of patent - 60
See Priority of Patent.

DELEGATED POWER—Consent of trustee 419
See Excessive Appointment.

DELIVERY OF GOODS—Right to refuse—Insolvency of purchaser - - 289
See Stoppage in Transitu.

DEMISE—Trade fixtures—Bill of sale - 1072, [1075, n.
See Registration of Bill of Sale. 1, 2.

DEMURRER—Bill to restrain groundless action [369
See Restraining Groundless Action.

—— Purchase for value—Statute of Limitations, s. 26 - - - - - 383
See Limitations, Statute of.

DEPOSIT—Deeds - - - 155, 932
See Deposit of Deeds. 1, 2.

—— Return of—Rescinded contract - 118
See Conditions of Sale. 1.

—— Securities—Bankers—Separate accounts 41
See Bankers' Account.

DEPOSIT OF DEEDS—*Equitable Mortgage—Deposit of Old Deed—Priority.*] The owner in fee of a farm deposited deeds of conveyance of the farm dated 1774, by way of security for money then due, writing at the same time a letter which stated that the deeds were the title-deeds of the farm, and were to be a security. He afterwards deposited the subsequent title-deeds of the farm, the earliest being dated 1787, with bankers, by way of security for money due to them; the title was investigated by the bankers, and they had no notice of the prior charge:—*Held* (affirming the decision of the Master of the Rolls), that the letter created an equitable charge on the farm, and that under the circumstances credit must be taken to have been given by the owner of the prior charge to the statement made by the mortgagor, that the deposited deeds were the whole of the title-deeds; and that the owner of the prior charge had therefore not been guilty of negligence so as to deprive herself of her priority. Dixon *v.* Muckleston - - - - 155

2. —— *Condition precedent — Guarantee — Equitable Mortgage.*] The Plaintiff handed title deeds to his brother to enable the brother to borrow £600 from *H.* The brother deposited them at his bankers, with a memorandum of deposit purporting to be executed by the Plaintiff, and addressed to them, "In consideration of your lending *F. B.*" (the brother) "£1000 for seven days from this date, I deposit," &c. The bankers did not place £1000 to the credit of the brother, but during the next seven days they allowed him, by cheques drawn in the ordinary way, to overdraw his account to an amount somewhat less than £1000. The Plaintiff filed his bill for delivery up of the deeds, alleging the memorandum of deposit to be a forgery, and also alleging that the bank had not lent the brother £1000 for seven days:—*Held* (affirming the decision of the Master of the Rolls), that, assuming the memorandum to be genuine, the bankers had no lien on the deeds, for that they had not fulfilled the condition. Burton *v.* Gray - - - - 932

DEVISE—Estate charged with debts and legacies—Mortgage by devisee - - 971
See Charge of Debts and Legacies.

DIRECTORS—Misconduct—Allotment to infant [45
See Liability of Directors.

—— Power to refuse to register transfer - 446
See Transfer of Shares. 1.

—— Qualification of - - - 548, 768
See Qualification of Directors. 1, 2.

DISCHARGE—Liquidation by arrangement—Subsequent debts - - - 962
See Debts subsequent to Discharge.

DISCRETION—Trustees improving estate - 309
See Assets employed in Trade. 1.
—— Trustees—Maintenance of infants - 798
See Maintenance of Infants.
DISSENTIENT SHAREHOLDERS — Reconstruction of company - - - 702
See Reconstruction of Company.
DIVIDENDS—Share in company—Apportionment
See Apportionment of Dividends. [192

DIVISIBLE CONTRACT—*Specific Performance—Agreement for Building—Leases.*] *C.* agreed to let to *W.* several plots of ground for ninety-nine years, at one given rent, to be apportioned as thereinafter mentioned. *W.* agreed to build on plot P twenty houses, on plot B eight, on plot G ten, and on plot Y five; and it was agreed that a separate lease of plot B, at a given rent, should be granted as soon as four of the houses on that plot and two of the ten houses on plot G were covered in, and that a separate lease of plot G should be granted as soon as five of the ten houses on that plot were covered in. *W.* mortgaged this contract to the Plaintiff, and afterwards became insolvent. The Plaintiff covered in the requisite number of houses on plots B and G, and applied for leases of them, denying at the same time his liability to take upon himself the other parts of the agreement, upon the performance of which the granting of leases of plots B and G did not by the terms of the contract depend:—*Held*, by *Wickens*, V.C., that the Plaintiff could have no relief, except on his assuming *W.'s* obligations under the original contract, and that as the Court could not enforce these obligations, relief could not be granted:—*Held*, on appeal, that as by the terms of the contract the right to have leases of plots B and G depended only on conditions which had been fulfilled, the Plaintiff, as assignee of *W.*, was entitled to have leases of those plots granted to him, without assuming *W.'s* obligations under the entire contract. Wilkinson *v.* Clements 96

DOCUMENTS—Production of - 361, 1017
See Production of Documents. 1, 2.
DOUBLE PROOF—Bankruptcy - - 914
See Proof for Joint and Several Contracts.
—— Bankruptcy—Outstanding bills - 535
See Cross-Acceptances.
DOWER—Protection against—Satisfied term 180
See Satisfied Term.

EASEMENT—Grant of—Obstruction by grantor—After-acquired property - 663
See Light and Air.

ELECTION — *Married Woman—Settlement—Reversionary Interest of Married Woman.*] After a lady, who had married during her minority, had come of age, a settlement was executed in the year 1850, to which her father was a party, by which, after reciting that on the treaty for the marriage it had been agreed that certain sums of stock belonging to the husband, and a reversionary interest belonging to the wife, should be settled upon the trusts thereinafter mentioned, and that the wife's father had agreed to transfer certain bank shares to the trustees, to be held upon the trusts thereinafter mentioned, and reciting the transfer of the sums of stock and the

ELECTION—*continued.*

bank shares to the trustees, trusts were declared as to the sums of stock for the husband for life, and then for the wife for her life; and as to the bank shares, during the joint lives of the husband and wife, to pay half the income to the husband and the other half to the wife for her separate use, and after the decease of either to pay the whole income to the survivor for life, and, subject to the above life interests, the sums of stock and bank shares were to be upon the trusts therein mentioned for the children of the marriage. By another witnessing part the husband and wife purported to assign the wife's reversion to the trustees, to be held, when it came into possession, on the same trusts as the bank shares. In 1865 the marriage was dissolved by a decree of the Divorce Court. In 1871 the wife's reversion fell into possession, and she filed a bill to establish that she was not put to her election under the settlement, and to have the fund transferred to her:—*Held* (reversing the decision of the Master of the Rolls), that the wife was put to her election between the interests provided for her by the settlement and her right to receive this fund free from the settlement:—*Held*, further, that in the event of her electing to take against the settlement, she was bound to account for all income received under it since the date of the order *nisi* for dissolution, and that the parties disappointed by her election had a lien on the fund for what she had so received; but that she was not liable to account for income received during the coverture.—*Campbell* v. *Ingilby* (21 Beav. 567; 1 De G. & J. 393) considered. Codrington *v.* Lindsay - - - - - - 578

ENDOWED SCHOOLS COMMISSIONERS—*Charity Scheme—Endowed Schools Act*, 1869, *s.* 30—*Charitable Trusts Act*, 1853, *s.* 28—*Jurisdiction—Appeal.*] If the Endowed Schools Commissioners have not made a declaration under the 30th section of the *Endowed Schools Act*, 1869 (32 & 33 Vict. c. 56), that it is desirable to apply, for the advancement of education, the income of a charitable endowment not previously applicable to education, the mere pendency of a scheme before the Commissioners is no reason why the Court of Chancery should not exercise its jurisdiction to settle a scheme for the management of the charity; but the governing body of the charity ought to have an opportunity of proposing their own scheme in Chambers, in opposition to the scheme of the Attorney-General.—Order of *Bacon*, V.C., affirmed.—The right of appeal from an order of the Vice-Chancellor, under the 28th section of the *Charitable Trusts Act*, 1853, extends to cases where the aggregate income of several charities dealt with by the order exceeds £100, although the income of each charity separately is less than that amount. *In re* Charitable Gifts for Prisoners. *Ex parte* Governors of Christ's Hospital 199
ENGINEER—Certificate—Building contract 597
See Building Contract.

ENTERING APPEARANCE—*Defendant of Unsound Mind.*] The Plaintiff and his sister had given a mortgage to *M.*, a solicitor, and the bill was filed against *M.* and the sister to have accounts taken of what was due, and for redemption. The sister was alleged to be of

ENTERING APPEARANCE—*continued.*
unsound mind, though not found so by inquisition. The Plaintiff's solicitor did not serve the bill on the sister, but, by the Plaintiff's instructions, assumed to act for her, entered an appearance in her name, and obtained at the Rolls the appointment of a guardian *ad litem*. The appearance and the appointment of a guardian were discharged by *Wickens*, V.C., on evidence that the sister had sufficient capacity to authorize a solicitor to act for her, and that she had authorized *M.* so to act:—*Held*, on appeal, that whether the capacity of the sister was proved or not the order of the Vice-Chancellor was right, for that the appearance and the appointment of a guardian founded on it were irregular. CAMPS *v.* MARSHALL - - - - - 462

EQUITY TO A SETTLEMENT—*Husband and Wife—Sufficient Maintenance—Marital Rights.*] On a marriage in 1862, the parties having no property, no settlement was made; but the husband, at the wife's request, gave up an appointment producing more than £300 a year. In the same year the wife's mother settled funds producing about £1000 a year on the wife for life, for her separate use, with remainder to the children, giving the husband £200 a year for life after the death of his wife; and shortly afterwards she gave the wife a further income of above £700 a year for her separate use. The wife allowed the husband £100 a year till 1865, when they ceased to live together. In December, 1870, he obtained a decree for restitution of conjugal rights, and a separation deed was thereupon executed by which she agreed to give him an annuity of £300 a year, and to maintain their two children while with her, his rights as to her unsettled property not being affected. At this time the wife had saved about £6000 out of her separate income. It appeared that the husband was not to blame in the disputes. A sum of £6000 having devolved upon the wife under the intestacy of a relation:—*Held* (affirming the decree of *Malins*, V.C.), that the wife was not entitled to any settlement out of this sum. GIACOMETTI *v.* PRODGERS - - - - - 338

—— Form of settlement—Ultimate limitation
See SETTLEMENT BY THE COURT. [482

EVIDENCE—Conversation between Plaintiff and deceased person - - - 888
See LOAN OR GIFT.

—— Parol—Ambiguity in will—Nephews and nieces - - - - - 928
See "NEPHEWS AND NIECES."

—— Patent—Opposition to sealing—New facts
See SEALING OF PATENT. [237

—— Proof in bankruptcy—Money advanced for use of firm - - - 914
See PROOF FOR JOINT AND SEVERAL CONTRACTS.

EXCEPTIONS FOR SCANDAL—*Relevancy.*] The Plaintiffs, who carried on an extensive and well-known business as auctioneers under the firm of "*Christie, Manson, & Woods*," filed their bill to restrain the issuing of the prospectus of a limited company to be "formed for the purpose of acquiring and working the well-known and rapidly-increasing auction and general land, estate, and

EXCEPTIONS FOR SCANDAL—*continued.*
house agency business of Messrs. *Christie & Christie*." The bill alleged that the business of the Plaintiffs was the only well-known business of auctioneers connected with the name of *Christie*, and that the description in the prospectus of the business therein mentioned was inapplicable to any business of the Defendants the *Christies*, and was inserted to induce the public to believe that the business was that of the Plaintiffs. The bill then alleged that *C. J. Christie*, one of the Defendants, was adjudicated bankrupt in 1869 and paid no dividend, and had obtained his order of discharge in 1870; that in 1869 he was committed for trial at the *Marylebone* Police Court on a charge of fraud by means of false cheques; that a report in the *Times*, which was set out in the bill, was a correct report of what took place at the committal; and that the money in respect of which the charge was made was subsequently paid by a relation, and the prosecution abandoned. The Defendants the *Christies* excepted for scandal to the allegations as to the criminal proceedings in 1869:—*Held* (reversing the decision of *Malins*, V.C.), that the allegations were scandalous and must be expunged, for that the Defendants having committed, in 1869, a fraud wholly unconnected with the subject-matter of this suit would have been irrelevant, and that, *à fortiori*, an allegation that he had been committed for trial on a charge of having been guilty of such fraud, without any allegation that he had been guilty of it, was irrelevant.—On a successful appeal from an order overruling exceptions for scandal, the Appellant was allowed his costs of the appeal, as well as his costs in the Court below as between solicitor and client. CHRISTIE *v.* CHRISTIE - - 499

EXCESSIVE APPOINTMENT—*Extent of Invalidity—Gift to the Executors or Administrators of A.—Personæ Designatæ.*] Husband and wife, having, under their marriage settlement, a joint power of appointment over personalty in favour of the children of the marriage, of whom there were three survivors, appointed one third of the fund to trustees upon such trusts as *H.* (one of the sons) by deed, executed with the consent of the father during his life, and after his death with the consent of the trustees of his will, or by will, should appoint; and in default of such appointment, upon trust for *H.* for life, or until bankruptcy or assignment (such bankruptcy or assignment being limited to twenty-one years after the death of his surviving parent); and after *H.*'s death, upon trust for his executors or administrators, as part of his personal estate; but if such interest should be previously determined, then upon the trusts therein mentioned:—*Held*, that the appointment to such uses as *H.* should appoint, with consent of the trustees, was void, but that the limitation over in default of appointment by *H.* was valid, and gave *H.* an absolute interest in the share, subject to the contingency of his committing a forfeiture within the prescribed period. WEBB *v.* SADLER - - - 419

EXECUTION CREDITOR—*Bankruptcy—Seizure and Sale—Private Sale by the Debtor to the Execution Creditor—Fraudulent Transfer—Fraudulent Preference—Bankruptcy Act*, 1869, *s.* 6, *sub-ss.* 2, 5, *and ss.* 87, 92.] *P.* recovered judgment for

EXECUTION CREDITOR—*continued.*

a sum exceeding £50 from a trader, and on the 8th of August lodged an execution in the hands of the sheriff, who seized six of his horses.—On the 11th of August, before any sale had been made by the sheriff, the debtor agreed with *P.* to sell him the six horses which the sheriff had seized for the amount of the debt and the sheriff's charges; and *P.* accordingly withdrew the execution, but he left the horses in the debtor's stables, and signed an agreement to let the debtor have the use of them for a certain payment per day.—On the 15th of August, *P.* removed the horses, and soon afterwards sold them for about the same price as he gave for them. The debtor was at the time of the sale insolvent, and on the 15th of August he filed a petition for liquidation, and trustees were appointed, who claimed the price of the horses from *P.*:—*Held* (affirming the decision of the Chief Judge), that the sale of the horses to the execution creditor, having been made for the purpose of avoiding a sale by the sheriff, was a fraudulent transfer under the 2nd sub-section of the 6th section of the *Bankruptcy Act*, 1869, and was void against the creditors.—But, *semble*, it would not have been fraudulent if the debtor had been solvent.—*Held*, also, by *James*, L.J. (*dissentiente Mellish*, L.J.), that the seizure by the sheriff, followed by the sale by the debtor to the creditor, constituted a seizure and sale within the 5th sub-section of the 6th section, and an act of bankruptcy:—*Held*, also, by *James*, L.J. (*dubitante Mellish*, L.J.), that the sale was a fraudulent preference of the creditor. *Ex parte* Pearson. *In re* Mortimer - - - 667

EXECUTOR—Account at bankers—Married woman - - - - - 88
See Bankers' Account. 2.

—— Assets employed in trade - 309, 323, n.
See Assets employed in Trade. 1, 2.

—— Plea that Defendant not executor—Renunciation of probate - - 731
See Plea that Defendant not Executor.

—— Power to pledge assets - - - 747
See Power to pledge Assets.

—— Power to sell—Charge of debts and legacies
See Charge of Debts and Legacies. [971

EXPRESS TRUST—Statute of Limitations—Mortgage - - - - - - 30
See Limitations, Statute of. 1.

FENCES—Liability to repair - - 756
See Implied Warranty.

FIDUCIARY CAPACITY—Money received under—Committal under Debtors Act - 231
See Committal under Debtors Act, 1869.

FILING AND REGISTRATION—Special resolution of creditors - - - 722
See Majority of Creditors. 1.

FIXTURES—Trade—Bill of sale 1072, 1075, n.
See Registration of Bill of Sale. 1, 2.

FOREIGN CONTRACT—*Ship—Specific Performance—Injunction—Jurisdiction—Substituted Service.*] A shipowner of *Hamburg* made, at *Hamburg*, an agreement with a domiciled Englishman for the sale to the Englishman of a *Hamburg* ship whenever she might return from the voyage on which she then was. The ship returned and was by the owner ordered to proceed to *Sunderland*. The master of the ship, who was authorized by the shipowner to act as his agent in the sale, refused to deliver the ship except on certain terms. The purchaser filed a bill against the owner and the master for specific performance. He obtained leave to substitute service on the master for the owner, and moved for an injunction to restrain the Defendants from removing the ship out of the jurisdiction:—*Held*, that substituted service on the master was effectual and proper:—*Held*, that the Court had jurisdiction to restrain the Defendants from removing the ship, and injunction granted.—Order of *Malins*, V.C., affirmed. Hart *v.* Herwig - - - - - 860

FOREIGN CONTRACT—*continued.*

2. —— *Service out of Jurisdiction.*] The Plaintiff, who was domiciled in *America* but temporarily resident in *England*, filed a bill against two other domiciled Americans, one of whom was also temporarily resident in *England*, to enforce a contract made in *America*. He afterwards obtained an order to serve the Defendant, who was in *America*:—*Held*, that although the Court had jurisdiction to make the order, it was not a proper case for making it; and the order was discharged. Davis *v.* Park - - - - 862, n.

FOREIGN JUDGMENT—*Fraud—Action at Law—Injunction—Concealment—Jurisdiction.*] A plea of fraud is a good defence at law to an action on a foreign judgment; and therefore the Court of Chancery will not, on the ground that such a judgment was obtained by fraud, interfere with the action at law.—In cases of concurrent jurisdiction proceedings at law will not be interfered with by the Court of Chancery, unless that Court can give a more perfect remedy, or the case can be better tried by the procedure of that Court.—Decision of *Malins*, V.C., affirmed. Ochsenbein *v.* Papelier - - - - - 695

FORFEITURE—Relief from penalty - 1022
See Relief from Penalty.

FRAUD—Agent selling for his own benefit 56
See Purchase from Agent.

—— Allegation of - - - - 597
See Building Contract.

—— Bankruptcy laws—Increase of security on bankruptcy - - - - 643
See Fraud on Bankruptcy Laws.

—— Bankruptcy—Meeting of creditors—*Bonâ fide* voting - - - - 727
See Majority of Creditors. 2.

—— Concealed—Discovery of—Statute of Limitations, s. 26 - - - - 383
See Limitations, Statute of. 2.

—— Debtor—Prosecution under Debtors Act 676
See Prosecution under Debtors Act, 1869.

—— Foreign judgment—Concurrent jurisdiction
See Foreign Judgment. [695

—— Preference of creditors - - 283, 614
See Fraudulent Preference. 1, 2.

—— Sale of reversion—Expectant heir - 484
See Usurious Contract.

FRAUD—*continued.*

—— Sale by debtor to execution creditor—Bankruptcy - - - - 667
See EXECUTION CREDITOR.

—— Undue influence—Condonation—Unfounded allegations—Collateral agreement 881
See UNDUE INFLUENCE.

FRAUD ON BANKRUPTCY LAWS—*Proviso that a Security shall be increased if the Debtor become Bankrupt—Agreement for Bill of Sale—Registration*—17 & 18 *Vict. c.* 36, *s.* 7.] *A.* sold a patent to *B.* in consideration of *B.* paying royalties to *A.* *B.* at the same time lent *A.* £12,500; and it was agreed that *B.* should retain one-half of the royalties, as they became payable, towards satisfaction of the debt; provided that, if *A.* became bankrupt or made an arrangement with his creditors, *B.* might retain the whole of the royalties in satisfaction of the debt. *A.* became a liquidating debtor:—*Held*, that *B.* had a lien on one-half only of the royalties, and that the proviso that he might retain the whole of the royalties in case of *A.*'s bankruptcy, &c, was a fraud upon the bankruptcy laws, and void.—An agreement for a bill of sale, if relied on as an equitable assignment of the property, requires to be registered under the *Bills of Sale Act* (17 & 18 Vict. c. 36). *Ex parte* MACKAY. *Ex parte* BROWN. *In re* JEAVONS - - - - 643

FRAUDS, STATUTE OF—*Written Agreement with Terms omitted—Rescinding Agreement—Offer in Bill.*] The Plaintiffs agreed to purchase an estate from the *L. Society*, and to pay a deposit on the signing of the contract. Before it had been signed the Plaintiffs verbally agreed with *B.* to make it over to him on certain terms. In order to enable *B.* to deal with the *L. Society*, the Plaintiffs signed and gave to him a memorandum, making over the contract to him in consideration of his paying to the *L. Society* the deposit, and engaging to pay a certain sum to the Plaintiffs; the other terms of the bargain between the Plaintiffs and *B.*, which were in favour of the Plaintiffs, being at *B.*'s request omitted from the memorandum. On the same day the contract between the Plaintiffs and the *L. Society* was signed, and the part signed by the *L. Society* was given to *B.*, who paid the deposit. *B.* afterwards repudiated all the stipulations in favour of the Plaintiffs which had not been inserted in the memorandum. The Plaintiffs then filed their bill against *B.* and the *L. Society*, asking to have the memorandum between *B.* and the Plaintiffs cancelled, and for a conveyance from the society on payment of what was due to them:—*Held* (affirming the decision of *Malins*, V.C.), that a demurrer by *B.* was not sustainable on the merits, for that the memorandum was only ancillary to the verbal agreement between the Plaintiffs and *B.*, and any use of it by *B.* for a purpose inconsistent with that agreement was fraudulent:—*Held*, further, that if the Plaintiffs could have maintained a bill for specific performance of the parol agreement between them and *B.*, on the ground that it had been in part performed—as to which *quære*—they were not bound to do so; but that, as *B.* had repudiated that agreement, they were entitled to fall back on their original rights under the agreement with the *L. Society*:—*Held*, further (differing from *Malins*, V.C.), that the bill was not demurrable for want of an offer to repay to *B.* what he had paid to the society. JERVIS *v.* BERRIDGE - - - - 351

FRAUDS, STATUTE OF—*continued.*

FRAUDULENT PREFERENCE—*Bankruptcy—Act of Bankruptcy—Withdrawing Balance from Bankers.*] *L.* being on the eve of bankruptcy, drew out all his balance at his bankers and sent it to *K.*, who was employed by him as accountant, and to whom he owed a considerable sum. His object in sending the money to *K.* was to prevent its being attached by another creditor, who had issued a writ against him. *K.* took back the money, and refused to accept it unless the debtor consented to his paying himself out of it. After some discussion, the debtor agreed to this, and *K.* accordingly appropriated £421, part of the sum entrusted to him, in satisfaction of his own debt. The evidence did not establish that there had been anything which amounted to pressure for payment on the part of *K.* before the occasion on which he took back the money to *L.* Three days afterwards *L.* stopped payment, and soon afterwards presented his petition for liquidation:—*Held*, that the act of the debtor in drawing out the balance from the bankers for the purpose of defeating the creditor who was suing him was in itself an act of bankruptcy, and that the payment of the £421 to *K.* was a fraudulent preference. *Ex parte* HALLIDAY. *In re* LIEBERT - - - 283

2. —— *Bankruptcy—Motive of Debtor—Desire to obtain Fresh Credit—Conditional Delivery of Goods—Preliminary Meeting of Creditors—Bankruptcy Act*, 1869, *s.* 92.] A trader, being in insolvent circumstances, applied to a creditor, to whom he owed £2500 for goods supplied in the way of his business, to supply him with more goods on credit. The creditor refused to supply any more goods unless the debtor paid £200 on account of the goods previously supplied. The debtor said he could not pay the money, and on being pressed by the creditor, he offered to return goods to the amount of the £200, which he did not want. This the creditor agreed to, and the goods were accordingly returned to him. On the same day the debtor filed a petition for liquidation:—*Held* (reversing the decision of *Bacon*, C.J.), that the delivery of the goods to the creditor was not a fraudulent preference.—*Ex parte Blackburn* (Law Rep. 12 Eq. 358) approved.—*Held*, also, that the trustee in the liquidation was not entitled to have the goods given up by the creditor on the ground that the delivery to him was on condition of his supplying fresh goods, which he had never done.—Two of the principal creditors of a debtor had a meeting with him, at which he admitted that unless he could get assistance from his friends he must become bankrupt:—*Held*, that one of the creditors might, notwithstanding the meeting, obtain payment from the debtor of a debt previously due. *Ex parte* TOPHAM. *In re* WALKER 614

—— Committal under Debtors Act - 231
See COMMITTAL UNDER DEBTORS ACT, 1869.

—— Sale by debtor to execution creditor - 667
See EXECUTION CREDITOR.

"FREEHOLD HOUSES"—*Will—Construction—Devise—Mortgage-money.*] The lessee of a term *T* 1

"**FREEHOLD HOUSES**"—*continued.*
of years in four houses assigned the term, by way of mortgage, to the owner in fee of the immediate reversion, who afterwards devised the houses by the description of "my freehold houses Nos. 5, 6, 7, and 8, *Stock Street*," and was at the time of his death in possession as mortgagee:—*Held* (affirming the decision of the Master of the Rolls), that the mortgage debt did not pass under the devise, but formed part of the testator's personal estate. Bowen *v.* Barlow - - 171

GAME—Agreement to kill—Damage to tenant
See Collateral Agreement. [756

GENERAL RULES IN BANKRUPTCY, 1870—Rule 61 - - - - - 690
See County Court Jurisdiction.

—— Rule 63 - - - - - 234
See Debtor Summons. 2.

—— Rules 169, 170, 311 - - - - 682
See Proof for Untaxed Costs. 1.

—— Rules 275, 284, 295 - - - 722
See Majority of Creditors. 1.

GIFT OR LOAN—Doubtful payments - 888
See Loan or Gift.

GIFT, ORIGINAL OR SUBSTITUTIONAL—*Will—Construction—Member of a Class dying before the Date of the Will—Substituted Gift.*] A testatrix, among other legacies, gave to the children of her late cousin *R. H.* £1000. The will contained a proviso that if any legatee should die in the lifetime of the testatrix leaving children, such legacy should not lapse, but should be paid to the children of the deceased legatee. One of the children of *R. H.* was dead at the date of the will, leaving children:—*Held* (affirming the decision of *Malins*, V.C.), that the children of the deceased child could not take under the proviso in the will inasmuch as the deceased child was not a "legatee" within the meaning of the clause.—*In re Potter's Trust* (Law Rep. 8 Eq. 52) and *Adams* v. *Adams* (Law Rep. 14 Eq. 246) distinguished. Hunter *v.* Cheshire - - - - - 751

GRANT—Act in derogation of - - 663
See Light and Air.

GROUNDLESS ACTION—Bill to restrain - 369
See Restraining Groundless Action.

GUARANTEE—Conditional - - - 932
See Deposit of Deeds. 2.

—— Determination on six months' notice—Death of guarantor - - - 866
See Death of Guarantor.

—— Illegal agreement - - - 1035
See Contrivance to procure Settling Day.

GUARDIAN—Religious education - - 622
See Religious Education.

HEIR—Right to void accumulations - 978
See Accumulations.

—— Sale of reversionary interest - - 484
See Usurious Contract.

HORSES—Noise of - - - - 467
See Increasing Nuisance.

HUSBAND AND WIFE—Ante-nuptial agreement as to education of children - 622
See Religious Education.

HUSBAND AND WIFE—*continued.*
—— Election — Settlement — Reversionary interest - - - - - - 578
See Election.

—— Separate estate—Account at bankers 88
See Bankers' Account. 2.

—— Settlement by Court of Chancery—Ultimate limitation - - - - 482
See Settlement by the Court.

—— Wife's equity to a settlement - - 338
See Equity to a Settlement.

—— Will of wife—Assent of husband - 778
See Will of Married Woman.

ILLEGALITY—Trust—Order and disposition—Bankruptcy - - - - 149
See Order and Disposition. 4.

IMPLICATION—Covenant to carry on business
See Sale of Business. [658

—— Warranty by lessor against noxious plants
See Implied Warranty. [756

IMPLIED WARRANTY—*Landlord and Tenant—Noxious Plants—Yew Trees—Liability to keep up Fences.*] There is no implied warranty on the part of a lessor who lets land for agricultural purposes, that no noxious plants are growing on the demised premises.—There is no implied obligation on the part of a lessor to keep up the fences of closes which he retains in his own hands, and which abut upon land demised to a tenant, so as to prevent the tenant's cattle from straying on to them. Erskine *v.* Adeane - - - 756

IMPOSSIBLE CONDITION - - - 454
See Conditional Gift.

INCREASING NUISANCE — *Injunction—User—House.*] The occupier of a house in a street in *London* had, many years ago, converted the ground floor into a stable. In 1871 a new occupier altered the stable so that the noise of the horses was an annoyance to the next-door neighbour, and prevented him from letting his house as lodgings:—*Held*, that the fact of horses having been previously kept in the stable, but so as not to be an annoyance, did not deprive the neighbour of his right to have the nuisance restrained:—Annoyance caused by the unusual use of a house may be a nuisance where like annoyance from the ordinary use of it would not be.—Decree of the Master of the Rolls reversed. Ball *v.* Ray 467

INDEMNITY—Breach of trust—Estoppel 1035
See Contrivance to procure Settling Day.

—— Stockbroker—Sale to recoup himself - 921
See Custom of Stock Exchange. 1.

—— Stockbroker—Transfer to infant - 939
See Custom of Stock Exchange. 2.

INDENTURE—Variance between two parts 1002
See Amalgamation of Companies. 2.

INDORSEMENT—Bill of lading—Inadvertence—Priority - - - - - 16
See Property in Goods shipped.

INFANT—Allotment of shares to—Misconduct of directors - - - - 45
See Liability of Directors.

—— Maintenance - - - 415, 798
See Maintenance of Infant. 1, 2.

INFANT—*continued.*

—— Partner—Bankruptcy of adult partner 51
See Order and Disposition. 2.

—— Religious education—Ward of Court 622
See Religious Education.

—— Transfer of shares to—Past member - 266
See Infant Transferee.

—— Transfer of shares to—Stock Exchange—Indemnity - - - - 939
See Custom of Stock Exchange. 2.

INFANT TRANSFEREE — *Contributory — Past Member—Adult.*] A shareholder in a company transferred shares to an infant, who transferred them to another infant, who transferred them to an adult, and all the transfers were registered. The company was ordered to be wound up more than a year after the first transfer, but less than a year after the last transfer:—*Held* (reversing the decision of the Master of the Rolls), that after the company had once obtained an adult shareholder, the intermediate transfers could not be avoided, that the shareholder ceased to be such at the date of the first transfer, and that he could not be put on the list of past members. *In re* Contract Corporation. Gooch's Case - - - 266

INJUNCTION—Action—Groundless action 369
See Restraining Groundless Action.

—— Action on policy of insurance - 22
See Restraining Action on Policy.

—— Action on foreign judgment - - 695
See Foreign Judgment.

—— Bankruptcy - - 214, 555, 595, 743
See Injunction in Bankruptcy. 1—4.

—— *Ex parte*—Suppression of material fact 1084
See Party-wall.

—— Foreign contract—Foreign ship - 860
See Foreign Contract. 1.

—— Light and air - - - - 663
See Light and Air.

—— Nuisance—Noise of horses - - 467
See Increasing Nuisance.

—— Nuisance—Trifling annoyance - 8
See Trifling Nuisance.

—— Obstruction of way - - - 650
See Obstruction of Way.

—— Pollution of river - - - 125
See Pollution of River.

—— Proceedings in arbitration - 476, n.
See Submission to Arbitration. 2.

—— Sale by trustee—Depreciatory condition of sale - - - - - 902
See Conditions of Sale. 2.

—— Usurious contract—Sale of reversionary interest - - - - 484
See Usurious Contract.

—— Works in mine - - - - 473
See Submission to Arbitration. 1.

INJUNCTION IN BANKRUPTCY — *Restraining Proceedings in Chancery—Bankruptcy Act*, 1869, *s.* 72.] A testator up to his decease carried on business in partnership with his son. The capital belonged to the father, and the articles contained provisions vesting the son's share immediately on the father's death in the father's executors. The father by will appointed the son and two other persons executors, with discretionary powers to sell the business to the son and to continue it in the meantime. The son alone proved, and continued the business with the testator's assets, and within a year from the father's death a suit was instituted by separate creditors of the father for the administration of his estate. A receiver was appointed in the suit, and shortly afterwards a trustee was appointed under a liquidation Petition which had been presented by the son before the receiver was appointed. The bill was amended by making the trustee a party, and praying an injunction to restrain him from meddling with the estate of the testator. The Registrar in Bankruptcy refused an application by the trustee for an injunction to restrain the Plaintiffs from taking any proceedings in the suit for the purpose of interfering with the realization and distribution of the stock-in-trade and effects of the firm, and *Malins*, V.C., in the suit, granted an injunction to restrain the trustee from interfering with the testator's assets, unless he should pay into the Court, in the names of the receiver and himself, a sum of £48,000 realized from the assets of the business:—*Held* (reversing both decisions), that the Court of Bankruptcy was the proper forum for deciding the questions arising between the estates of the father and the son, and that the injunction in Chancery must be discharged, and an injunction in Bankruptcy granted, to restrain the Plaintiffs from taking any proceedings in Chancery against the trustee in respect of any property come to his hands. Morley *v.* White. *In re* White - - - - - - 214

2. —— *Restraining Proceedings in a Chancery Suit—Bankruptcy Act*, 1869, *s.* 72.] A suit in Chancery was instituted by legatees under the will of a testator against his executors, and against the continuing partners of a firm of which he had been a member at the time of his death, and *R. S. D.*, another partner who had retired after the testator's death, for the purpose of winding up the affairs of the partnership as they existed at the time of the testator's death, and obtaining payment to his estate of the share of the capital which was due to him. After the bill was filed the continuing partners filed a petition for liquidation by arrangement, and a trustee was appointed. The trustee was made a party to the suit by a supplemental order, but no relief was prayed against him.—The trustee having applied to the Court of Bankruptcy for an injunction to restrain the proceedings in the suit as against him, it was *held* by *Bacon*, C.J., that the Court had no jurisdiction to grant the injunction.—After the order was made *R. S. D.* also filed a petition for liquidation:—*Held*, by the Lords Justices, that the Chief Judge was right in refusing the injunction, *R. S. D.* being then solvent.—But *held*, on the production of evidence that *R. S. D.* had also become a liquidating debtor, that all the matters in question in the suit might be properly determined in Bankruptcy; and that the trustee was entitled to the injunction asked for. *Ex parte* Gordon. *In re* Dixon - - - 555

3. —— *Liquidation by Arrangement—Non-payment of Composition by Debtor—Bankruptcy Act*, 1869, *s.* 125.] Where a creditor objects to be bound by an arrangement with creditors on

INJUNCTION IN BANKRUPTCY—*continued.*

grounds personal to himself and not applicable to the rest of the creditors he will not be restrained by the Court of Bankruptcy from trying the question in an action at law.—A creditor refused to be bound by a resolution for a composition registered under the 125th section of the *Bankruptcy Act*, 1869, on the ground that his name was not duly inserted in the debtor's statement of debts, and that the composition had not been tendered to him within the prescribed time:—*Held*, that he ought not to be restrained from suing the debtor at law. *Ex parte* Paper Staining Company. *In re* Bishop - - 595

4. —— *Composition—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 72, 127.] Where resolutions accepting a composition payable by the debtor have been duly passed and registered under the *Bankruptcy Act*, 1869, a creditor will be restrained from proceeding at law in order to try the validity of the resolutions.—Order of *Bacon*, C.J., affirmed. *In re* Thorpe. *Ex parte* Hartel - - - - - 743

INSTALMENTS—Sale by—Right of vendor to refuse further delivery - - 289
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JOINT AND SEPARATE ESTATES—*Proof of Debts—Proof by Partner against Estate of Copartner—Principal and Surety.*] *H.*, a partner in a banking firm, entered into a bond with a board of guardians, on being appointed their treasurer, with two sureties, one of whom was *K.*, a partner in the firm, and the other was *E.*, who was not a partner. *H.* kept the account of the guardians' money at his bank under a special heading, "*Norwich* Union," and a sum of £5677 was standing to that account when the bank stopped payment. *H.* died shortly after the stoppage, and his estate was administered in Chancery. The other partners were adjudicated bankrupts. The joint estate and *H.'s* separate estate were alleged to be insolvent; joint debts to a large extent remained unpaid; *K.'s* separate estate was solvent. The amount due to the guardians was paid by *E.*, who recovered by proof upon the separate estate of *K.*, his co-surety, one moiety of the amount paid. The trustee of *K.'s* separate estate, who was also the trustee of the estate of the bankrupt partners, then claimed to prove against *H.'s* separate estate for the amount of the moiety paid to *E.* out of *K.'s* estate:—*Held*, that, as the partnership received the money from and owed it to the guardians, the relation of principal and surety never in reality existed between *H.* and *K.* The claim was therefore disallowed.—Order of the Master of the Rolls affirmed.—Whether *Ex parte Topping* (4 D. J. & S. 551) would apply to a case where the separate estate in respect of which the proof is sought to be made is solvent, so that any surplus would go to the joint estate, *quære*. Lacey *v.* Hill. Leney *v.* Hill - - - 441

2. —— *Bankruptcy—Alteration of Estate by Partnership Deed—Surviving Partner.*] By a partnership deed it was stipulated that *A.* and *B.* should be partners in the profits of the business, the capital of which belonged to *A.*; and that on the death of *A.* the partnership should be dissolved, and *B.'s* share of profits should thenceforth belong to *A.'s* representatives, and that his representatives should thenceforth carry on the business, and that *B.* should receive from them his share of the profits up to *A.'s* death. *A.* died during the partnership, having appointed *B.* his executor. *B.* carried on the trade for fourteen months, and then filed a petition for liquidation. Part of the stock-in-trade which existed at *A.'s* death still remained in specie, but the greater part had been disposed of by *B.* in the course of the business, and fresh stock-in-trade bought by him:—*Held* (affirming the decision of Mr. Registrar *Pepys*), that the partnership deed had not the effect of converting the stock-in-trade into separate estate of *A.*, but that so much of the present assets as had been in existence at *A.'s* death was applicable as joint estate to pay the joint creditors of the firm, and so much as had been bought since *A.'s* death was applicable as separate estate of *B.*:—*Held*, also, that the previous decision in this case (Law Rep. 8 Ch. 214) had concluded the question of the Court in which the joint estate was to be administered, and that it could not be re-opened. *Ex parte* Morley. *In re* White - - - - - - 1026

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JUDGMENT—Foreign—Fraud—Injunction—Concurrent jurisdiction - - 695
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—— Bankruptcy and Chancery - 214, 555
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See TRUSTEE OF CREDITORS' DEED.

LIABILITY OF DIRECTORS — *Companies Act*, 1862, *s.* 165—*Misconduct of Director—Winding-up—Allotment to Infant.*] A director of a company induced three of his children, who were minors, to apply for shares. Shares were allotted to each, and he gave them money to pay the sums payable on allotment. All the shares in the company were allotted. The company never paid any dividend, and an order for winding it up was made before any of the children had attained twenty-one. The infants were placed on the list of contributories, and an order was made against each for payment of an arrear of calls, but, their infancy having been discovered, no attempt was made to enforce it:—*Held* (affirming the order of the Vice-Warden of the Stannaries), that the father was liable to pay the amount of these calls, as a loss occasioned to the company by his breach of duty as director in having shares allotted to infants. *In re* CRENVER AND WHEAL ABRAHAM UNITED MINING COMPANY. *Ex parte* WILSON 45

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—— Solicitor—Costs - - - - 918
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LIFE INSURANCE—Injunction to restrain action
See RESTRAINING ACTION ON POLICY. [22

LIGHT AND AIR—*Lease—After-acquired Estate.*] A lessor granted a lease for twenty-one years of a house with its appurtenances, amongst which lights were specified. At the time of the grant he held an adjoining house for a term of years. He subsequently acquired the reversion expectant on the term in the adjoining house; and after the expiration of the term he proceeded to build on the site of the adjoining house in a manner which might interfere with the lights of the demised house, those lights not being ancient lights:—*Held* (reversing the decision of *Malins*, V.C.), that the lessor was not by his grant prevented from so building. BOOTH *v.* ALCOCK 663

—— Party-wall - - - - 1084
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LIMITATION OF SHIPOWNER'S LIABILITY—*Carriers—Injunction*—17 & 18 *Vict. c.* 104, *s.* 514—25 & 26 *Vict. c.* 63, *s.* 54.] A railway company carrying passengers and goods partly by railway and partly by their own ships, is entitled to the limitation on the liability of shipowners imposed by the Merchant Shipping Acts.—A railway company, known to be also shipowners, contracted to carry passengers and goods from *London* to *Guernsey*. The passengers and goods were taken by railway from *London* to *Southampton*, and were there put on board a ship which belonged to the company. The ship, on her way to *Guernsey*, came into collision with another ship and sank, with several of the passengers and all the goods. Actions were brought against the company by surviving passengers for loss of luggage and for delay, by shippers of goods for loss of goods, and by the administrators of lost passengers for damages;—*Held*, that, as to all the damages (except those for delay), the liability of the company was, by the Merchant Shipping Acts, limited to the amount of £15 per ton on the tonnage of the ship; that the amount so payable should be distributed by the Court of Chancery, and that all the actions against the railway company (except those for delay) should be restrained.—Order of the Master of the Rolls varied. LONDON AND SOUTH-WESTERN RAILWAY COMPANY *v.* JAMES - - 241

LIMITATIONS, STATUTE OF—*Mortgage — Express Trust — Conveyance upon Trust to sell in default of Repayment of Advance* (3 & 4 *Will.* 4, *c.* 27), *ss.* 25, 28—*Term of Years—Conveyance of Fee — Implied Surrender.*] A security in the form of a trust for sale is a mortgage within the meaning of the 28th section of the *Statute of Limitations*.—Before 1829 *L.* had demised two estates to *P.* for long terms of years by way of mortgage. On the 11th of February, 1829, *P.* made to *L.* a further advance, and *L.*, by a deed to which *P.* was a party, but not a conveying party, conveyed the fee in those estates and another estate to *C.*, upon trust for *P.*, his heirs, executors, administrators, and assigns, nevertheless upon the further trusts hereinafter declared; which were, to permit *L.* to continue in possession and receipt of rents till the 11th of August, and if *L.* should then repay the further advance with interest, and the other mortgages charged on the property and thereinafter specified, to reconvey to *L.*, his heirs or assigns; but in default of payment, then that *C.*, his heirs or assigns, should immediately, or at their or his discretion, enter into possession, and sell the estates, and stand possessed of the proceeds in trust, in the first place, to pay costs, then the sums due to *P.* with interest, and a sum due on mortgage to another person with interest, and to pay the surplus to *L.*, his executors, administrators, or assigns. *L.* at the same time attorned tenant to *P.* Default having been made in payment, *P.* entered into possession in 1832, and thenceforth received the rents and let the property. Sales were subsequently made of parts of the property, the last being in 1848, and *C.* conveyed to the purchasers, *P.* being a party, and it was agreed that all terms should be assigned in trust to attend. In 1871 *L.*'s heir-at-law filed a bill to have the trusts of the deed of 1829 carried into execution:—*Held* (reversing the decision of the Master of the Rolls), that the deed of 1829 did not create a trust of the estate for the benefit of the mortgagor which he could enforce, so as to bring the case within the 3 & 4 Will. 4, c. 27, s. 25, but was a mortgage within the meaning of sect. 28 of the same statute:—*Held*, also, that there was no implied merger of the terms created by *P.*'s earlier securities, and that those securities remained in force notwithstanding the deed of 1829;—*Held*, further, that although the deed created an express trust in favour of *L.* of the surplus proceeds of sale after paying incumbrances, no relief could be given to the Plaintiff on this ground, as it was not alleged, nor was there anything to lead to the supposition, that there had ever been any such surplus:—*Held*, therefore (reversing the decision of the Master of the Rolls), that the bill must be dismissed with costs. Locking *v.* Parker - - - - - 30

2. —— 3 & 4 *Will.* 4, *c.* 27, *s.* 26 — *Concealed Fraud — Purchaser for Value — Legal Title—Suit in Equity.*] The Plaintiff, by his bill, stated to the following effect:—That an estate being limited to the Plaintiff's father for life, remainder to his first and other sons successively in tail, the father in 1797 intermarried with a woman who had been his mistress, and had just borne him a son; that after the marriage the parents agreed to pass off the son as legitimate, and he was always recognised as such; that the Plaintiff, who was born ten years afterwards, was the eldest—but was brought up in the belief that he was the second—legitimate son; that when the illegitimate son came of age he was informed by the father that he was illegitimate, and with that knowledge joined the father in suffering a recovery to bar the entail; that on the marriage of the illegitimate son in 1823, he and the father made an ante-nuptial settlement of the estates, which was negotiated by the wife's father, as her agent, and on her behalf, with full knowledge that the husband was illegitimate; that the father died in 1832, upon which the illegitimate son entered into possession, and remained so till his death in 1842, ever since which time his eldest son had been in possession; that the Plaintiff had never until 1866 believed or suspected, or had any reason to believe or suspect, that his elder brother was illegitimate; and the bill prayed for a declaration that the Plaintiff was entitled to the estates, and that the Defendants, who claimed under the settlement of 1823, might be ordered to give up possession to him. The Defendants demurred:—*Held*, that a Court of Equity had jurisdiction:—*Held*, that the designedly bringing up the Plaintiff in the belief that he was the second legitimate son was a case of concealed fraud within the meaning of the *Statute of Limitations* (3 & 4 Will. 4, c. 27, s. 26), and that time did not begin to run against the Plaintiff's right to sue in equity until the time when he might first, with reasonable diligence, have discovered the fraud: *Held*, further, that a purchaser for value who, though not having any personal notice of the fraud, contracts through an agent who knows of the fraud, cannot protect himself under the saving in sect. 26 as a "*bonâ fide* purchaser for value who at the time of the purchase did not know and had no reason to believe that any such fraud had been committed," and that therefore the persons claiming under the settlement of 1823 could not sustain this defence:—*Held*, therefore (affirming the decision of *Malins*, V.C.), that the demurrers must be overruled. Whether a defence of purchase for value under sect. 26 can be raised by demurrer, and whether it must not be by plea or answer supported by the Defendant's oath, *quære*. Vane *v.* Vane - - - - - 383

LIQUIDATION BY ARRANGEMENT—Creditors' right to vote - - - 997
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—— Debts incurred after discharge - 962
See Debts subsequent to Discharge.

—— Fraudulent debtor — Prosecution under Debtors Act - - - 676
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—— Signing resolution—Filing and registration
See Majority of Creditors. 1. [722

LIQUIDATOR—Reconstruction of company 702
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LIS PENDENS—Administration suit—Powers of executor - - - - 747
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LIST B—Winding-up—Past member of company
See Past Member. [800

LOAN OR GIFT—*Gift—Acceptance—Promissory Note—Parol Agreement—Evidence by Claimant under alleged Bargain with a Person since Deceased — Corroboration.*] *W.*, the uncle of the Plaintiff's wife, was applied to by a friend of the Plaintiff to advance £1000 to defray some expenses connected with the Plaintiff's election as Member of Parliament. *W.* declined to make the advance, but said he would give the Plaintiff £500 and deduct it from the legacy he intended to leave to his wife. Shortly afterwards *W.* sent the Plaintiff a cheque for £500. The Plaintiff wrote to thank *W.*, saying that he would gladly repay it at an early opportunity, and hoped shortly to be able to do so. A few weeks afterwards, as the Plaintiff deposed, a conversation took place between him and *W.*, and it was agreed at the Plaintiff's instance that the Plaintiff should pay banker's interest on the sum during *W.'s* life; and the Plaintiff, for the purpose, as he deposed, of effectuating this agreement, signed and gave to *W.* a promissory note for £500, with interest at £1 per cent., on the understanding that payment of the principal was not to be enforced, but only payment of interest, during *W.'s* life. After *W.'s* death his executors sued the Plaintiff on the note for the £500:—*Held* (reversing the decision of *Malins*, V.C.), that (although, if there had been a complete gift of the £500, it could not afterwards have formed a consideration for a promissory note) the executors were entitled to recover; for that, as the Plaintiff had not, before the giving of the promissory note, agreed to accept the £500 as a gift, it remained open whether it should be a gift or loan; and the giving the promissory note was conclusive evidence that the parties agreed upon its being a loan; and the Court could not allow the documentary evidence to be rebutted by the parol evidence given by the Plaintiff on his own behalf. —*Per James*, L.J.:—Evidence of a Plaintiff on his own behalf as to a bargain with a man since dead ought, in the absence of corroboration, to be disregarded. Hill *v.* Wilson - - - 888

LOAN TO PARTNERSHIP—*Bankruptcy—Proof of Debt—Lender receiving Share of Profits—28 & 29 Vict. c. 86, s. 5.*] *M.* lent certain sums to *T.*, a trader, under a written agreement pursuant to 28 & 29 Vict. c. 86, by which *M.* was to receive in lieu of interest £40 per cent. on the profits of *T.'s* business, and after a certain period was to have liberty to determine the agreement at any time, in which event the money was to be repaid by instalments secured by bills of exchange. While this agreement was in force *M.*, in conjunction with *H.*, lent *T.* other sums of money, for which interest at £10 per cent. was to be paid. *M.* determined the agreement, and *T.* gave *M.* bills of exchange for the moneys advanced under it, except certain profits which were carried over to the £10 per cent. account; but *M.* and *H.* went on advancing to *T.* other sums on the £10 per cent. account. After all the trade debts of *T.* which had been due during the pendency of the agreement had been paid, *T.* became bankrupt. *M.* carried in a proof for the moneys advanced under the agreement, and *M.* and *H.* carried in another for the balance on the £10 per cent. account:—*Held* (affirming the decision of the Chief Judge), that *M.* could not prove for the moneys

LOAN TO PARTNERSHIP—*continued.*

advanced under the agreement, though all other debts existing during its continuance had been paid:—*Held* (reversing the decision of the Chief Judge), that *M.* and *H.* could prove for all moneys lent at interest without any stipulation as to profits, whether such moneys were advanced before or after the determination of the agreement, and that although there could not have been a proof for the whole of the balance if it had in part consisted of profits, yet as according to the ordinary mode of attributing payments in an account current the profits carried to this account had been discharged by payments made by *T.* on account, the balance could not be treated as in any measure arising from profits, and the proof must be for its whole amount:—*Semble*, if an advance were made under the Act, with an agreement for a share of profits, and further sums were advanced without any such agreement, with an intention to elude the Act, the lender would be a partner. *Ex parte* Mills. *In re* Tew - - - - - - 569

LUNACY—Attendance at proceedings - 739
See Attendance in Lunacy.

MAINTENANCE OF INFANT—*Freehold Estate.*] On an application by an infant for maintenance, the Court has jurisdiction, without suit, to charge the expenses of his past maintenance and the costs of the application on the corpus of a freehold estate to which he is entitled in fee. *In re* Howarth - - - - - - 415

2. —— *Trustees—Discretion.*] Trustees were by will authorized, if they thought fit, to apply the income of shares to which children were presumptively entitled towards the maintenance of the children, notwithstanding the father of the children might be of sufficient ability to maintain them. A suit was instituted for the administration of the estate of the testator:—*Held*, that the Court would not control the discretion of the trustees, and that, if they thought it fit that the income should be paid to the father for the maintenance of the children, an order would be made for payment accordingly. Brophy *v.* Bellamy 798

MAJORITY OF CREDITORS — *Liquidation by Arrangement—Signing Special Resolution prior to its Filing or Registration—Bankruptcy Act*, 1869, *s.* 125—*Bankruptcy Rules*, 1870, *rr.* 275, 284, 295.] The words "prior to the filing or registration of the resolution," in the 275th rule of the *Bankruptcy Rules*, 1870, mean "prior to the resolution being either filed or registered." Therefore, where a special resolution for liquidation has been filed by the person entrusted with it, it is too late for a creditor to sign it.—The decision of *Bacon*, C.J., reversed. *Ex parte* Thorne. *In re* Butlin 722

2. —— *Bankruptcy—Resolution for Composition—Votes of Creditors—Bona fides—Device to benefit Debtor — Bankruptcy Act*, 1869, *s.* 126—*Fresh First Meeting.*] A creditor who votes for a composition with a debtor is bound to vote *bonâ fide* for the benefit of the creditors, and not for the benefit of the debtor.—*M.*, a creditor, voted at a first meeting of creditors for a resolution for liquidation by arrangement. A requisite majority not having been obtained, the resolution was not registered; but the Registrar, on the application of the debtor, directed a fresh first meeting

MAJORITY OF CREDITORS—*continued.*

to be called.—Before that meeting was held *M.* sold his debt to *T.* for 10*s.* in the pound. At the meeting *M.*, by *T.'s* direction, voted for a composition of 2*s.* 6*d.* in the pound, and by his vote the resolution was carried:—*Held*, that, inasmuch as it appeared clear that the vote in respect of *T.'s* debt was given for the benefit of the debtor, and not of the creditors, the vote ought to be rejected, and the resolution was accordingly set aside.—*Semble*, the Registrar had no power to direct a fresh first meeting to be called. *Ex parte* Cobb. *In re* Sedley - - - - - 727

MARRIAGE SETTLEMENT—Covenant for future settlement—When void in bankruptcy *See* Covenant to settle. [718

MARSHALLING — *Administration — Scotch Descended Estates—Lex loci rei sitæ—Costs.*] A testator domiciled in *England* died possessed of personal estate and also of real estates in *Scotland*. His will purported to deal with the Scotch real estates, but was inoperative to pass them, and they descended to the Scotch heir. A suit having been instituted for the administration of the testator's estate against the executors, one of whom was the Scotch heir, he elected to take the descended estates in opposition to the will, and gave up the legacy which had been bequeathed to him by the will:—*Held*, first, that the liability of the Scotch real estates to the payment of debts, as between the heir and the pecuniary legatees, must be determined by the law of *Scotland*, and not by the law of the country where the testator's estate was being administered: Secondly, that as the law of *Scotland* threw the general debts primarily on the personal estate, and did not permit them to fall, directly or indirectly, on the real estate until the personal estate was exhausted, there could be no marshalling in the English Court against the Scotch heir in favour of the pecuniary legatees: Thirdly, that no part of the general costs of the suit could be thrown on the Scotch estates; and that the heir was entitled to his costs out of the personal estate except the extra costs occasioned by his election.—Decision of the Master of the Rolls reversed.—*Semble*, that if the real estate had been situate in *England*, the costs of the suit, which, under the circumstances, would have been confined to the administration of the personal estate, ought not to have been thrown on the real estate. Harrison *v.* Harrison - - 342

MATERIAL FACT—Suppression of—Costs 1084 *See* Party-wall.

MEETING OF CREDITORS - - 722, 727 *See* Majority of Creditors. 1, 2.

MEMORANDUM OF ASSOCIATION — Appointment of directors - - - 548 *See* Qualification of Directors. 1.

MINE—Lease—Arbitration clause - - 473 *See* Submission to Arbitration. 1.

MISCONDUCT OF DIRECTORS — Allotment of shares to infant - - - 45 *See* Liability of Directors.

MONEY—*Legacy—Will—Construction—"Sum and Sums of Money owing to me"—Words.*] A testatrix made a specific disposition of certain property, including "all sum and sums of money which shall be due and owing to me at the time of my decease,"

MONEY—*continued.*

and gave the residue of her personal estate to other persons. At the time of her death in 1781, she was one of the two next of kin of her son, who had died intestate in 1778. The son was the residuary legatee of his father, who had died in 1776. In 1800 a decree was made for taking the accounts of a partnership in which the father had been engaged, and which had been dissolved by the death of the other partner a few months before the father's death. In 1820 the representatives of the surviving executor of the father paid into Court in this suit a sum of money on account of what was due from the executor to the father's estate in respect of moneys coming from the partnership. Nothing was shewn as to the state of the partnership assets or of the estates of the father or son at the time of the death of the testatrix:—*Held* (affirming the decision of the Master of the Rolls), that the moiety of the testatrix in the fund in question did not pass under the gift of "sums of money due and owing to me at the time of my decease;" but under the residuary bequest, it not being shewn that the assets were at her death in such a state that her share could be treated as a sum of money then owing to her.—*Bainbridge* v. *Bainbridge* (9 Sim. 16) distinguished. Martin *v.* Hobson - - 401

MORTGAGE—Costs of mortgagee - - 295 *See* Costs in Mortgage Suit.

—— Costs of mortgagee—Appeal - - 76 *See* Sale of Commission.

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"NEPHEWS AND NIECES"—*Will—Parol Evidence—Ambiguity—Nephews and Nieces of Testator's Wife.*] Residuary gift in trust for "my nephews and nieces living, and the issue, if any, of my nephews and nieces dead before me." The

"NEPHEWS AND NIECES"—*continued.*
testator never had any nephew or niece of his own, nor had he any brother or sister living when he made his will:—*Held* (affirming the decision of the Master of the Rolls), that the nephews and nieces of the testator's wife took under the gift, and that evidence of circumstances making it improbable that the testator intended to benefit them, but not tending to shew that any other class was intended, was inadmissible. Sherratt *v.* Mountford - - - - - 928

NEXT OF KIN—Right to void accumulations 978
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NOISE—Nuisance—Horses - - - 467
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NOTICE—Death of guarantor—Subsequent advances - - - - 866
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—— Mortgage of proceeds of sale of commission
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NOXIOUS PLANTS—Yew trees—Landlord and tenant - - - - 756
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—— Trifling annoyance—Delay - - 8
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OBSTRUCTION OF WAY—*Injunction—Right of Way—Right of Way in Gross—Nuisance arising from Acts of Several Persons.*] *P.* was the owner of an inn, the yard of which was approached by a passage over adjoining property of *M.* *P.* and *M.* agreed to alter their boundary, and substitute a new passage for the old one. *M.* accordingly, in 1854, conveyed to *P.* a small strip of land reaching across the end of the new passage where it entered the yard, and granted to *P.*, his heirs and assigns, "rights of way at all times and for all purposes along a passage intended to run between the piece of land hereinbefore conveyed and a street called the *Tyrrels.*" By another deed *P.* re-leased his rights of way over the old passage. The Plaintiff was a lessee of the inn and yard under *P.* The Defendants were tenants of *M.*, occupying warehouses on his property, and the bill was filed to prevent the Defendants from allowing carts and waggons to remain stationary in the passage in course of loading and unloading, so as to obstruct the access to the yard;—*Held* (affirming the decision of the Master of the Rolls), that the necessity of the business of the Defendants did not give them any right to occupy the passage by stationary obstructions when any other person having a right of way required to pass:—*Held*, further, that the right of way was not a right in gross, but was appurtenant to the property occupied by the Plaintiff, so that his lease gave him a right to the enjoyment of it.—*Ackroyd* v. *Smith* (10 C. B. 164) explained.—The acts of several persons may together constitute a nuisance, which the Court will restrain, though the damage occasioned by the acts of any one, if taken alone, would be inappreciable. Thorpe *v.* Brumfitt - 650

OPPOSITION TO PATENT—New evidence 237
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ORDER AND DISPOSITION—*Bankruptcy—Bill of Sale—Registration*—17 & 18 *Vict. c.* 36.] On the 23rd of September *H.* discounted for *P.* two bills of exchange payable on the 12th of October, and *P.* gave *H.* a bill of sale as security, requesting him not to register it unless the bills were dishonoured at maturity. *H.* accordingly did not register it. On the 12th of October the bills were dishonoured, on which *H.* took them up, and *P.* gave him two fresh bills for the same amount, and a new bill of sale of the same chattels. On the 30th of October the new bills were dishonoured, and *H.* gave directions to take possession of the chattels. Early on the 31st a broker went to take possession, but could not on that day get into the house where they were. On the same day the bill of sale was registered, and *P.* committed an act of bankruptcy by filing a petition for liquidation, on which he was subsequently adjudged bankrupt. On the 1st of November *H.* obtained possession of the goods:—*Held* (reversing the decision of the Registrar), that the goods belonged to *H.* and not to the trustee in bankruptcy, for that they were not in the order and disposition of the bankrupt with the consent of the true owner at the time of the act of bankruptcy; that the *Bills of Sale Act* did not apply; and that the transaction was not invalid as being a scheme to evade the provisions of that Act. *Ex parte* Harris. *In re* Pulling - - 48

2. —— *Bankruptcy—Joint Ownership—Bankruptcy of one Partner—Infant Partner—Protected Dealings with Bankrupt*—32 & 33 *Vict. c.* 71, *ss.* 15, 94.] In order to bring goods, in the order and disposition of a bankrupt, within the provisions of the *Bankruptcy Act*, 1869, s. 15, clause 5, they must be in the sole possession and sole reputed ownership of the bankrupt.— Therefore, where two partners, one of whom was an infant, committed an act of bankruptcy, and the adult partner was adjudicated bankrupt:—*Held*, that the machinery and trade fixtures in the house where the business was carried on, which belonged to the landlord, and were with his consent in the possession of the firm, did not pass to the trustee in the bankruptcy.—A trader's goods were seized by the sheriff under a judgment obtained after the debtor had committed an act of bankruptcy. The landlord of the house where the trade was carried on gave notice to the sheriff that the goods were his property. Afterwards the trader was adjudicated bankrupt upon the act of bankruptcy:—*Held*, that the notice to the sheriff was not a dealing with the bankrupt under the 94th section of the *Bankruptcy Act*, 1869. *Ex parte* Dorman. *In re* Lake - - - 51

3. —— *Bankruptcy—Consent of True Owner—Bonded Warehouse.*] In December, 1870, *W.* bought from *C.* whisky in bond, to remain in bond to *C.'s* order rent free for twelve months, after which warehouse rent to be paid. In March, 1871, the price was paid. On the 19th of February, 1872, *W.* wrote to *C.* directing him to forward a specified hogshead of the whisky, and inclosing a cheque of sufficient amount to pay duty and clear the whisky. On the 26th *C.* filed a petition for liquidation, having retained the cheque, but not

ORDER AND DISPOSITION—*continued.*
paid the duty nor in any way complied with *W.'s* directions. At the time of sale the whisky had been all carried to *W.'s* credit in *C.'s* books, but had throughout been lying to *C.'s* order at a dock warehouse:—*Held* (reversing the decision of the Chief Judge and affirming that of the County Court Judge), that this hogshead did not pass to the trustee in liquidation as being within *C.'s* order and disposition, as the consent of the true owner had been determined by the demand of possession, though no notice had been given to the warehouseman. *Ex parte* Ward. *In re* Couston - - - - - 144

4. —— *Bankruptcy—Trustee—Illegal Trust.*] The chairman of a company, with the assent of the company, held in his name shares in another company, which had been purchased with the money of the first-named company. The chairman became bankrupt:—*Held* (reversing the decree of the Master of the Rolls), that, though the purchase by one company of shares in another company was illegal, the shares were not within the order and disposition of the bankrupt so as to pass to his assignees, and that he must transfer them as the company should direct.—*Ex parte Watkins* (2 Mont. & A. 348) distinguished. Great Eastern Railway Company *v.* Turner. 149

5. —— *Bankruptcy — Reputed Ownership — Purchaser's Goods in Vendor's Bonded Warehouse —Customs of Particular Trade—Bankruptcy Act*, 1869 (32 *& Vict. c.* 71), *s.* 15, *sub-s.* 5.] At the time of the presentation of a petition for liquidation by arrangement there were lying in the bonded warehouse of the debtors, who were wine and spirit merchants in *Liverpool*, certain buts of whisky which they had sold to the Appellant. The goods were left there for the convenience of the purchaser, to whom a delivery warrant had been given by the vendors, in which they stated that they held the goods to his order as warehousemen. The vendors did not carry on business as general warehousemen, but it was proved to be the usual custom of the wine and spirit trade, in *Liverpool*, for goods sold in bond to remain in the possession or under the control of the vendors, in the bonded warehouse in which they were at the time of sale, until they were required by the purchaser for use.—*Held* (reversing the decision of the Chief Judge), that the existence of a custom of this nature, shewn to be well known among persons concerned in the wine and spirit trade, excluded the doctrine of reputed ownership, and that the goods did not pass to the trustee.—*Hamilton* v. *Bell* (10 Ex. 545), *Priestly* v. *Pratt* (Law Rep. 2 Ex. 101), and *Prismall* v. *Lovegrove* (6 L. T. (N.S.) 329), approved. *Knowles* v. *Horsfall* (5 B. & A. 134) observed upon. *Ex parte* Watkins. *In re* Couston - - - 520

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—— Deceased Partner — Assets employed in trade - - - - 309, 323, n.
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—— Dissolution—Right to use of old name of firm - - - - - 91
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—— Loan—Share of profits—28 & 29 Vict. c. 86
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—— Shares registered in name of firm - 831
See Transfer of Shares. 2.
PARTNERSHIP ACCOUNTS—*Interest after Dissolution — Annual Rents — Money Received.*] In taking the accounts of a partnership, interest after the dissolution will not in general be allowed to the partners on their respective capitals, though interest during the partnership with annual rests is allowed; but this rule may be varied by the terms of the articles, as, for example, by a provision treating the capital left in by a partner as an interest-bearing loan.—Any sums of money received after the dissolution and retained by either partner ought to be debited to him, and applied first in reduction of the interest due to him, and then in reduction of his capital.—Order of

PARTNERSHIP ACCOUNTS—*continued.*

Malins, V.C., varied.—*Pilling* v. *Pilling* (3 D. J. & S. 162) questioned. Barfield *v.* Loughborough 1

PARTY-WALL—*Wall extending above adjoining Building—Ancient Lights—Bristol Improvement Acts*, 1840 *and* 1847—*Ex parte Injunction—Suppression of Material Fact—Costs.*] A wall may be a party-wall to such height as it belongs in common to two buildings, and cease to be a party wall for the rest of its height.—The *Bristol Improvement Act*, 1840, enacts that no opening shall be made in any party-wall except for communication from one building to another. The Plaintiff had a house, one wall of which was to the height of the first story a party wall between the Plaintiff's house and a building belonging to the Defendants, but above that height had ancient windows opening to the external air. The Plaintiff pulled down his house, and proposed to rebuild it with windows in the same position as before. Before doing this, he gave notice to the Defendants, under the Act, that the wall, which he described as a party-wall, was out of repair, and a certificate of two surveyors was given directing the party-wall to be rebuilt at the joint expense of the Plaintiff and Defendants. The Defendants afterwards proceeded to erect a building which would obstruct the light coming to the ancient windows of the Plaintiff:—*Held* (affirming the decision of *Malins*, V.C.), that the wall above the Defendants' building was not a party-wall, and that the Plaintiff was not precluded from making windows in it; and an injunction was granted, restraining the Defendants from obstructing his ancient lights.—The Plaintiff obtained an *ex parte* injunction upon the filing of the bill; but no mention was made in the bill, or in the affidavit in support of the motion, of the notice to pull down the wall, or the certificate of the surveyors:—*Held*, that inasmuch as these facts were only important as raising a point of law, based on an unreasonable construction of the Act, they were not material facts, and the Plaintiff was justified in omitting them. Weston *v.* Arnold - 1084

PAST MEMBER—*Contributory—Release of Debts—Dividend—Amount of Liabilities*—25 & 26 *Vict. c.* 89, *s.* 38.] A past member or B contributory of a company, in which the property and the money obtained from the A contributories were insufficient for the payment of the debts, bought up and caused to be released to the company the only debts due when he had ceased to be a member of the company, and remaining due when the winding-up order was made:—*Held*, that no call could be made upon him in the winding-up.—Order of the full Court of Appeal affirmed on rehearing.—In estimating the debts for which a B contributory is liable, all dividends paid in respect of these debts under the winding-up must be deducted; but the funds contributed by the B contributories form part of the general assets of the company, and are not to be applied preferentially or exclusively to the payment of those debts which existed before that contributory ceased to be a member of the company.—Order of the Court of Appeal varied on rehearing.—*Webb* v. *Whiffin* (Law Rep. 5 H. L. 711) considered. *In re* Blakely Ordnance Company. Brett's Case. *In re* Oriental Commercial Bank. Morris' Case 800

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—— Doubtful whether loan or gift - 888
See Loan or Gift.

—— Out of Court - - - - 736
See Payment out of Court.

PAYMENT OUT OF COURT—*Lands Clauses Act, s.* 69—*Payment to Trustees—Several Applications.*] Land was vested in trustees in trust to sell as soon as the youngest of a class of children attained twenty-one, and to divide the proceeds among such of the children as should be then living, and the issue of such of them as should be dead. Part of the land was taken under the *Lands Clauses Act* before the youngest child attained twenty-one, and the purchase-money was paid into Court. After the youngest child attained twenty-one the trustees and some of the *cestuis que trust* presented a petition, asking that the fund might be paid out to the trustees, or in the alternative, that the shares of those *cestuis que trust* who were petitioners might be paid out, leaving the other shares in trust in the matter of the Act. Vice-Chancellor *Bacon* refused to order payment out to the trustees, but expressed his willingness to make an order according to the other alternative. The petitioners did not object to this, but the company insisted that the order ought to be for payment of the whole fund to the trustees:—*Held*, that as the petitioners did not object to the order proposed, the company could not complain of it.—Whether the Court would in such a case order payment of the whole fund to the trustees if they required it, *quære*. *In re* Sowry - - - - - - 736

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PERSONA DESIGNATA—Appointment to executors and administrators of object of power
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PERSONALTY—Real estate appointed as personalty - - - - 419
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PLEA THAT DEFENDANT NOT EXECUTOR—*Renunciation of Probate after Bill filed—Amended Bill—Parties—Debtor made a Defendant to a Creditor's Suit.*] A bill filed by a creditor for the administration of a testator's estate alleged that one of the Defendants was named as an executor in the will, and that although he had not proved the will, he had never renounced probate. It also alleged that the Defendant was a debtor to the testator's estate, and that the acting executor was insolvent, and did not intend to enforce the debt against him. The Defendant by his answer did not admit the debt. The Plaintiff then amended his bill by introducing charges tending to prove that the Defendant was a debtor to the estate. The Defendant then pleaded that before the amendment of the bill he had renounced probate: —*Held* (reversing the decision of *Malins*, V.C.), that the Defendant was properly made a party to the original bill, and that as no new case had been made by the amended bill, the Defendant's plea could not be sustained. Morley *v.* White. [731

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—— Suit by shareholder on behalf of others 1035
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POLICY OF INSURANCE—Injunction to restrain action - - - - - 22
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POLLUTION OF RIVER—*Injunction—Abuse of Parliamentary Powers—Waterworks Act*, 1847 (10 & 11 *Vict. c.* 17), *s.* 6.] A waterworks company were authorized by their private Act to take and use the water of certain springs which supplied a river upon the banks of which certain mills were situate. The Act provided that the company should not abstract more than a certain amount of water before they had constructed a compensation reservoir for storing the water during floods for the benefit of the millowners. The Act gave the company compulsory powers for acquiring land, streams, and springs for their undertaking, and powers to acquire by consent lands for constructing their compensation reservoir. The Act contained a reservation of the rights of the owners and occupiers of any lands, mills, or works, to the use of the waters of the stream, except so far as provided and declared by the Act. The *Waterworks Clauses Act*, 1847 (10 & 11 Vict. c, 17), was incorporated with this Act.—The company constructed a compensation reservoir, and a subsequent Act of Parliament, which gave them further powers, including powers of emptying and cleansing the reservoir, recognised this reservoir as a sufficient compensation reservoir for the millowners, and directed it to be maintained.—The owner of some dye works situate on the river below the reservoir filed a bill against the company, com-

POLLUTION OF RIVER—*continued.*
plaining that the effect of the reservoir was to make the water of the river more muddy than it was before its construction, and to render it unfit for the process of dyeing, and praying for an injunction to restrain the Defendants from fouling the stream. These allegations being in the judgment of the Court established:—*Held* (reversing the decision of *Malins*, V.C.), that the Acts gave the Defendants no power to foul the water; that the compensation clauses in the *Waterworks Act*, 1847, did not apply, inasmuch as the injury was such as the company were not authorized to commit; and that the Plaintiff was entitled to an injunction.—*Quære*, whether sect. 6 of the *Waterworks Act*, 1847, gives compensation for injuries to the lands of third persons caused by works on land which could be taken only by consent. Clowes *v.* Staffordshire Potteries Waterworks Company - - - - 125

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—— Executor—Pledging assets—Administration decree - - - - 747
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—— New trustees—"Continuing trustee"—Person of unsound mind - - 735
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—— Revocation—Voluntary settlement - 430
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—— Sale and mortgage—Devisee of estate charged with debts - - 971
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—— Sale—Trustee—Depreciatory condition of sale - - - - - 902
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POWER TO PLEDGE ASSETS—*Executrix—Lis Pendens—Administration Decree—Mortgage of Assets.*] A decree was made in a creditors' suit for the administration of the personal estate of a testator, but no receiver was appointed nor any injunction granted to restrain the executrix from dealing with the assets. More than two years after the decree, and nearly three years after the death of the testator, his executrix, who was also his sole legatee, opened an account with a bank, headed "*E. G.* executrix of *B. G.*" In the following year, the account being overdrawn, she deposited with the bank a picture belonging to the testator's estate to secure the balance then due and further advances. It appeared that the bankers did not know of the suit, and had no notice of any breach of duty on the part of the executrix:—*Held* (reversing the decision of the Master of the Rolls), that the bank had a valid security on the picture, for that the doctrine of *lis pendens* had no application, a decree for admi-

POWER TO PLEDGE ASSETS—*continued.*
nistration without any injunction or appointment of a receiver not taking away the power of the executrix to deal with the assets. Berry *v.* Gibbons [747

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PRIORITY OF PATENT — *Rival Applicants—Delay — Date of Patent.*] An applicant for a patent two months after the date of his provisional protection applied for the Great Seal to be affixed. A week afterwards a caveat was entered, but the applicant did not, until six months from his original application had nearly elapsed, present a petition for the Great Seal:—*Held*, that his delay was not an objection to the sealing of his patent. —*B.* applied for a patent, and obtained provisional protection on the 30th of March; *C.* on the 3rd of April. *B.* applied for the Great Seal on the 21st of May; *C.* obtained letters patent on the 22nd of May, antedated, according to the usual practice, to the 3rd of April. The patents appearing to be partially for the same matter:—*Held*, that, whether the conduct of *C.* had or had not been fraudulent, the letters patent granted to *B.* must bear date on the 21st of May, and not on the 30th of March. *Ex parte* Bailey - 60

PRIVILEGED COMMUNICATION—Production of documents - - - - 361
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PRODUCTION OF DOCUMENTS—*Privileged Documents—Affidavit*] A Plaintiff will not be compelled to produce muniments of title which he swears do not, to the best of his knowledge, information, and belief, contain anything impeaching his case, or supporting or material to the case of the Defendant.—*Bolton* v. *Corporation of Liverpool* (1 My. & K. 88) considered. A Plaintiff will not be compelled to produce confidential correspondence between himself or his predecessors in title and their respective solicitors with respect to questions connected with matters in dispute in the suit, although made before any litigation was in contemplation.—*Pearse* v. *Pearse* (1 De G. & Sm. 12) and *Lawrence* v. *Campbell* (4 Drew. 485) approved. — Order of the Master of the Rolls affirmed. Minet *v.* Morgan - - 361

2. —— *Protection—Further Affidavit.*] Plaintiffs, being called upon for an affidavit of documents, filed an affidavit specifying various documents as to which they claimed protection, on the ground that they were evidence of their own title. An order was made for their production. The Defendant afterwards obtained an order for a further affidavit, and the Plaintiffs filed an affidavit specifying various documents, including some which had been produced under the former order, and contained matter appearing to support the Defendant's case, and claiming protection for them on the ground that they exclusively related to the Plaintiffs' title, and did not evidence or support any part of the case made by the Defendant. Vice-Chancellor *Malins* having ordered their production:—*Held*, on appeal, that production ought not to be ordered at once, but that the Plaintiffs must file a further affidavit, and that the form in *Minet* v. *Morgan* (Law Rep. 8 Ch. 361) was the right form. Corporation of Hastings *v.* Ivall - - - - - 1017

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See Proof for Untaxed Costs. 1, 2.

PROOF FOR JOINT AND SEVERAL CONTRACTS—*Bankruptcy—Double Proof—Member of a Firm and sole Contractor—Bankruptcy Act*, 1869, *s.* 31—*Debt payable at Request of a Stranger—Debt in which the Debtor has a beneficial Interest.*] Where a joint and several covenant is entered into by partners for payment of a debt, and there is nothing in the instrument to shew that they were jointly contracting as partners, parol evidence may be admitted to shew that the money was used for partnership purposes, and if that is established proof may be made in bankruptcy against their joint as well as their separate estates.—A covenant to pay a sum of money when requested by *A.*, or after his death by the covenantee, with interest in the meantime, creates a present debt which may be proved for in bankruptcy.—A debtor, before his bankruptcy, covenanted to pay a sum of money which was due to his father to a trustee to whom the father assigned it; and trusts were declared of the money, under which the debtor took a reversionary interest:—*Held*, that the trustee of the settlement could prove for the whole amount without deducting the debtor's interest. *Ex parte* Stone. *In re* Welch - 914

PROOF FOR UNLIQUIDATED DAMAGES—*Bankruptcy—Debt capable of being fairly estimated—Bankruptcy Act*, 1869, *s.* 31—*Unilateral Agreement.*] *H.* entered into a written agreement with *S.* and *A.* that he would supply them with steam-power for any looms that might be put up in their weaving shed for a term of twenty-one years from August, 1858, at a fixed annual rent per loom, payable in advance. In 1865 *S.* and *A.* assigned their weaving shed and the benefit of the agreement to *W.* In 1871 *H.* mortgaged his mill, which contained the steam-power; and in 1872 he filed a petition for liquidation by arrangement, under which a trustee was appointed. The mortgagee then took possession of the mill and repudiated the agreement. *W.* was, in consequence, obliged to obtain steam-power for his looms at a much higher cost; and he claimed to prove in the liquidation for the injury which he had sustained:—*Held* (reversing the decision of *Bacon*, C.J.), first, that although the agreement for the supply of steam-power might be put an end to at the commencement of any year by the owners of the weaving-shed discontinuing to work any looms, the agreement was not unilateral, and could be sued on at law:—Secondly, that the

PROOF FOR UNLIQUIDATED DAMAGES—*contd.*
damages sustained by the owner of the weaving shed were such as could be fairly estimated, and that *W.* was entitled to prove for them in the liquidation. *Ex parte* Waters. *In re* Hoyle 562

PROOF FOR UNTAXED COSTS—*Compounding Debtor—Non-payment of Composition—Unliquidated Liability—Proof of Debts under Composition—Bankruptcy Act*, 1869, *ss.* 31, 126—*Bankruptcy Rules*, 1870, *rr.* 169, 170, 311—*Injunction.*] A claim for costs is a debt proveable in bankruptcy under the 31st section of the *Bankruptcy Act*, 1869, although the costs have not been taxed at the date of the adjudication.—Such a debt may also be included in a composition under the 126th section of the *Bankruptcy Act*, 1869, and the debtor is bound to pay the composition on the estimated amount which he has inserted in his statement, even though the costs are not taxed at the time limited for payment of the composition.—It is not necessary for a creditor whose debt is inserted in the statement of the debts of a compounding debtor to prove his debt before he receives his composition; but, *quære*, whether he can vote at a meeting of creditors until he has done so.—A debtor who made a composition with his creditors under the 126th section of the *Bankruptcy Act*, 1869, was liable to a creditor for payment of untaxed costs in an action at law, and the debtor inserted them in his statement at an estimated amount. The costs were not taxed at the time appointed for payment of the compensation; and accordingly the debtor did not tender the composition to the creditor. The creditor then signed judgment, and had the costs taxed, and levied execution against the goods of the debtor for the whole amount. The debtor applied for an injunction to restrain the creditor:—*Held* (reversing the decision of the Registrar), that the debtor ought to have paid the composition on the estimated amount of the debt, and that the creditor was entitled to proceed with his execution notwithstanding the composition. *Ex parte* Peacock. *In re* Duffield - - - 682

2. —— *Liquidation by Arrangement—Creditor's Right to Vote—Unliquidated Debt—Bankruptcy Act*, 1869, *s.* 16, *sub-s.* 3.] A liquidating debtor was indebted to a creditor in £357 recovered by a verdict at law, and costs, which had not been taxed. The creditor attended the first meeting of creditors, and stated in his affidavit that the debtor was indebted to him in £357 on the verdict and an amount of costs which he estimated at £200; and claimed to vote in respect of the aggregate amount. The creditor had been restrained by injunction from taking any further proceedings in the action:—*Held*, that the estimated amount of untaxed costs was an unliquidated debt within the *Bankruptcy Act*, 1869, s. 16, sub-s. 3, and that he could not vote in respect thereof. The proper course for the creditor to pursue was either to apply for leave to sign judgment and tax his costs, or else to swear to such a sum as the costs when taxed would at least amount to. *Ex parte* Ruffle. *In re* Dummelow - 997

PROPERTY IN GOODS SHIPPED—*Bills of Lading—Transfer—Priority—Acceptance—Inadvertence.*] Corn merchants in *California* agreed to send cargoes of wheat to a miller in *England*,

PROPERTY IN GOODS SHIPPED—*continued.*
the reimbursement to be by his acceptance against bill of lading. The corn merchants shipped a cargo, and made out the bill of lading in six parts. Three parts, with corresponding bills of exchange drawn on the miller for the price of the cargo, were indorsed by the corn merchants, and transferred to a Californian bank for valuable consideration. These bills of exchange were, with the bills of lading annexed, accepted by the miller. One indorsed part of the bill of lading was inadvertently sent by the corn dealers to the miller, and by him transferred to an English bank for valuable consideration. The bills of exchange were not met by the miller:—*Held*, that the corn merchants were entitled to deal as they did with the cargo by transferring the bills of lading; that the English bank could not, under the circumstances, claim as holders of the bill of lading without notice; and that the English bank had no priority.—*Quære*, whether the miller might not have refused to accept the bills of exchange unless the bills of lading were delivered to him,—Decree of the Master of the Rolls affirmed. Gilbert *v.* Guignon [16

PROSECUTION UNDER DEBTORS ACT—*Bankruptcy—Fraudulent Debtor—Liquidation by Arrangement—Jurisdiction—Right of Appeal from Judge of County Court—Debtors Act*, 1869, *ss.* 3, 16—*Bankruptcy Act*, 1869, *ss.* 71, 125. An order can be made under the 16th section of the *Debtors Act*, 1869 (32 & 33 Vict. c. 62), for the prosecution of a fraudulent debtor in a liquidation by arrangement, as well as in a bankruptcy.—An appeal lies to the Chief Judge in Bankruptcy from an order made by a County Court Judge, under the 16th section of the *Debtors Act*, 1869.—Whether, on an appeal brought by the trustee from an order made under that section, it is necessary to serve the debtor, *quære*. *Ex parte* Dempsey. *In re* Dempsey - - - - - - 676

PURCHASE FOR VALUE—Defence raised by demurrer - - - - 383
See Limitations, Statute of. 2.

PURCHASE FROM AGENT—*Re-sale—Decree for Repayment.*] *A.* being aware that *B.* wished to obtain shares in a certain company, represented to *B.* that he, *A.*, could procure a certain number of shares at £3 a share. *B.* agreed to purchase at that price, and the shares were thereupon transferred, in part to him and in part to his nominees, and he paid to *A.* £3 a share. He afterwards discovered that *A.* was in fact the owner of the shares, having just bought them for £2 a share:—*Held*, that, on the facts, *A.* was an agent for *B.*: and *A.* ordered to pay back to *B.* the difference between the prices of the shares.—Decree of the Master of the Rolls reversed. Kimber *v.* Barber - 56

PURCHASER KEPT OUT OF POSSESSION—*Vendor and Purchaser—Rent—Wilful Default—Deterioration.*] A dispute arose between the trustees for a deceased vendor and a purchaser, the purchaser claiming to be entitled under his agreement to an additional piece of land. The trustees filed a bill and obtained a decree for specific performance, excluding the additional piece of land. The trustees had not allowed the purchaser to take possession of the rest of the land

PURCHASER KEPT OUT OF POSSESSION—*contd.*
whilst the purchase-money remained unpaid, and in the meantime the rest of the land was allowed to lie waste:—*Held* (affirming the decree of the Master of the Rolls), that the purchaser must be allowed to set off against the interest payable by him the amount of rent which might have been received, and the amount of deterioration. Phillips *v.* Silvester - - - - - 173

QUALIFICATION OF DIRECTORS—*Company—Contributory—Directors appointed by the Memorandum of Association—Resolution altering "future qualification"—First General Meeting—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 39.] By the memorandum of association of a company, *C.* and *H.* were named as directors, without being required to hold any particular number of shares as a qualification. The company was regulated by Table A. of the schedule to the *Companies Act*, 1862, the 58th clause of which provides that at the first ordinary meeting the whole of the first body of directors shall retire. An extraordinary general meeting was held within four months after the registration, at which a resolution was passed (which was duly confirmed) that "the future qualification of a director" should be 100 shares. It was also resolved to postpone the first ordinary general meeting for three years. The company was afterwards ordered to be wound up:—*Held* (reversing the decision of *Malins*, V.C.), that the future qualification meant the qualification of future directors, and that *C.* and *H.* were not liable for 100 shares although they continued to act as directors till the company was wound up:—*Held*, also, that by holding the extraordinary meeting within four months after registration, the company had complied with the *Companies Act*, 1867, s. 39, which provides that the first general meeting shall be held within four months after registration, and that the resolution postponing the first ordinary general meeting, at which the original directors were to resign, for three years, was valid. *In re* La Mancha Irrigation and Land Company. Lord Claud Hamilton's Case - - - - - 548

2. —— *Allotment of Paid-up Shares—Articles of Association.*] One of the articles of a company which had been established for working a concession in *Austria*, purchased from *E.*, provided that *F.* and three other persons therein named, and any other qualified persons whom they might appoint, not exceeding, with themselves, ten, should be the original directors of the company. It was also provided that every member holding not less than fifty shares should be eligible as a director, and that the office of a director should be vacated if he should cease to hold its qualification. *F.* did not sign the memorandum of association, and refused to subscribe any money for shares, but accepted the offer of *E.* to give him fifty paid-up shares, as the qualification of a director, out of those appropriated to *E.*, in payment of *F.'s* services in making inquiries and reporting concerning the value of the concession in *Austria*. Fifty paid-up shares were accordingly allotted to *F.*, and he had no other shares in the company. On the company being wound up, his name was placed on the list of contributories for fifty ordinary

QUALIFICATION OF DIRECTORS—*continued.*
shares:—*Held* (reversing the decision of *James*, L.J., sitting for *Wickens*, V.C.), that *F.* having been named as a director in the articles, the provision as to qualification did not apply to him; and that the paid-up shares having been allotted to him for *bonâ fide* consideration out of those appropriated to *E.*, he was liable to no calls upon them. *In re* Anglo-Moravian Hungarian Junction Railway Company. Forbes' Case - 768

RAILWAY COMPANY—Carriers by sea—Limitation of liability - - - 241
See Limitation of Shipowner's Liability.

—— Delegation of statutory powers—Ultrà Vires Act—Traffic arrangement - 841
See Traffic Arrangement. 1.

—— Scheme of arrangement - - 1064
See Scheme of Arrangement.

—— Traffic arrangement—Indefinite agreement
See Traffic Arrangement. 2. [942

REAL ASSETS—Scotch estates—Administration
See Marshalling. [342

REAL ESTATE—Conversion into personalty 419
See Conversion.

—— Maintenance of infant—Jurisdiction 415
See Maintenance of Infant. 1.

RECONSTRUCTION OF COMPANY—*Winding-up—Arrangement—Purchase of Assets—Companies Act*, 1862, *ss.* 161, 162.] The *M. Company* made over its property to the *M. Corporation*, which undertook to satisfy all the obligations of the company. The corporation was unsuccessful, and the company was obliged to pay a debt of £7000, from which the corporation ought to have indemnified it. The company was being wound up under supervision, and all its debts were paid. The corporation was being wound up, its shares were fully paid up, it owed a considerable amount of debts, and it had substantially no assets, except some shipbuilding property, which was of speculative value and not readily saleable. Nearly all the creditors of the corporation, other than the company, were willing to accept an immediate payment of 4*s.* in the pound in satisfaction of their debts. Under these circumstances the liquidators entered into an arrangement which was confirmed by extraordinary general meetings of the shareholders of the company and the corporation respectively, that the corporation should make over its assets to the company; that the company should pay 4*s.* in the pound to all the creditors of the corporation whose debts exceeded £10, and pay in full all the debts under £10, and keep the corporation indemnified against all its debts, whether proved in the winding-up or not. *Malins*, V.C., made an order approving of this agreement, and directing that all shareholders in the company who disapproved of it should have their interests valued, be paid the amount of such valuation at once, and release their interests to the liquidator. All the shareholders of the company acquiesced in this order except two, one of whom appealed on the ground that the arrangement was one which the Court would not sanction:—*Held*, on appeal, that the order of the Vice-Chancellor was right. *In re* Marine Investment Company. *Ex parte* Poole's Executors - - 702

RECTIFICATION OF REGISTER—Refusal of directors to register transfer - 446
See Transfer of Shares. 1.

REGISTRATION—Bill of sale—Agreement 643
See Fraud on Bankruptcy Laws.

—— Bill of sale—Order and disposition - 48
See Order and Disposition. 1.

—— Bill of sale—Trade fixtures 1072, 1075, n.
See Registration of Bill of Sale. 1, 2.

—— Special resolution of creditors - 722
See Majority of Creditors. 1.

—— Transfer of shares - - 446, 831
See Transfer of Shares. 1, 2.

REGISTRATION OF BILL OF SALE—*Trade Fixtures—Bills of Sale Act* (17 & 18 *Vict. c.* 36).] *W.*, a lessee for years, demised by way of mortgage a cotton mill and all the steam-engines, mill gear, and fixed and moveable machinery to *B.*, to hold, as to the mill and such machinery as was of the nature of fixtures, for the residue of the term except the last two days, and as to the moveable machinery and other articles absolutely. The deed contained a power of sale by the mortgagee of the mill and machinery, and as to the machinery fixed and moveable either with the mill or separately:—*Held*, that the deed, so far as it operated as a mortgage of trade fixtures, required registration under the *Bills of Sale Act*; and that the fact of the building and the trade fixtures being included in the same demise made no difference. —*Begbie* v. *Fenwick* (Law Rep. 8 Ch. 1075, n.) and *Hawtry* v. *Butlin* (Law Rep. 8 Q. B. 290) followed. —*Boyd* v. *Shorrock* (Law Rep. 5 Eq. 72) dissented from. *Ex parte* Daglish. *In re* Wilde - 1072

2. —— *Trade Fixtures—Bills of Sale Act* (16 & 17 *Vict. c.* 36).] *S.* demised a leasehold manufactory to a mortgagee for the residue of the term on which he held it: and by a second witnessing part of the same indenture, he assigned all the steam-engines and other trade fixtures to the mortgagee absolutely, subject to the proviso for redemption therein contained:—*Held*, that the mortgage of the trade fixtures required to be registered as a bill of sale.—*Boyd* v. *Shorrock* (Law Rep. 5 Eq. 72) distinguished. Begbie *v.* Fenwick - - - - - 1075, n.

RELEASE OF DEBTS—Past member of company
See Past Member. [800

RELEVANCY—Exception for scandal - 499
See Exceptions for Scandal.

RELIEF FROM PENALTY—*Vendor and Purchaser—Company—Ultrà vires.* A company incorporated by Act of Parliament for making a dock agreed with a landowner to purchase a piece of land for £4000, of which £2000 was to be paid at once, and the remaining £2000 on a future day named in the agreement, with a provision that if the whole of the £2000 and interest was not paid off by that day, in which respect time was to be of the essence of the contract, the vendors might re-possess the land as of their former estate, without any obligation to repay any part of the purchase-money:—*Held* (affirming the decision of the Master of the Rolls), that this stipulation was in the nature of a penalty, from which the company was entitled to be relieved on payment of the balance of the purchase-money, with interest.—*Per James*, L.J.:

RELIEF FROM PENALTY—*continued.*
—*Semble*, that if, on the true construction of the agreement, this stipulation had not been merely in the nature of a penalty, it would have been void as *ultrà vires*. *In re* DAGENHAM (THAMES) DOCK COMPANY. *Ex parte* HULSE - 1022

RELIGIOUS EDUCATION—*Ward of Court—Abandonment by the Father of his right to control his Children's Education—Ante-nuptial Agreement as to Religion of the Children.*] An ante-nuptial agreement that the children shall be brought up in a different religion from that of the father is not binding at law or in equity; but such an agreement will have weight with the Court in considering whether the father has abandoned his right to educate his children in his own religion. —Where a father has not forfeited or abandoned his right to educate his children in his own religion, the Court cannot refuse to order a child to be educated in that religion merely because it thinks that the child will be more happy and contented, or better provided for, if left with those who have had the care of it.—But if a father has forfeited or abandoned his right to educate his children in his own religion, the Court will consider only the happiness and benefit of the child, and will order it to remain in the care of those by whom it has been brought up, and to be educated in their religion; although the child may not have so far imbibed the particular doctrines of that religion as to render it dangerous to change its religious training.—The father of the infant Plaintiff was a Roman Catholic and the the mother a Protestant. Before the marriage they made a verbal agreement that the boys should be brought up as Roman Catholics and the girls as Protestants. The Plaintiff, who was a girl, was baptized in the Church of *England*. At the time of her birth her father was absent, ill of consumption, but was informed by letter of the mother's intention as to the baptism. He replied, saying that a Roman Catholic priest would call on the mother. This was not done, and the child was baptized as a Protestant. The father died in February, 1863, when the child was about nine months old, leaving no property for the support of his children. A few days before his death he made a will whereby he directed that his children should be brought up in the Roman Catholic faith, and appointed his brother, who was a Roman Catholic, their guardian. After his death the Plaintiff was allowed by the guardian to remain with her mother and her mother's family, and to be brought up by them as a Protestant till she was nearly nine years old. The guardian then claimed that the child should be given up to him, and after long discussions applied for a writ of *habeas corpus* in the Court of Queen's Bench. The child was then made a ward of the Court of Chancery, being then nearly eleven years old, and the Lords Justices, having seen and conversed with her, were of opinion that she had not imbibed the distinctive principles of the Church of *England* to such an extent that it would be cruel or dangerous on that ground alone to have her educated in the Roman Catholic faith:—*Held*, notwithstanding (affirming the decision of *Malins*, V.C.), that the Plaintiff ought to be allowed to remain with her mother, and to be brought up in the Protestant religion. ANDREWS *v.* SALT - 622

RENEWABLE LEASEHOLDS—*Subsequent Purchase by Lessee of Reversion—Equitable Charge on Renewable Leaseholds.*] *W. W. T.* was the equitable owner, subject to an estate for life, and to £1500, raiseable on the death of the tenant for life, of leaseholds for lives, which were perpetually renewable, and were vested in *B.* as trustee, with a direction to renew until the £1500 had been paid. The settlement under which *W. W. T.* acquired his interest contained a covenant by him to pay the £1500. In 1811 *W. W. T.* conveyed his interest to trustees upon trust for himself for life, and after his death, subject to raising the £1500, upon trust to raise £2000 for his younger children, and subject thereto for his eldest son *T. T.* absolutely. In 1815, after the death of the tenant for life, by a deed to which the owners of the £1500 were parties, and which recited, contrary to the fact, that the £1500 had been paid, *B.* conveyed the leaseholds to *W. W. T.* absolutely. In 1818, all the *cestuis que vie* being dead, *W. W. T.* obtained a renewed lease from the landlord to himself, and in 1819 purchased the reversion in fee, which was conveyed to a trustee for him. Subsequently *W. W. T.* paid off the £1500. In 1845 *W. W. T.* mortgaged the property in fee, the trustee of the fee joining, so that the leasehold interest was merged. By will made in 1856, reciting that he had paid off the £1500, and that it was a subsisting charge on the property for his benefit, he made a bequest of that charge, and appointed the £2000 among his younger children, and subject to those charges, and to a further charge of £500 created by his will, devised all his estate in this property to *T. T.*:—*Held* (affirming the decision of *Bacon*, V.C.), that the three sums of £1500, £2000, and £500, were subsisting charges, and must be raised out of the estate, without distinguishing between those charged on the leaseholds and that charged on the fee. TRUMPER *v.* TRUMPER - - - 870

REPUTED OWNERSHIP - 48, 51, 144, 149, 520
See ORDER AND DISPOSITION. 1—5.

RESCINDING CONTRACT—Agreement with term omitted - - - - 351
See FRAUDS, STATUTE OF.

—— Sale by monthly instalments - - 289
See STOPPAGE IN TRANSITU.

RESOLUTION OF CREDITORS—Composition—*Bona fides* - - - - 727
See MAJORITY OF CREDITORS. 2.

—— Composition—Injunction against creditor 743
See INJUNCTION IN BANKRUPTCY. 4.

—— Liquidation by arrangement - - 722
See MAJORITY OF CREDITORS. 1.

RESTRAINING ACTION ON POLICY—*Injunction—Policy of Assurance obtained by Misrepresentation—Action at Law—Conflict of Evidence—Concurrent Jurisdiction—Discretion of the Court.*] A bill having been filed by an assurance company for the cancellation of a life policy as having been obtained by concealment and misrepresentation, a motion was made to restrain an action at law upon the policy, which had been commenced immediately after the filing of the bill:—*Held* (affirming the decision of *Malins*, V.C.), that although the Court of Chancery had complete jurisdiction in such a case, yet the Court of Law was the most

RESTRAINING ACTION ON POLICY—*continued.*
suitable tribunal for dealing with disputed facts respecting a policy of assurance; and the motion for an injunction was refused.—When proceedings are commenced at law and in equity respecting the same matter, if the nature of the claim of the Plaintiff at law is such that he could only enforce it at law, the Court of Equity will be very reluctant, on an interlocutory application, to withdraw the case from the jurisdiction of the Court of Law. Hoare *v.* Bremridge - - 22

RESTRAINING GROUNDLESS ACTION — *Demurrer—Good Defence at Law.*] In a bill filed to restrain an action at law the statements were as follows:—In the voluntary winding-up of a joint-stock company a sum of £500 was awarded to the Defendant as compensation for his loss of salary as secretary of the company. The Defendant was at that time indebted to the company in a larger sum than £500, and the Plaintiff, who was the liquidator of the company, accordingly wrote to the Defendant informing him of the award, and asking him to pay the balance due from him after setting off the £500 so awarded. The Defendant brought an action against the Plaintiff, seeking to make him personally liable for the sum of £500, as money had and received to the Defendant's use. The bill prayed a declaration that the Defendant was not entitled to the payment of the £500 without settling the debt due from him to the company, and that the action might be restrained. The Defendant demurred for want of equity:—*Held* (reversing the decision of *Malins*, V.C.), that as the bill disclosed a good defence at law to the Defendant's action there was no ground for relief in equity, and the demurrer was allowed. Kemp *v.* Tucker - - 369

REVERSION—Married woman—Election - 578
See Election.

—— Purchase of charge on leasehold - 870
See Renewable Leaseholds.

—— Sale by expectant heir - - - 484
See Usurious Contract.

REVIVOR AND SUPPLEMENT—*Practice—Appeal—Revivor.*] Where a sole Plaintiff dies after his petition for re-hearing is before the Court of Appeal in Chancery, the suit can be revived on an original motion before the Court of Appeal. Chadwick *v.* Chadwick - - - 926

REVOCATION—Power of—Voluntary settlement
See Voluntary Settlement. [430

RIGHT OF WAY—Appurtenant or in gross 650
See Obstruction of Way.

—— Obstruction by several persons - 650
See Obstruction of Way.

RIGHT TO NAME OF FIRM - - 91
See Trade Name.

RIVAL INVENTIONS - - - 167
See Specification of Patent.

RIVER—Pollution of - - - 125
See Pollution of River.

RUNNING POWERS—Railway company 841, 942
See Traffic Arrangement. 1, 2.

SALE—Agent—Insolvency of principal—Right to recoup himself - - - 921
See Custom of Stock Exchange. 1.

SALE—*continued.*

—— Business—Implied covenant to carry it on
See Sale of Business. [658

—— By agent to his principal - - 56
See Purchase from Agent.

—— Commission in army - - - 76
See Sale of Commission.

—— Goods—Monthly instalments—Insolvency of purchaser—Right of vendor to refuse further delivery - - - 289
See Stoppage in Transitu.

—— Execution creditor—Seizure without sale
See Execution Creditor. [667

—— Trustees—Depreciatory condition of sale 902
See Conditions of Sale. 2.

SALE OF BUSINESS — *Injunction — Price to be ascertained from Profits—Implied Covenant.*] The Defendant sold to the Plaintiffs his news-agency business for £2500, payable by instalments. The first two instalments of £500 each were payable at all events, but the payment of the other two of £750 each was contingent on the profits of the business, and in the event of the profits of the business exceeding a certain amount, the Defendant was to receive further benefits. The Plaintiffs at the same time engaged the Defendant to superintend their business, including along with the business sold certain other branches, for five years, at a salary; he undertaking to obey their directions. Within the first year the Plaintiffs agreed with a company to discontinue the news-agency business, giving the company the option of continuing such parts of it as the company might elect to continue. The Plaintiffs then directed the Defendant to discontinue the transmission of news, and the Defendant refusing to obey, they filed their bill for an injunction to restrain him from transmitting news, which injunction was granted:—*Held* (reversing the decision of *Malins*, V.C.), that, as the purchase-money was to be ascertained by reference to the profits, there was an implied covenant by the Plaintiffs that the business should be carried on, and that as the Plaintiffs had broken this implied covenant, they were not entitled to restrain the Defendant from breaking any other part of the agreement. Telegraph Despatch and Intelligence Company *v.* McLean - - - - - 658

SALE OF COMMISSION — *Mortgagee — Notice — Priority—Costs of Appeal.*] An officer in a regiment assigned the money to arise from the sale of his commission to two assignees separately. He obtained leave to sell out, and the two assignees gave to the agents of the regiment simultaneous notices of their incumbrances. £450, forming part of the money which the officer would receive, came from a particular fund in the hands of the agents, held by them subject to the directions of the *Horse Guards*. Six days after the notices had been given, a letter was sent from the *Horse Guards*—the purport of which was communicated by the agents to the officer—requesting the agents to transfer £450 from the fund to the officer. The first assignee then gave a second notice. The agents sent a form of receipt to the officer, which was returned by him signed, before which the £450 was not issuable by the agents. The second assignee then gave a second notice:—*Held* (re-

SALE OF COMMISSION—*continued.*

versing the decision of the Master of the Rolls), that the first assignee had priority over the second assignee.—Where a mortgagee appeals from the decision of a Court below, and the decision is reversed, he will be allowed to add his costs of the appeal to his mortgage charge. ADDISON *v.* COX [76

SATISFIED TERM—8 *& 9 Vict. c.* 112—*Dower.*] *A.*, being lessee of land for ninety-nine years, created a mortgage term which ultimately became vested in a trustee for a mortgagee, and subsequently acquired the fee. He afterwards became bankrupt. In pursuance of an agreement between his assignees, himself, and the mortgagee, a deed was executed by which the mortgagee released the mortgage debt, and the fee simple was conveyed to the mortgagee freed and discharged from all equity of redemption. It was intended that the wife of *A.*, who was married in 1832, should join in the deed for the purpose of releasing her dower, but she refused to execute it, and after the death of *A.* she filed her bill to enforce her right to dower:—*Held* (reversing the decision of *Bacon*, V.C.), that the mortgage debt was not extinguished, and that the term was not satisfied within the 2nd section of the *Satisfied Terms Act*, 8 & 9 Vict. c. 112, and that the term afforded the purchaser protection against the Plaintiff's right of dower.—*Toulmin* v. *Steere* (3 Mer. 210) commented on.—*Doe* v. *Jones* (13 Q. B. 774) followed. ANDERSON *v.* PIGNET - - - - - 180

SCANDAL—Exceptions for - - - 499
See EXCEPTIONS FOR SCANDAL.

SCHEME OF ARRANGEMENT—*Judgment Creditor—Priority.*] *S.* recovered judgment against a railway company, sued out an elegit, and delivered it to the sheriff, who found that the company were possessed of the railway, which was in the occupation of another company under a working agreement. The writ was duly registered. After this a scheme of arrangement was confirmed by the Court, which scheme authorized the company to create certain amounts of debenture A stock and debenture B stock. Debenture A stock was to be applied, first, in payment of the mortgage debentures of the company, and certain costs; the stock applied to those purposes having priority in payment of interest over the residue of that stock, which residue was to be applied in paying unpaid vendors of land. Debenture B stock was to be applied in paying off debentures which were not mortgages on the undertaking, and other debts. The income of the company was to be applied—(1) In paying rent-charges granted to vendors of land. (2) In payment of the interest on preferred debenture A stock. (3) In payment of the interest on the residue of that stock. (4) In payment of interest on debenture B stock. (5) In payment of dividends to shareholders:—*Held*, by the Master of the Rolls, that *S.* was entitled to take debenture B stock in satisfaction of his judgment, but had no higher right. *S.* appealed, contending that he was not bound by the scheme, and had a charge on the income in priority to the A and B stocks, by whomsoever held; for that the priority of those unpaid vendors and mortgagees who had accepted payments in those stocks had been lost by extinguishment of their former securities:—*Held*, on

SCHEME OF ARRANGEMENT—*continued.*

appeal, that *S.* was not bound by the scheme, but that as it did not lessen his rights, neither did it increase them; that he therefore was not entitled to such priority as he claimed; but that, subject to the rights of unpaid vendors, the income must, in the first place, to an amount equal to that of the principal, interest, and costs due to vendors of land who had accepted payment in A debenture stock, and of the principal, interest, and costs due to holders of debenture mortgages issued before the filing of the sheriff's return, be applied according to the scheme. STEVENS *v.* MID-HANTS RAILWAY COMPANY. LONDON FINANCIAL ASSOCIATION *v.* STEVENS - - - - - 1064

SCOTCH HEIR—Administration in *England*—Payment of debts and legacies - 342
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SEALING OF CHARTER—Supplemental charter
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SEALING OF PATENT—*Opposition—Law Officer—New Questions.*] In opposing the grant of letters patent, the burden is on the opponent to shew that the grant would be clearly wrong.—Where the facts on which the opponent relies were within his knowledge when he opposed before the law officer, he cannot, when before the Lord Chancellor, raise a new legal argument on these facts; nor can he then bring forward evidence which he might have brought before the law officer. *Ex parte* SHEFFIELD - - 237

SECURITIES FOR BILLS OF EXCHANGE—*Bankruptcy—Doctrine of Ex parte Waring—Double Insolvency—Bills drawn by a Third Party.*] *L. & Co.* employed *S. & Co.* as their correspondents at *Havanah*, and *R.* as their correspondent in *London*. They consigned certain cargoes to *S. & Co.*, at the same time informing them that they would draw bills on *R.* for the value. This they accordingly did, and the bills were accepted by *R.* Before the bills came to maturity *S. & Co.* sent remittances in short bills to *R.* to cover the amount of the bills, telling him to take them "against the acceptances." *R.* became bankrupt, and the acceptances were not paid, and soon after *S. & Co.* became insolvent:—*Held* (affirming the decision of *Bacon*, C.J.), that the remittances must be applied to meet the acceptances, under the rule of *Ex parte Waring* (19 Ves. 345).—It is no objection to the application of the rule in that case that the party sending the remittances was not a party to the bills as drawer or indorser, provided the bills were drawn in respect of a transaction in which he is liable. *Ex parte* SMART. *In re* RICHARDSON - - - - 220

2. ——*Bankruptcy—Doctrine of Ex parte Waring—Firms engaged in a Joint Adventure.*] Two distinct firms, *L. & Co.* of *Bombay*, and *G. & Co.* of *London*, were engaged in a joint adventure for buying and selling goods in *England* and *India*. The course of business as to the homeward shipments was that *L. & Co.* drew bills on *G. & Co.* which they discounted in *India*, and with the proceeds purchased cotton which they consigned to *G. & Co.* specially to meet the acceptances. Both firms stopped payment, and went into liquidation. The holders of unpaid acceptances of *G. & Co.*, which had been drawn in this way, claimed

SECURITIES FOR BILLS OF EXCHANGE—*contd.*
to have the proceeds of certain shipments of cotton specially appropriated to meet the acceptances:—*Held*, that the bill holders were entitled to have the cotton specially appropriated, upon the principle of *Ex parte Waring* (19 Ves. 345), but subject to the rights of the creditors, if any, of the aggregate firms to have the cotton applied as part of the aggregate assets. *Ex parte* Dewhurst. *In re* Leggatt. *In re* Gledstanes - - 965

—— Bill of lading—Indorsement by inadvertence - - - - - 16
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SEIZURE AND SALE—Private sale by debtor—Withdrawing execution - - 667
See Execution Creditor.

SEPARATE ESTATE—Account at bankers—Sums paid in by husband - - 88
See Bankers' Account. 2.

—— Will of married woman - - 778
See Will of Married Woman.

SERVICE—Avoiding—County Court district 690
See County Court Jurisdiction.

—— Debtor summons—Affidavit - - 234
See Debtor Summons. 2.

—— Out of jurisdiction—Foreign contract 862, n.
See Foreign Contract. 2.

—— Substituted—Master of ship - - 860
See Foreign Contract. 1.

—— Trustee Act—Person of unsound mind 735
See Trustee Acts.

SET-OFF IN WINDING-UP—*Company—Calls.*] In winding up a company, debts cannot be set off against calls.—A contractor agreed with a company to supply them with steam-engines at a fixed price, and to take shares in the company, payment of the calls on which should not be enforced until at least two engines should have been paid for, and the contractor might set off against the calls the money due to him. The contractor took shares accordingly, and made two engines for the company, which were not taken by the company or paid for. The company was afterwards ordered to be wound up by the Court, and a call was made by the liquidator:—*Held* (reversing the decision of *Bacon*, V.C.), that the contractor could not set off the amount due to him from the company under his agreement as damages or otherwise against the amount due by him on the calls. —*Brighton Arcade Company* v. *Dowling* (Law Rep. 3 C. P. 175) disapproved of. *In re* Paraguassu Steam Tramroad Company. Black & Co.'s Case - - - - - 254

SETTLEMENT—By Court of Chancery—Ultimate limitation - - - - 482
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—— Covenant for future settlement—When void in futurity - - - - 718
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—— Election—Married woman—Reversionary interest - - - - 578
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SETTLEMENT—*continued.*

—— Shifting clause - - - - 982
See Shifting Clause.

—— Voluntary - - - - 430
See Voluntary Settlement.

SETTLEMENT BY THE COURT—*Equity to a Settlement—Limitation in Default of Children.*] Where a wife is entitled to an equity to a settlement, the fund will be limited, after the death of the wife and in default of children of the wife, to the husband whether he does or does not survive the wife. Walsh *v.* Wason - - - 482

SHAREHOLDER—Dissentient - - 702
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—— Paid-up—Contract for—Companies Act, 1867, s. 25 - - - - - 956
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—— Paid-up—Qualification of director - 768
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—— Paid-up—Subscriber of memorandum 270 [407, 768
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—— Sale by agent for his own benefit - 56
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SHIFTING CLAUSE—*Settlement—Construction—Proviso that on the occurrence of a contingent event the "Succession to" Lands should "devolve upon" another Person—Patent of Peerage—Conditional Limitation—Power of the Crown.*] By letters patent the barony of *B.* was conferred on *E.* for life, with successive remainders to her second and other sons and the heirs male of their respective bodies. The patent contained a proviso that if the second son of *E.* or any other person taking under the letters patent should succeed to the earldom of *D.*, the "succession to" the dignity of *B.* should "devolve upon" the son of *E.* or the heir who should be next entitled to succeed to the barony of *B.*, if the person so succeeding to the earldom of *D.* was dead without issue male.—Lands having been devised by a testatrix to trustees and their heirs, upon trust "to convey, settle, and assure" the same "in a course of entail to correspond as nearly as may be with the limitations of" the barony of *B.*, "and the provisoes affecting the same contained in the letters patent" —a settlement was executed in which was inserted a clause providing that, if the second son of *E.* (who had then by the death of *E.* become Baron *B.*) or any other person taking under the limitations therein contained should succeed to the earldom of *D.*, the "succession to" the lands thereby settled should "devolve upon" the son of *E.* or the heir who would be next entitled to succeed to the barony of *B.*, if the person so succeeding to the earldom of *D.* was dead without issue male.—The second son of *E.* afterwards succeeded to the earldom of *D.* He had issue male:—*Held* (affirming the decree of *Bacon*, V.C.), upon the construction of the clause, that upon the second son of *E.* succeeding to the earldom of *D.*,

SHIFTING CLAUSE—*continued.*
the third son of *E.* became entitled in possession to the settled estates.—*Quære*, whether the Crown has any power to make a conditional limitation of a peerage. COPE *v.* EARL DE LA WARR - 982

SHIP—Foreign—Contract to sell—Specific performance—Injunction - - 860
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SOLICITOR—Lien for costs - - - 918
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—— London agent—Special agreement - 65
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—— Undue influence—Independent advice 881
See UNDUE INFLUENCE.

SOLICITOR'S LIEN—*Administration Suit.*] Solicitors for the trustees of an estate which is under the administration of the Court have not, after their discharge, such a lien for costs and money advanced in the suit as will enable them to refuse production of documents which are required by the receiver for the management of the estate.—Order of *Bacon*, V.C., affirmed. BELANEY *v.* FFRENCH - - - - - 918

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—— Purchaser kept out of possession—Deterioration of land - - - - 173
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—— Parol agreement—Part performance - 351
See FRAUDS, STATUTE OF.

SPECIFICATION OF PATENT—*Lodging Complete Specification*—15 *&* 16 *Vict. c.* 83, *s.* 9—*Law Officer—Rival Inventor.*] It is the duty of the law officer to hear and determine which of two rival applicants for patents is entitled to a patent, and the question ought not to be remitted to the Lord Chancellor by directing warrants for both patents.—An applicant for a patent does not, by lodging a complete specification and obtaining protection, acquire the rights of a patentee so as, during the six months' protection, to prevent any other person who had previously applied for a patent for a similar invention from obtaining a patent.—It is no objection to the grant of a patent that another person has been making experiments and working towards a similar invention. *Ex parte* HENRY - - - 167

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33 & 34 Vict. c. 71, ss. 54, 55—*National Debt* [113
See Stock transferred to National Debt Commissioners.
35 & 36 Vict. c. 44—*Chancery Funds Act* 465
See Chancery Funds Act.

STAYING PROCEEDINGS — *Practice — Pending Appeal—Costs.*] Proceedings on an order to pay money and costs stayed pending an appeal, on payment of the money by the Defendant to the Plaintiff, the Plaintiff giving security for repayment, or if the Plaintiff preferred it on payment into Court, the costs to be paid to Plaintiff's solicitor on his undertaking to repay them if directed. —The applicant, in such a case, must pay the costs of the application.—*Burdick* v. *Garrick* (Law Rep. 5 Ch. 453) distinguished. Merry *v.* Nickalls 205

—— Suit to restrain encroachment on mine—Agreement for arbitration - 473
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STOCK EXCHANGE—Custom of - 921, 939
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STOCK TRANSFERRED TO NATIONAL DEBT COMMISSIONERS—*Accumulations—Legal Holder —National Debt Act*, 1870 (33 & 34 *Vict. c.* 71, *ss.* 54, 55.] Stock standing in the name of a deceased trustee having been transferred to the Commissioners for the Reduction of the National Debt, a person claiming to be the legal personal representative of the beneficial owner petitioned for a re-transfer:—*Held* (reversing the decision of *Malins*, V.C.), that an inquiry, who was entitled, could not be directed in the absence of the personal representative of the trustee:—*Held*, also, that a claimant who establishes his claim has no title to any accumulations arising from the investment of the dividends, his right being to have the stock re-transferred and the amount of unpaid dividends paid to him in cash, without interest. *In re* Ashmead's Trusts - - 113

STOPPAGE IN TRANSITU—*Bankruptcy—Sale of Goods by Monthly Instalments—Insolvency of Purchaser—Right of Vendor to refuse further Delivery —Price of past Instalments—Rescinding Contract.*] *H.* sold 330 tons of bleaching-powder to *E.*, to be delivered thirty tons per month, payment to be made in cash fourteen days after each delivery. The whole amount was delivered except one instalment of thirty tons due in December, 1871; but the November instalment was not paid for. On the 20th of December, *E.* called a meeting of his creditors and declared himself insolvent. On the 23rd of December *H.* wrote a letter refusing to deliver any more bleaching-powder under the contract. In February following, *E.* was adjudicated bankrupt, and the trustee applied to the Court for an order upon *H.* to pay £150 damages for non-delivery of the December instalment of goods:—*Held* (affirming the decision of *Bacon*, C.J.), that although neither the non-payment of the November instalment nor the bankruptcy of *E.* would entitle *H.* to rescind the contract, yet he had a right, after the declaration of insolvency, to refuse to deliver any more goods till the price of both the November and December instalments had been tendered to him:—*Held*, also, that *H.'s* letter of the 23rd of December did not excuse the trustee of *E.'s* estate from tendering the price of the two instalments before claiming damages for the non-delivery of the December instalment. *Ex parte* Chalmers. *In re* Edwards - 289

SUBMISSION TO ARBITRATION — *Reference — Stay of Proceedings—Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125), *s.* 11.] The lease of a mine contained an agreement to refer disputes between the lessors and three lessees to arbitrators or their umpire, pursuant to the provisions of the *Common Law Procedure Act*, 1854. The lessees sank a shaft, and through the shaft drew minerals from an adjoining mine. The lessors filed a bill to restrain the lessees from so doing. Two of the three lessees applied for an order to stay proceedings in the suit, and that the matter might be referred to arbitration:—*Held*, on the construction of the lease, that the Court would not decide, but would leave it to the arbitrators to decide whether the matters in dispute between the parties were within the agreement to refer;—*Held*, also, that the arbitrators would have power to decide

SUBMISSION TO ARBITRATION—*continued.*
whether the claims of the lessors were or were not against good faith, and would have power to direct payment of damages:—*Held*, that neither the want of any appeal, nor the inability of the arbitrators to grant an injunction, formed any objection to a reference:—*Held*, on the construction of the Act (17 & 18 Vict. c. 125, s. 11), that it was no objection to the application that two only of three Defendants were, at the commencement of the suit and at the date of the application, ready and willing to concur, and (*per* Lord *Selborne*, L.C.) that the dissent of a Defendant, if persisted in, would not necessarily be a ground for refusing the order.—Order of *Wickens*, V.C., staying proceedings in the suit, affirmed. Willesford *v.* Watson - - - - 473

2. —— *Partnership Articles — Injunction to restrain Proceedings in Arbitration — Common Law Procedure Act*, 1854, *s.* 11.] Partnership articles contained a clause providing for the dissolution of the partnership by one partner giving notice to his co-partners. It was further agreed that the provisions of the *Common Law Procedure Act* relating to arbitrations should be applicable. *C.*, one of the partners, gave notice to *W.* of his intention to dissolve partnership, but *W.* disputed the validity of the notice, and filed a bill to restrain *C.* from advertising the dissolution. *C.* then appointed an arbitrator, and called upon *W.* to submit the matters in dispute to arbitration. *W.* then moved to restrain *C* from proceeding in the arbitration:—*Held*, by *Bacon*, V.C., that the jurisdiction of the Court was not ousted by the articles, and that the injunction must be granted. Witt *v.* Corcoran - - - 476, n.

SUBSCRIBER OF MEMORANDUM—*Company—Paid-up Shares—Payment in Cash—Companies Act*, 1867 (30 *&* 31 *Vict. c.* 131), *s.* 25.] *F.* and two other persons, by an agreement which was registered along with the memorandum and articles of association of a company formed in 1869, agreed to sell a mine to the company for £20,000, half of which was to be paid at once by 5000 fully paid-up shares of £2 each in the company, £6000 at the end of a month, and £4000 when the profits reached a certain rate. *F.* subscribed the memorandum of association for 1000 shares. The company took possession of the mine, and 5000 fully paid-up shares were allotted to the vendors or their nominees; 1600 of them being allotted to *F.*, who never had any other shares allotted to him. The company was ordered to be wound up, at which time *F.* remained on the register for 275 shares, having sold the rest:—*Held* (affirming the decision of the Master of the Rolls), that *F.* was liable to be placed on the list of contributories for the 1000 shares for which he had subscribed the memorandum, as shares on which nothing had been paid; for that, on the face of the registered documents, there was no connection between the 1000 shares for which *F.* subscribed and the 5000 paid-up shares, and that if there was any subsequent agreement for *F.'s* giving up, in satisfaction of his liability to pay for the 1000 shares, paid-up shares to which he would otherwise have been entitled, such agreement was invalidated by the *Companies Act*, 1867, s. 25.—Under the *Companies Act*, 1867, s. 25, the holder of shares (unless such agreement, as provided by that section, has been registered) cannot defend himself against an action for calls by anything which would only support a plea of accord and satisfaction, and would not support a plea of payment. *In re* Pen'Allt Silver Lead Mining Company. Fothergill's Case - - 270

2. —— *Company—Paid-up Shares—Payment in Cash—Companies Act*, 1867 (30 *&* 31 *Vict. c.* 131), *s.* 25.] Any *bonâ fide* transaction between a company and a shareholder which, if the company brought an action against him for calls, would support a plea of payment, is "payment in cash" within sect. 25 of the *Companies Act*, 1867. —*S.* took shares in a company formed for working a mine which he sold to them. The whole nominal amount of the shares was immediately payable, as was also the purchase-money of the property. It was agreed between *S.* and the company that he should be credited in account with the price of the property, and debited with the amount payable on his shares; and the balance of the account thus made out was shortly afterwards exactly balanced by cash payments by *S.*:—*Held* (reversing the decision of the Vice-Warden of the Stannaries), that *S.* must be considered as having paid up his calls in cash. *In re* Harmony and Montague Tin and Copper Mining Company. Spargo's Case - - - - 407

3. —— *Company—Articles of Association — Allotment of Paid-up Shares.*] *D.*, one of the seven subscribers to the memorandum of association of a limited company established for working a concession in *Austria*, subscribed for 100 shares. The articles of association recited that *E.*, who assigned the concession to the company, had agreed to cause fully paid-up shares to be allotted to all the persons subscribing the memorandum; and the 5th article provided that the shares of each subscriber to the memorandum should be allotted to him as fully paid up, and that a competent number of shares should be allotted to *E.* in pursuance of the arrangement which had been previously come to.—On the 3rd of October, 1865, the day on which the company was registered, the directors set apart for *E.*, for work already done for the company, 4000 paid-up shares and a large sum in debentures; and *E.* shortly afterwards requested the secretary to allot some of the 4000 shares to persons named, and among others, 100 shares to *D.*, who had no other shares in the company. The company was ordered to be wound up, and the official liquidator placed *D.* on the list of contributories for 100 shares as having subscribed the memorandum for that amount, and made a call on him in respect of them.—*Held* (affirming the decision of *James*, L.J., sitting for *Wickens*, V.C.), that the clause in the articles of association providing that the shares subscribed for in the memorandum should be allotted as fully paid-up was inoperative; and that as there was no evidence that *D.* had given any *bonâ fide* consideration for having his shares paid up, he had been rightly placed on the list for 100 ordinary shares, and was liable to pay the call on them. *In re* Anglo-Moravian Hungarian Junction Railway Company. Dent's Case - - - 768

SUBSTITUTED SERVICE — Master of ship — Owner out of jurisdiction - - 860
See Foreign Contract. 1.

SUBSTITUTIONAL GIFT - - - 751
See Gift, Original or Substitutional.

SUPPLEMENTAL CHARTER—*Objections—Great Seal.*] In order to stop the sealing of a supplemental charter granted to an existing corporation, it must in general be shewn that the proposed charter is contrary to law, or that no proper authority for the application had been given, or that some personal right of a member of the Society would be wrongly interfered with. *Ex parte* Society of Attorneys, &c. - - 163

SURETY—Proof in bankruptcy—Partnership 441
See Joint and Separate Estate. 1.

SURVIVOR—Principle of construction of word—When to be read "other" - - 70
See Survivorship.

SURVIVORSHIP — *Will — Construction — Other.*] A testator gave a sum of money in sixths, and directed his trustees to hold one sixth in trust for each of his six daughters for life, with remainder to her children, to be transferred and vested at twenty-one or marriage; and he provided that in case any of his daughters should die without leaving a child, then her share should go in trust for his surviving daughters in equal shares, if more than one, during their respective lives, and after their decease for their respective children *per stirpes* and not *per capita*, in the same manner as the original shares:—*Held*, that on the death of a daughter without leaving a child who attained twenty-one or married, the children of other daughters who had predeceased her took shares in her one-sixth.—The principles upon which the Court considers the word "survivor" as not completely expressing the testator's intention, discussed.—Decision of the Master of the Rolls reversed. Waite *v.* Littlewood - - 70

TAXATION OF COSTS—*Special Agreement—Jurisdiction—Petition under 6 & 7 Vict. c. 73, s. 37—Bill in Chancery—London Agency Business—Demurrer.*] Bill filed by a country solicitor against a *London* solicitor, alleging that the Defendant had made a special agreement with the Plaintiff to transact certain business for him on agency terms, and charging that the Defendant falsely pretended that the agreement was one not for agency but for partnership in the particular business. The bill charged that, on either construction of the agreement, the Plaintiff was entitled to an account, and prayed that Defendant might deliver his bills of costs as Plaintiff's agent, and also for a general account of all dealings and transactions between them.—The Defendant demurred, on the ground that the proper remedy of Plaintiff was by petition under the *Solicitors' Act*:—*Held* (affirming the decision of the Master of the Rolls), that the demurrer ought to be overruled. Ward *v.* Lawson - - - 65

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TERM OF YEARS—Satisfied—8 & 9 Vict. c. 112
See Satisfied Term. [180

TRADE FIXTURES—Demise of—Bill of sale
[1072, 1075, n.
See Registration of Bill of Sale. 1, 2.

TRADE NAME—*Dissolution of Partnership—Use of Old Name of Firm—Tendency to deceive.*] A trader, who has been a manager or a partner in a firm of established reputation, has a right, on setting up an independent business, to make known to the public that he has been with that firm; but he must take care not to do so in a way calculated to lead the public to believe that he is carrying on the business of the old firm, or is in any way connected with it.—The Plaintiff, an old-established tailor, took the Defendant, who had been his foreman, into partnership, and the business was carried on under the name of *H. & P.* The partnership was afterwards dissolved by a decree of the Court, in which it was provided that the business of the partnership should belong to the Plaintiff. The Plaintiff accordingly kept up the shop under the name of *H. & Co.* Subsequently the Defendant set up a shop only a few doors from the Plaintiff's shop, and painted over the door the words "*P.*, from *H. & P.*":—*Held* (affirming the decree of *Malins*, V.C.), that, having regard to the manner in which the names were painted up, the Defendant had done that which was calculated to lead the public to suppose that he was still connected with the old firm, and that the Plaintiff was entitled to an injunction. Hookham *v.* Pottage - - - - 91

TRAFFIC ARRANGEMENT—*Railway Company—Delegation of Statutory Powers—Agreement by one Company to work the Line of another—Ultrà Vires act—Railway Clauses Consolidation Act*, 1845, *ss.* 87, 92—*Right to use Junction.*] The *H. Railway Company*, whose line ran into the Defendant company's line at *B.*, had a Parliamentary right to use the Defendants' station at *B.*—The Plaintiff company had running powers over the Defendants' line, and were anxious to run trains through the *B.* station over the *H.* line. The *H. Company* applied to Parliament for power to lease their line to the Plaintiffs, but through the opposition of the Defendants the proposed bill was thrown out. The *H. Company* then entered into an agreement with the Plaintiffs, terminable on six months' notice, by which they agreed to allow the Plaintiffs to use the *H.* line and all its stations, sidings, &c., and to afford them every facility for so doing; the Plaintiffs to keep the line in repair, and appoint and pay their own officers, and fix the rates and fares of through traffic, paying to the *H. Company* a proportion of the through rates and fares by way of commuted toll. It was also provided that if the *H. Company* should desire the Plaintiffs to undertake the local traffic of the *H.* line the Plaintiffs would do so, paying the *H. Company* a proportion of the fares.—The Plaintiffs under this agreement claimed the right to run their trains over the Defendants' junction at *B.*, and filed their bill to establish the right, which the Defendants resisted, on the ground that the agreement between the Plaintiffs and the *H. Company* was *ultrà vires* and illegal:—*Held* (reversing the decision of the Master of the Rolls), that the agreement was not *ultrà vires* or illegal, and that the Plaintiffs were entitled to the relief prayed. Midland Railway Company *v.* Great Western Railway Company [841

2. —— *Railway Companies—Running Powers—Indefinite Agreement, whether perpetual—Con-*

TRAFFIC ARRANGEMENT—*continued.*

sideration not expressed in Deed—Construction.] The *L. Railway Company*, being in want of money to complete an extension line, applied to the *N. W. Railway Company* for a loan of £40,000, and it was agreed that the *N. W. Company* should lend the money and have running powers over the lines of the *L. Company*. An agreement under seal was entered into, not referring to the loan, by which it was agreed, (1) that, subject to such bye-laws and regulations of the *L. Company* as should from time to time be in force, the *N. W. Company* might run over and use the railways of the *L. Company*, and their stations, sidings, and conveniences; (2) that the receipts from through traffic should be apportioned between the two companies according to mileage proportion, with a certain allowance per cent. to the *N. W. Company* out of the *L. Company's* share; (3) that the *N. W. Company* might have their own staff at the stations on the *L. Company's* lines; (4) that, whether the running powers were exercised or not, there should be a complete system of through booking and through fares from the stations of each company by the lines of the other; (5) that, if the running powers were exercised, the fares should be fixed by the *N. W. Company*, and if the *L. Company* objected to any of them, then by arbitration; (6) that the *N. W. Company* should not carry the local traffic on the *L.* lines, but should, if required by the *L Company*, carry local passengers for 15 per cent. of the local fares; (7) that the companies should send by each other all traffic not otherwise consigned to and from stations on the lines of each other whenever such lines formed the shortest route; (8) that any difference under the agreement should be settled by arbitration under the *Railway Company's Arbitration Act*, 1859. The *N. W. Company* advanced the £40,000, and the agreement as to running powers was acted upon for some time, but afterwards the *L. Company* gave three months' notice to determine it:—*Held*, by *Malins*, V.C., that the jurisdiction of the Court of Chancery was excluded by the 8th clause of the agreement; but this objection was waived on appeal:—*Held*, by the Court of Appeal, that evidence of the advance of the £40,000 having been the consideration for the agreement was admissible:—*Held*, by *James*, L.J., that, apart from this evidence, the agreement was not determinable:—*Held*, by *Mellish*, L.J., that, having regard to this evidence, which did not contradict anything in the agreement itself, it was clear that the agreement was not determinable; but whether, apart from the proof of consideration, this agreement, the principal terms of which were one-sided, would not have been revocable, *quære.*—*Per James*, L.J.:—*Semble*, the jurisdiction of the Court was not excluded by the 8th clause; for that, if the agreement was revocable, the revocation would determine the 8th clause as well as the other terms of the agreement. LLANELLY RAILWAY AND DOCK COMPANY *v.* LONDON AND NORTH-WESTERN RAILWAY COMPANY 942

TRANSFER—Business of company - 540, 1002
See AMALGAMATION OF COMPANIES. 1, 2.

—— Paymaster General—Stock in company 465
See CHANCERY FUNDS ACT.

TRANSFER OF SHARES—*Company—Power of Directors to refuse to register Transfer—Rectification of Register—Insurance Company.*] The deed of settlement of a life insurance company provided that any shareholder should be at liberty to transfer his shares to any other person who was already a shareholder, or who should be approved by the board of directors, and that no person not being already a shareholder, or the executor, &c., of a shareholder, should be entitled to become the transferee of any share unless approved of by the board:—*Held* (reversing the decision of the Master of the Rolls), that the directors were not bound to disclose their reasons for rejecting a transferee, provided they had fairly considered the question at a meeting of the board; and that, in the absence of evidence to the contrary, the Court would take for granted that they acted reasonably and *bonâ fide*. But if there is evidence to shew that directors who have such a power have exercised it capriciously or unfairly, the Court has jurisdiction to interfere, and this jurisdiction may be exercised on a summons under the 35th section of the *Companies Act*, 1862.—*Robinson* v. *Chartered Bank* (Law Rep. 1 Eq. 32) distinguished. *In re* GRESHAM LIFE ASSURANCE SOCIETY. *Ex parte* PENNEY - - - - 446

2. —— *Contributory—Registration in the Name of a Firm—Errors in Registration—Past Member* —25 & 26 *Vict. c.* 89, *ss.* 25, 38.] One of two partners in a foreign firm of bankers lent to *L.* in this country a sum of money, *L.* executing, by way of security, a transfer to the firm of shares in a company, which was executed by the above-named partner in the name of his firm, and the transfer was approved of by the directors. *L.* at that time held transfers of a corresponding number of shares, but the transfers were not registered. Some time afterwards the transfer deeds were left at the office of the company, and the transfers were registered, the registration of the transfer to the bankers being dated before the registration of the transfers to *L.*, and being in the name of the bankers as a firm. The loan was afterwards repaid, and the shares were re-transferred to *L.* by the same partner, he executing the deed in the name of the firm, and the transfer was duly registered. Within a year from this time an order for winding up the company was made:—*Held*, that under the circumstances the one partner could accept shares so as to bind the firm:—*Held*, that shares can be sufficiently registered in the name of a firm:—*Held*, that under the circumstances the errors and irregularities in the registration did not affect the liability of the firm:—*Held*, that the firm of bankers were, in respect of these shares, liable as past members of the company.—Decision of the Master of the Rolls affirmed. *In re* LAND CREDIT COMPANY OF IRELAND. WEIKERSHEIM'S CASE - - 831

—— Infant—Past member - - - 266
See INFANT TRANSFEREE.

TRESPASS—Trifling annoyance—Delay - 8
See TRIFLING NUISANCE.

TRIFLING NUISANCE—*Evidence—Trespass—Injunction—Jurisdiction—Delay.*] The amount of annoyance which will induce the Court to interfere between the owners of adjoining buildings discussed and defined, and the nature and value

TRIFLING NUISANCE—*continued.*

of evidence in such cases considered.—Where a trifling trespass or an interference with an ancient right has been submitted to for six years, the Court will not exercise its jurisdiction, but will leave the Plaintiffs to their rights at law.—Decree of the Master of the Rolls reversed. GAUNT *v.* FYNNEY - - - - - 8

TRUST—Illegal—Order and disposition—Bankruptcy - - - - - 149
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—— Mortgage—Trust for sale—Statute of Limitations, ss. 25, 28 - - - 30
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TRUSTEE—Creditors' deed—Liability for negligence - - - - - 711
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—— Discretion—Maintenance of infant - 798
See MAINTENANCE OF INFANT. 2.

—— Improvement of estate—Just allowances 309
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—— New trustees—Person of unsound mind 735
See TRUSTEE ACTS.

—— Payment out of Court to—Lands Clauses Act - - - - - - 736
See PAYMENT OUT OF COURT.

—— Sale by - - - - - - 902
See CONDITIONS OF SALE. 2.

TRUSTEE ACTS—*Power to appoint New Trustees—Lunacy.—Service.*] A power of appointing new trustees provided that if any trustees or trustee should die, or become unwilling or unable to act, the trustees or trustee for the time being, whether continuing or declining to act, might appoint a new trustee or trustees. One of the three trustees became of unsound mind, but was not so found by inquisition, and the other two appointed a new trustee in his room :—*Held*, that the power was well exercised.—A petition for an order vesting the trust estate in the continuing trustees and the new trustee having been presented :—*Held*, that service on the trustee of unsound mind was not necessary. *In re* EAST. *In re* TRUSTS OF BELLWOOD'S WILL - - - - 735

TRUSTEE OF CREDITORS' DEED—*Bankruptcy—Personal Liability of Trustee for Negligence and Overpayment of Dividends—Interest on Money lost by Breach of Trust—Appeal for Costs.*] Among the assets of a debtor who executed a creditors' deed under the 192nd section of the *Bankruptcy Act*, 1861, was a bill of exchange which the debtor had deposited with his solicitor as a security for his professional charges. The bill was dishonoured at maturity, at which time the solicitor had received from other sources sufficient to pay all his charges then due. The trustee, however, allowed the bill to remain in the solicitor's hands, who brought an action on it against the acceptor, but nothing was recovered in consequence of the acceptor's insolvency. The creditors sought to charge the trustee with the loss of the money, on account of his allowing the solicitor to keep the bill and treat it as his own, instead of himself dealing with the acceptor and effecting a compromise :—*Held* (affirming the decision of the Chief Judge), that there was no ground for charging the trustee on this account.—A creditor signed

TRUSTEE OF CREDITORS' DEED—*continued.*

the deed for a debt due on bills for which the debtor was liable. Before making formal proof of the debt, the creditor received dividends from the estates of other persons who were liable on some of the bills, but the trustee nevertheless paid him dividends on the full amount of the bills. The other creditors sought to surcharge the trustee with the dividend thus overpaid :—*Held* (affirming the decision of the Chief Judge), that considering the uncertainty of the law at the time, which was before the decision of the case of *In re Kelson* (Law Rep. 4 Ch. 125), the trustee ought not to be surcharged for the overpayment of the dividends.—The trustee allowed wine and spirits to the amount of £130 to remain in the debtor's possession, which was eventually lost to the estate :—*Held*, that the trustee must personally make good the loss, with interest at £5 per cent.—The Court will not allow an appeal for costs under the *Bankruptcy Act*, 1861. *Ex parte* OGLE. *Ex parte* SMITH. *In re* PILLING - 711

ULTRÀ VIRES—Amalgamation—Power to sell business - - - - - 540
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—— Company—Colourable payment—Guarantee [1035
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—— Railway company—Agreement to work line of another company - - - 841
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UNBORN CHILD - - - - - 969
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UNCONSCIONABLE BARGAIN - - 484
See USURIOUS CONTRACT.

UNDUE INFLUENCE—*Fraud—Collateral Agreement—Condonation—Independent Solicitor—Unproved Allegations.*] Fraud cannot be condoned unless there be full knowledge of the facts and of the rights arising out of those facts, and the parties are at arm's length.—An agreement rendered inoperative by a collateral fraudulent agreement cannot be made valid by the abandonment of the collateral agreement.—Agreements, though prepared by an independent solicitor, may be set aside if that one of the parties for whom the solicitor is acting is under the undue influence of the other party.—Where material allegations of fraud are proved, the Plaintiff will obtain relief although other allegations of fraud may not be proved. — Decree of *Malins*, V.C., reversed. MOXON *v.* PAYNE - - - - 881

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USER—Nuisance—Increase of nuisance - 467
See INCREASING NUISANCE.

USURIOUS CONTRACT—*Expectant Heir—Unconscionable Bargain—Injunction.*] The doctrines of equity as to the relief of expectant heirs from unconscionable bargains have not been affected by the repeal of the usury laws, or by the alteration of the law as to sales of reversionary interests. —A young nobleman in his twenty-second year, entitled to large property in the event of his surviving his father, was largely indebted. The creditor pressed for payment, and recommended the young nobleman to apply to a certain money-lender. The money-lender advanced enough money to in part pay off the creditor, and made a further advance to the young nobleman, taking by way of security his acceptances at three months for the sum advanced with interest and discount together exceeding the rate of 60 per cent. The acceptances became due, and the process was repeated, the young nobleman receiving a small advance. The young nobleman had no professional assistance in these matters, and no application was made to his father or to the solicitors of the father. The father died before the second set of bills became due, and the money-lender commenced actions upon them:—*Held* (affirming the decree of *Wickens*, V.C.), that the actions would be restrained; and a decree made for delivery up of the bills on payment of the sums actually advanced and interest at 5 per cent. EARL OF AYLESFORD *v.* MORRIS - - - 484

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See TRUSTEE ACTS.

VOLUNTARY SETTLEMENT—*Power of Revocation—Change of Mind—Destruction of Deed—Variation from Instructions.*] The absence of a power of revocation, and the fact that the attention of the settlor was not called to that absence, do not make a voluntary settlement invalid; they are merely circumstances to be considered in deciding on the validity of a voluntary settlement. —A widow instructed a solicitor to prepare a deed settling certain houses and buildings on herself for her life, and after her death for the benefit of her children. The deed, as prepared, did not exactly correspond with the instructions, but was read over to and executed by her. There was no suggestion made to her that the deed ought to

VOLUNTARY SETTLEMENT—*continued.*

contain a power of revocation. Some years afterwards she burnt it, and expressed satisfaction at having got rid of it. She executed a mortgage of part of the settled property, after asking the consent of a son who was both beneficially interested and a trustee of the settlement, and made a will purporting to dispose of the whole property: —*Held* (reversing the decree of *Wickens*, V.C.), that, under the circumstances, the deed of settlement was valid, and not affected by the want of a power of revocation or by the divergence from the instructions. HALL *v.* HALL - - 430

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WILL OF MARRIED WOMAN—*Separate Estate — Appointment — Death of Husband — Assent — After-acquired Property — 1 Vict. c. 26, ss. 8, 24.*] A married woman having separate estate, and having under her marriage settlement a power of

WILL OF MARRIED WOMAN—*continued.*
appointment in the event of her dying in the lifetime of her husband, made a will with the assent of her husband, and survived her husband:—*Held*, that though the will passed the separate estate, it did not execute the power of appointment, nor pass property acquired by the wife after the death of her husband:—*Held*, that the death of a husband operates as a revocation of his assent to the will of his wife.—Decree of *Bacon*, V.C., reversed.—Observations on *Noble* v. *Phelps* (Law Rep. 2 P. & M. 276). Noble *v.* Willock - 778

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